Who's the Boss? Determining a Test for Joint Employer Liability Under the Massachusetts Wage Act

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INTRODUCTION

In Massachusetts, when an employee makes a claim against an employer for failing to properly pay under state law, the employee files a claim pursuant to the Wage Act.[1] The Wage Act in Massachusetts is a remedial statute meant to protect workers from the "unreasonable detention of wages."[2] The basis for determining liability for who owes an employee wages lies in the answer to the threshold question: Who is the individual's employer?[3] In most situations, such an answer is a relatively straightforward analysis, as most employment relationships are uncomplicated, and a worker's employer is the one who cuts the worker's paycheck and directs and controls the individual's work.[4] However, situations can arise where multiple entities are jointly and severally liable for a worker's wages and are thus joint employers of the same employee.[5]

Currently, under the Wage Act, the concept of joint employer liability is ill-defined.[6] Stemming largely from the fact that the Wage Act provides no universal definition of "employer," courts use statutory and common law

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[1] *See generally* Am. Mut. Liab. Ins. Co. v. Comm'r of Labor and Indus., 163 N.E.2d 19, 21 (Mass. 1959); Mark F. Murphy & Michael P. Murphy, *Wage Act Claims: Recent Developments in Massachusetts*, 48 BOS. B.J., May/June 2004, at 19 *passim*.

[2] *Am. Mut. Liab. Ins. Co.,* 163 N.E.2d at 21; Murphy & Murphy, *supra* note 1, at 19.

[3] *See generally* Carl H. Petkoff, Note, *Joint Employment Under the FLSA: The Fourth Circuit's Decision to Be Different*, 70 S.C. L. REV. 1125, 1126 (2019) (explaining that where an employee has multiple employers, the various employers can be held liable for violations of the Wage Act).

[4] *Id.*

[5] *Id.*

[6] *See* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 501–02 (Mass. App. Ct. 2017).

tests to search for a consistent application of joint employment.[7] However, these tests lead to inconsistent results, leaving the question of who a worker's employer is unanswered.[8]

This Note will begin by introducing the concept of joint employment and providing examples of how joint employment materializes in the workplace.[9] It will provide background on the Massachusetts Wage Act and discuss a recent appeals court decision that set out the current interpretation of joint employment under the Wage Act.[10] This Note will also detail recent trial court cases where the uncertainty in defining "joint employer" has led to inconsistent results.[11] Next, this Note will show how a stronger joint employment test will help prevent wage theft while providing employers with certainty.[12] This Note will argue that using the Independent Contractor Statute to find an employment relationship in a joint employment context is inappropriate, and instead argue that courts should interpret the Wage Act in accordance with the Fair Labor Standards Act (hereinafter "FLSA").[13] This Note will then review the different tests for joint employment under the FLSA and argue that the best test is the one adopted in *Zheng v. Liberty Apparel Co.* by the Second Circuit.[14] Finally, this Note will assert that an appropriate approach is to redefine "employer" within the Wage Act by drawing inspiration from the Workers Compensation Statute and the Temporary Workers Right to Know Law.[15]

I. Background

A. *Joint Employment in General*

Under the joint employment doctrine, an employee who is formally employed by one employer, such as the one who issues a paycheck, may be deemed to be employed by a second employer if the second employer exercises sufficient control over the terms and conditions of the worker's

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[7] *See id.*

[8] *Compare* Jinks v. Credico (USA) LLC, No. 1784CV02731-BLS2, 2020 WL 1989278, at *3 (Mass. Super. Ct. Mar. 31, 2020), *with* Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *3 (Mass. Super. Ct. Dec. 15, 2017).

[9] *See infra* Part I(A).

[10] *See infra* Part I(B)–(C).

[11] *See infra* Part I(D).

[12] *See infra* Part II.

[13] *See infra* Part III.

[14] *See infra* Part IV.

[15] *See infra* Part V.

employment.[16] Generally, joint employment can be classified as vertical or horizontal.[17] A vertical joint employment relationship exists when two employers permit one employee to work simultaneously for them and arises in familiar contexts such as when a contractor hires a subcontractor who has its own employees or when a staffing agency provides employees for a business.[18] The second scenario, a horizontal joint employment relationship, exists when multiple employers employ the same employee who works separate hours for each employer during the same work week.[19] If the companies are sufficiently associated regarding the employment of the employee, the companies may aggregate their managerial responsibilities.[20]

The FLSA, enacted in 1938, sets the nationwide standards for minimum wage and overtime pay but does not mention "joint employment" directly.[21] However, one year after the passage of the FLSA, the Department of Labor ("DOL") introduced the concept of joint employment in response to unscrupulous employers attempting to avoid compliance with the law.[22] The concept has evolved through various circuit court decisions and DOL interpretations.[23] The different decisions in federal circuits have created a murky definition of joint employment.[24] The concept is even less clearly defined when applied to the Massachusetts Wage Act.[25]

B. *The Massachusetts Wage Act*

The Massachusetts Wage Act, specifically Mass. Gen. Laws. ch. 149, §§ 148–150 ("Wage Act"), provides "strong statutory protection for employees and their right to wages."[26] It was enacted to prevent the

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[16] Petkoff, *supra* note 3, at 1126.

[17] *See generally* Petkoff, *supra* note 3, at 1139 (defining vertical and horizontal joint employment).

[18] Scott M. Prange, *Managing the Workforce in the Gig Economy*, 20 HAW. B.J., June 2016, at 4, 9.

[19] *Id.*

[20] *See id.*

[21] Petkoff, *supra* note 3, at 1126.

[22] Jason Schwartz & Ryan Stewart, *FLSA Turns 80: The Divide Over Joint Employment Status*, LAW 360 (June 18, 2018, 12:49 PM EDT) (sub. req.), https://perma.cc/7SUT-63LW.

[23] *See* Petkoff, *supra* note 3, at 1126.

[24] New York v. Scalia, 464 F. Supp. 3d 528, 536 (S.D.N.Y. 2020); Petkoff, *supra* note 3, at 1126.

[25] *See generally* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 502 (Mass. App. Ct. 2017) (holding defendant was not plaintiff's joint employer under the Wage Act because she did not provide direct services to defendant).

[26] Crocker v. Townsend Oil Co., 979 N.E.2d 1077, 1086 (Mass. 2012).

"unreasonable detention of wages," and as such it requires employers to make prompt and full payment of wages to their employees. [27] The Wage Act is broad and inclusive; it provides that any worker providing any services, unless exempted by the Independent Contractor Statute ("ABC Test"), should be paid the wages earned.[28] Wages are "earned" once an "employee has completed the labor, service, or performance required of him . . . ."[29]

In addition to ensuring that employees are paid on a timely basis, the Massachusetts wage and hour laws provide other employee protections.[30] For instance, the Minimum Wage Statute requires employers to pay at least the required minimum wage, while the Overtime Statute requires that many employers pay time and a half when employees work more than forty hours in a week.[31] Further, employees are protected from being misclassified as independent contractors, protected from retaliation for seeking proper payment of wages, and entitled to Sunday and holiday premium pay under the Massachusetts Blue Laws. [32]

"The Wage Act 'impose[s] strict liability on employers.'" [33] Under Mass. Gen Laws ch. 149, § 148, (hereinafter "§ 148"), liability extends beyond just the business entity itself; § 148 includes individual liability for those operating the business.[34] Specifically, under § 148 the president and treasurer of a corporation, as well as any officers or agents who manage the corporation, are deemed to be employers.[35] A manager of a limited liability company who "'controls, directs, and participates to a substantial degree in formulating and determining' the financial policy of a business entity" may also be subject to personal liability for violations of the Wage Act.[36] Other than a few narrow exceptions in the statute, no employer is exempt from the

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[27] Am. Mut. Liab. Ins. Co. v. Comm'r of Labor and Indus., 163 N.E.2d 19, 21 (Mass. 1959); Murphy & Murphy, *supra* note 1, at 19.

[28] *See generally* MASS. GEN. LAWS ANN. Ch. 149, § 148B (West 2004) (listing exceptions to status as an employee); Awuah v. Coverall N. Am., Inc., 952 N.E.2d 890, 896 (Mass. 2011).

[29] *Awuah*, 952 N.E.2d at 896.

[30] *E.g.*, MASS. GEN. LAWS ANN. Ch. 151, § 1 (West 2021) (setting the minimum wage); *id.* § 1A (providing that employees shall be paid overtime).

[31] *Id.* §§ 1, 1A.

[32] MASS. GEN. LAWS ANN. Ch. 136, § 6 (West 2021); MASS. GEN. LAWS ANN. Ch. 149, § 148A (West 1977); *id.* § 148B.

[33] Dixon v. City of Malden, 984 N.E.2d 261, 265 (Mass. 2013) (citation omitted).

[34] *See* MASS. GEN. LAWS ANN. Ch. 149, § 148.

[35] Donis v. Am. Waste Servs., LLC, 149 N.E.3d 361, 366 (Mass. 2020).

[36] Cook v. Patient Educ., LLC, 989 N.E.2d 847, 849 (Mass. 2013).

Wage Act.[37]

Pursuant to Mass. Gen. Laws ch. 149, § 27C, when an employer violates the Wage Act the employer faces the possibility of civil or criminal penalties from the Attorney General.[38] In addition to enforcement initiated by the Attorney General's Office, Mass. Gen. Laws ch. 149, § 150 provides a private right of action for employees.[39] This private right of action allows an employee to file a civil action up to three years after the violation for injunctive relief, damages, lost wages, and other benefits on the employee's own behalf and for others similarly situated.[40] When an employee prevails, the employee is entitled to treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of litigation and reasonable attorney's fees.[41]

C. *Status of Joint Employment Under the Massachusetts Wage Act*

The status of joint employment under the Massachusetts Wage Act is unclear—largely because the Wage Act does not define "employer."[42] While Mass. Gen. Laws. ch. 149, § 1 does provide a definition, it is not applied to the Wage Act or Overtime and Minimum Wage Statutes.[43] Because the Wage Act lacks a coherent definition, courts have applied multiple tests to determine who is an employer and joint employer.[44]

In 2017, in *Gallagher v. Cerebral Palsy of Massachusetts, Inc.* ("*Gallagher*"), the Massachusetts Appeals Court reviewed two tests for determining who is an employer and briefly applied them to the theory of joint employment.[45] In *Gallagher*, the plaintiff was a personal care attendant for an elderly man and brought a claim against Cerebral Palsy of Massachusetts, Inc. ("CPM") alleging that CPM was her employer.[46] The Court noted that neither the Wage Act nor the Overtime Statute included a "self-contained definition of 'employer.'"[47] Instead, the Court applied the ABC Test and a common law

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[37] *Donis*, 149 N.E.3d at 366 (citation omitted).

[38] MASS. GEN. LAWS ANN. Ch. 149, § 27C (West 2004).

[39] *Id.* § 150.

[40] *Id.*

[41] *Id.*

[42] Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 501 (Mass. App. Ct. 2017).

[43] MASS. GEN. LAWS ANN. Ch. 149, § 1 (providing that the definition of "Employer" applies only to Mass. Gen. Laws. Ch. 149, §§ 105A–105C).

[44] *See Gallagher*, 86 N.E.3d at 498.

[45] *See id.*

[46] *Id.* at 497.

[47] *Id.* at 498–502 (citation omitted).

"Right to Control Test" and then briefly applied both to the concept of joint employment.[48]

The ABC Test provides a presumption that "an individual performing any service" for another is an employee.[49] A purported employer can rebut the presumption by meeting the following three elements, known as the ABC Test:

> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
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> (2) the service is performed outside the usual course of the business of the employer; and,
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> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[50]

As a result, before reaching the ABC Test, the threshold question of whether the individual provided services to the alleged employer must be answered.[51] The Court in *Gallagher* held that as to the Wage Act and the Overtime Statute, the ABC Test provided the appropriate test for determining if there is an employer-employee relationship and that it superseded the common law Right to Control Test.[52]

The *Gallagher* Court also reviewed the common law "Right to Control Test" as applied to joint employment and acknowledged that the U.S. Supreme Court defined the concept of joint employment as "a company possessing 'sufficient control over the work of the employees' of another company."[53] The *Gallagher* Court stated the basis of a joint employer relationship is simply where one employer, "contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer."[54] The Court remarked that it was not making a determination whether the ABC Test had supplanted the common-law Right to Control Test when applied to a joint employment theory under

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[48] *Id.* at 499.

[49] MASS. GEN. LAWS ANN. Ch. 149, § 148B (West 2004).

[50] *Id.*

[51] *Gallagher*, 86 N.E.3d at 499.

[52] *See id.*

[53] *Id.* at 501–02 (quoting Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964)).

[54] *Gallagher*, 86 N.E.3d at 501 (quoting Commodore v. Genesis Health Ventures, Inc., 824 N.E.2d 453, 456 (Mass. App. Ct. 2005)).

the Wage Act and Overtime Statute.[55]

D. *The Current Two Test Approach to Joint Employment Under the Wage Act Has Led to Inconsistent Results*

Due to the lack of clarity, trial courts have approached the concept of joint employment under the Wage Act differently; such different approaches have led to inconsistent results.[56] Some state courts have looked to federal courts' interpretations of the FLSA regarding joint employment, while others have tried to piece together a meaning using the different ways "employer" is described in various parts of the Wage Act.[57] For instance, § 148 references "an employer," the Minimum Wage Statute references "any employer," and the Overtime Statute references "no employer."[58] In attempting to define employer and joint employers from these terms, courts' interpretations end up on opposite ends of the spectrum.[59]

1. *Jinks v. Credico (USA), LLC*

In *Jinks v. Credico (USA), LLC* ("*Jinks*") three individuals worked for DFW Consultants, Inc. ("DFW") doing face-to-face sales for the business clients of Credico (USA), LLC ("Credico").[60] DFW and Credico entered into contracts where DFW provided services for Credico, and in return DFW agreed to have its employees comply with Credico's code of business ethics and conduct; however, DFW made clear that Credico had no right to control the work performed by DFW employees.[61] Three employees filed suit alleging that DFW and Credico were their joint employers.[62] The Court held that "joint employers can both be held liable under the [W]age [A]ct and [O]vertime [S]tatute" and that "the 'right to control' test determines whether

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[55] *Id.* at 502.

[56] *Compare, e.g.*, Jinks v. Credico (USA) LLC, No. 1784CV02731-BLS2, 2020 WL 1989278, at *3 (Mass. Super. Ct. Mar. 31, 2020), *with, e.g.*, Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *3 (Mass. Super. Ct. Dec. 15, 2017).

[57] *See, e.g.*, *Jinks*, 2020 WL 1989278 at *3; *Cerulo*, 2017 WL 11496924 at *3.

[58] MASS. GEN. LAWS ANN. Ch. 149, § 148 (West 2009) (stating that "an employer may make payment of wages prior to the time that they are required"); MASS. GEN. LAWS ANN. Ch. 151, § 1 (West 2021) (making it unlawful for "any employer" to pay subminimum wages); *id.* § 1A (providing that "no employer" in the commonwealth shall fail to pay overtime).

[59] *Compare, e.g.*, *Jinks*, 2020 WL 1989278, *with, e.g.*, *Cerulo*, 2017 WL 11496924.

[60] 2020 WL 1989278 at *1.

[61] *Id.* at *2.

[62] *Id.* at *1.

more than one company is a joint employer."[63] However, based on the facts of the case, the Court concluded that Credico was entitled to summary judgment because it did not have a right to control the DFW employees and thus was not a joint employer.[64]

In determining if Credico was a joint employer, the Court looked both to the ABC Test and the Right to Control Test.[65] The Court held that Credico was not a joint employer under the statutory test, as the workers did not provide services to Credico, and thus did not meet the threshold question under the ABC Test.[66] Likewise, the Court held that Credico was not the joint employer of the workers under the Right to Control Test.[67] The Court looked to how federal courts have applied the concept under the FLSA and applied the following four-part test:

> To determine whether an employment relationship exists for purposes of the FLSA, courts "must look to the totality of the circumstances, including whether the alleged employer: (1) had the power to hire and fire the employee, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[68]

In applying the four-part test, the Court held that Credico had no power to hire or fire workers, did not supervise or control their work schedule, and did not have the power to establish rates of payment nor did they maintain employment records.[69] As a result, while the Court explicitly acknowledged that a joint employment relationship can exist under the Wage Act, and even applied the four-part test as applied to the FLSA, the facts of the claim in *Jinks* meant that there was no joint employment relationship in that particular instance.[70]

2. *Cerulo v. Chambers*

In *Cerulo v. Chambers* ("*Cerulo*"), two car salesmen at the Herb Chambers car dealerships in Massachusetts filed complaints against the parent

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[63] *Id.* at *3.

[64] *Id.*

[65] *Id.* at *5–7.

[66] *Jinks*, 2020 WL 1989278 at *5–7.

[67] *Id.* at *8.

[68] *Id.* at *7 (quoting Romero v. Clean Harbors Surface Rentals USA, Inc., 368 F.Supp.3d 152, 159 (D. Mass. 2019).

[69] *Id.*

[70] *Id.*

company Jennings Road Management Corp., d/b/a The Herb Chambers Companies ("JRM").[71] The dealerships were separate Massachusetts corporations, but the complaint alleged that they were "operated" by JRM.[72] The plaintiffs alleged that the commission policy violated the Wage Act and that JRM was their joint employer.[73]

The Court in *Cerulo* held that while the Wage Act does not formally define "employer," the language in § 148 "strongly points to the entity that cuts the paycheck."[74] Unlike in *Jinks*, the Court in *Cerulo* declined to look to federal interpretation of the FLSA's definition of employer.[75] Thus, the Court did not consider the four-part joint employment test under the FLSA interpretation.[76] Instead, *Cerulo* limited the definition of employer to the more narrow "entity from which the employee gets his or her paycheck, and its management."[77]

Because the Wage Act does not have a comprehensive definition of employer, and the *Gallagher* decision only briefly discusses joint employment, the results at the trial court level are quite broad.[78] The Court in *Jinks* held that it "makes good sense" that two entities could both be liable to a single employee as joint employers under the Wage Act and Overtime Statute, and that the argument against it "has no merit."[79] However, the Court in *Cerulo* narrowed the definition of "employer" to just the entity that cuts an employee's paycheck, all but doing away with the viability that joint employment liability is possible under the Wage Act.[80]

II. Importance/Relevance

A. *A Strong Test for Joint Employment Will Help Deter Wage Theft*

Wage theft is a pervasive problem in the United States that costs workers

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[71] Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *1 (Mass. Super. Ct. Dec. 15, 2017).

[72] *Id.* at *2.

[73] *Id.* at *1.

[74] *Id.* at *3.

[75] *Id.* at *4.

[76] *See id.*

[77] *Cerulo*, 2017 WL 11496924 at *5.

[78] Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 501–02 (Mass. App. Ct. 2017). C*ompare* Jinks v. Credico (USA) LLC, No. 1784CV02731-BLS2, 2020 WL 1989278, at *3 (Mass. Super. Ct. Mar. 31, 2020), *with Cerulo*, 2017 WL 11496924 at *3–5.

[79] *Jinks*, 2020 WL 1989278 at *4.

[80] *Cerulo*, 2017 WL 11496924 at *5.

an estimated fifty-billion dollars a year.[81] In Massachusetts alone, between 2015 and 2016 the Massachusetts Attorney General's Office found that $5,406,900 had been stolen from workers in the cases her office opened.[82] Wage theft largely affects low-wage workers and can take multiple forms, such as paying less than the minimum wage, failing to pay premium pay for overtime hours, taking unauthorized deductions from a worker's pay, or failing to pay for all hours worked.[83]

The fissuring of the workplace has led to employment situations that are more likely to result in wage theft occurring.[84] Fissuring occurs when companies increasingly outsource activities through a system of contracting, franchising, and using staffing agencies.[85] Fissured employment is spreading in a growing number of industries with a large concentration of low wage workers.[86] This leads to more workplaces breaking into pieces and shifting to third-party companies and subcontractors.[87] Fissuring does not always occur due to efforts to thwart liability under the wage and hour laws, but the end result is employment relationships become "more tenuous, responsibility for legal compliance is shifted, and the workforce becomes vulnerable to violations of even the most basic protections."[88] In particular, workers at the bottom of the fissured workplace, those who are most vulnerable to wage theft, receive lower pay and face insecure employment situations and violations of the wage and hour laws.[89]

A strong and certain interpretation of joint employment should lead to decreased wage theft by employers.[90] With a weak interpretation, companies can cut labor costs by outsourcing the work, and thus liability, to other

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[81] Celine McNicholas et al., *Two Billion Dollars in Stolen Wages Were Recovered for Workers in 2015 and 2016—And That's Just a Drop in the Bucket*, ECON. POL'Y INST. (Dec. 13, 2017), https://perma.cc/42CJ-PCJ7.

[82] *Id.*

[83] *See* Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 761 (2019); McNicholas et al., *supra* note 81.

[84] See David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. AND LABOUR REL. REV., no. 2, 2011, at 33, 34, https://perma.cc/YSS3-TCNH.

[85] *Id.*

[86] *Id.*

[87] David Weil & Tanya Goldman, *Labor Standards, the Fissured Workplace, and the On-Demand Economy*, PERSPS. ON WORK, 2016, at 26, 27, https://perma.cc/ADQ6-59QY.

[88] *Id.*

[89] *Id.*

[90] *See* Vin Gurrieri, *5 Things to Watch as DOL Wades into Joint-Employer Debate*, LAW 360 (Apr. 2, 2019, 10:12 PM EDT) (sub. req.), https://perma.cc/KGH7-L6CW.

parties while maintaining a fair amount of control.[91] A stronger test is more likely to result in the finding of a joint employment relationship in any given case, and there will be more opportunities for employees to file suit against the larger, usually more financially stable, employer.[92] This increased potential liability may also increase the deterrent effect for potential wage theft.[93] Businesses fearing potential joint liability will be less likely to hire undercapitalized firms that offer the lowest bid, thus reducing the chances of wage theft.[94]

B. *A Clear Test for Joint Employment Will Help Protect Well-Intentioned Employers*

Joint employment liability exposes businesses to significant risk if they are not careful in setting up appropriate systems of employment.[95] The level of exposure can affect preferred business models, particularly in the developing world of the gig economy.[96] Because the Wage Act imposes treble damages plus attorney's fees and costs, the exposure to liability could be fairly damaging to a business.[97] Further, imposing individual liability on certain officers of corporations and managers of limited liability companies makes potential claims of Wage Act violations all the more serious.[98]

The joint employment doctrine needs to strike a balance between protecting workers from unscrupulous employers and allowing businesses to continue to function.[99] While a weak test for joint employment allows some businesses to avoid liability, it leaves too much opportunity for dishonest employers to violate the law.[100] Predictability and certainty, however, are valuable to businesses making both long-term investment and

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[91] *Id.*

[92] *See* Celine McNicholas & Heidi Shierhol, *EPI Comments Regarding the Department of Labor's Proposed Joint-Employer Standard*, ECON. POLICY INST. (June 25, 2019), https://perma.cc/32FL-NQUW.

[93] *Id.*

[94] *Id.*

[95] Schwartz & Stewart, *supra* note 22.

[96] Schwartz & Stewart, *supra* note 22.

[97] Rebekah D. Provost, Note, *Punishing and Deterring the Unknowing: Mandatory Treble Damages Under the Massachusetts Wage Act*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 305, 317–18 (2013).

[98] *See* MASS. GEN. LAWS ANN. ch. 149, § 148 (West 2009).

[99] *See generally* Petkoff, *supra* note 3, at 1144.

[100] *See generally* McNicholas & Shierhol, *supra* note 92.

daily operational decisions.[101] With a clearer, stronger test for joint employment, projected costs will be more certain, and businesses forming new contractual arrangements will have an easier time negotiating prices for goods and services.[102] Additionally, businesses will be able to decide whether entering into a contract is worth the risk of potential liability under the Wage Act.[103] However, if the joint employment test is too expansive, it may accidentally include traditional subcontracting and franchising arrangements in the employment context, which will lead to unpredictability in liability and limit business flexibility.[104] As a result, a strong and clear joint employment test will also benefit honest and well-intentioned employers by providing them the predictability they desire.[105]

III. Massachusetts Courts Should Not Use the ABC Test or "Paycheck" Test but Should Follow the FLSA Interpretation of the Common Law

A. *The ABC Test Is the Wrong Test—It Tests Who Is an Employee, Not an Employer*

The purpose of the ABC Test is to protect workers by ensuring that they are properly classified as employees.[106] With that classification comes a myriad of rights and benefits.[107] Misclassification hurts both employees as well as state and federal governments in lost tax and insurance revenue.[108] An employer who misclassifies employees, thus failing to pay the additional taxes and benefits that are associated with proper classification, also gains an unfair advantage over the employer's competitors.[109] However, the ABC Test is of questionable utility in determining if an employment relationship exists and is particularly inappropriate when considering the concept of joint employment.[110]

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[101] Petkoff, *supra* note 3, at 1144.

[102] Petkoff, *supra* note 3, at 1145.

[103] Petkoff, *supra* note 3, at 1145.

[104] *See generally* Petkoff, *supra* note 3, at 1144.

[105] *See generally* Petkoff, *supra* note 3, at 1144.

[106] Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1066 (Mass. 2013).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *See* Henderson v. Equilon Enters., LLC, 253 Cal. Rptr. 3d 738, 752–53 (Cal. Ct. App. 2019) (refusing to apply the California ABC Test to joint employment claims, noting that joint employment claims "raise different concerns, such as when the primary employer is unwilling or no longer able to satisfy claims of unpaid wages and workers must look to another business entity that may be separately liable as their employer").

The policy purpose of the ABC Test, ensuring employees are properly categorized as employees, is usually already true in a joint employment situation.[111] In the joint employment context, the employee is typically already considered the employee of the primary employer.[112] The issue then becomes whether a second business can also be deemed a secondary or joint employer.[113] The primary employer is already responsible for paying taxes and providing legal protections to the employee.[114] Thus, the policy purposes of the ABC Test are typically satisfied, and using the ABC Test to disprove the worker's status as an employee is unnecessary.[115]

Even if a situation arises wherein a worker is misclassified and is filing a claim of joint employment liability, the ABC Test is inappropriate to determine the employment relationship.[116] This is because, before a court can apply the ABC Test to find if a worker was an employee, the court must first determine who employed the worker.[117] Because the ABC Test does not define "employer," using it as the basis to determine if an employment or joint relationship exists is backwards and illogical.[118] While the ABC Test does not define "employer," it does reference an "employer" in the second prong of the test when it examines whether a worker performed a service "outside the usual course of the business of the employer."[119] The usage of "employer" within the statute, but the failure to define it, makes it clear that the ABC Test is intended to determine if a worker is an employee and nothing else.[120] It would be circular and illogical if the test to determine an employer used the term "employer" within that definition.[121]

Given that the ABC Test is not an appropriate means to determine if an employment relationship exists, it is particularly unreasonable to use it to determine if a joint employment relationship exists.[122] Other states with

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111 *See* Curry v. Equilon Enters., LLC, 233 Cal. Rptr. 3d 295, 313 (Cal. Ct. App. 2018).

112 *Id.*

113 *Id.*

114 *See Henderson*, 253 Cal. Rptr. 3d at 753.

115 *Curry*, 233 Cal. Rptr. 3d at 313.

116 *See Henderson*, 253 Cal. Rptr. 3d at 753.

117 *Id.*

118 MASS. GEN. LAWS ANN. Ch. 149, § 148B (West 2004).

119 *Id.*

120 *See generally* Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1066 (Mass. 2013).

121 Alberty-Vélez v. Corporación de Puerto Rico Para La Difusión Pública, 361 F.3d 1, 6 (1st Cir. 2004) (explaining that a definition of employee as "an individual employed by an employer" is "completely circular and explains nothing").

122 *See generally Henderson*, 253 Cal. Rptr. 3d at 753.

similar ABC Tests have examined the issue and determined that the ABC Test should be used only to determine whether the worker is an employee or independent contractor of the hiring entity, and a separate joint employment test should apply to the secondary employer.[123] At various levels, those states' courts have determined that in a joint employment context other tests are more appropriate.[124]

B. *The "Paycheck" Test in* Cerulo *Is Also Inappropriate–It All but Removes the Prospect of Joint Employment*

Cerulo narrows the definition of employer to just the entity issuing employee paychecks, which appears to contradict both state and federal precedent.[125] Massachusetts courts have found that joint employment liability can exist in claims involving discrimination, workers compensation, and wage and hour violations.[126] Joint employer liability has also existed under the FLSA in some form since 1939.[127] Federal courts have consistently found that one company issuing a paycheck is only one criterion in determining if an employment relationship exists and does not preclude joint employer liability.[128]

Thus, there should be ample room for a finding that two employers may

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[123] *Id.* (holding that that the "ABC test was not intended to apply to joint employer claims" and that the "relevant inquiry is instead whether the secondary entity has the power to control the details of the employee's working conditions, or indeed, the power to prevent the work from occurring in the first place"); *see* Camillo Echavarria v. Williams Sonoma, Inc., No. 15-6441, 2016 WL 1047225, at *4 (D.N.J. Mar. 16, 2016) (applying a joint employer and Economic Realities Test instead of the ABC Test); Curry v. Equilon Enters., LLC, 233 Cal. Rptr. 3d 295, 313 (Cal. Ct. App. 2018) (holding that the ABC Test is "directed toward the issue of whether employees were misclassified" and that it is "not relevant in the joint employment context").

[124] *Echavarria*, No. 15-64412016 WL 1047225 at *4; *Henderson*, 253 Cal. Rptr. 3d at 753; *Curry*, 233 Cal. Rptr. 3d at 314.

[125] Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *3 (Mass. Super. Ct. Dec. 15, 2017).

[126] *See* Whitman's Case, 952 N.E.2d 983, 989 (Mass. App. Ct. 2011) (applying joint employment to the Workers' Compensation Act); Commodore v. Genesis Health Ventures, Inc., 824 N.E.2d 453, 456 (Mass. App. Ct. 2005) (applying joint employer liability to employment discrimination claims). *Contra* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 501 (Mass. App. Ct. 2017) (arguing fiscal intermediaries may not qualify as employers for purposes of the Wage Act).

[127] Schwartz & Stewart, *supra* note 22.

[128] *E.g.*, Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 130 (4th Cir. 2017); Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 676 (1st Cir. 1998) ("[I]t is the totality of the circumstances, and not any one factor, which determines whether a worker is the employee of a particular alleged employer.").

both be liable to an employee for unpaid wages.[129] However, the test put forth under *Cerulo*, which limits the employment relationship to the entity which cuts the paycheck, runs contrary to both state and federal interpretation.[130] If the *Cerulo* test was to prevail, it would all but remove the concept of joint employer liability from the wage and hour laws.[131] Unless employees collect paychecks from multiple entities in a particular pay week, only the entity issuing the check could be held liable.[132] As a result, the test is clearly too narrow and should not be applied when claims of joint employment arise.[133]

C. *Massachusetts Courts Should Apply the Economic Realities Common Law Test to Joint Employer Liability*

1. The Economic Realities Test Is Best Suited for the Question of Joint Employment

Given that the ABC Test is not well suited for questions of joint employment, Massachusetts courts should apply the common law when determining if a purported joint employer should be liable for unpaid wages.[134] The Right to Control Test is the traditional common law test, and holds that a company is deemed to be a joint employer when it has "sufficient control over the work of the employees" of another company.[135] A purported joint employer does not need to exercise actual control—it only needs to have the right to do so.[136] However, the Right to Control Test is not sufficiently broad to capture all joint employment relationships.[137] Joint

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[129] *See Gallagher*, 86 N.E.3d at 502 (noting that the basis of joint employer liability under the Wage Act is a question of how much control an employer has retained over employment conditions of employees employed by another employer).

[130] *See generally Cerulo*, 2017 WL 11496924 at *3.

[131] *See id.*

[132] *See id.*

[133] *Compare id.*at *3, *with Gallagher*, 86 N.E.3d at 501–02.

[134] *See generally Gallagher*, 86 N.E.3d at 501–02.

[135] Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964); *see* Silvia v. Woodhouse, 248 N.E.2d 260, 264 (Mass. 1969) (holding that determining an employment relationship "depends on whether there is a right to control").

[136] Cowan v. E. Racing Ass'n, 111 N.E.2d 752, 756 (Mass. 1953) ("The test of the relationship is the right to control. It is not necessary that there be any actual control by the alleged master to make one his servant or agent, but merely a right of the master to control.").

[137] Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003) (holding courts should "look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the FLSA").

employment relationships may exist where an employer controls some of the workplace situation, but where their actual control may be somewhat limited.[138] Given that there is no definition of "employer" under the Wage Act, and case law as to joint employment in Massachusetts is underdeveloped, Massachusetts courts should look at the Economic Realities Test as applied by federal courts when interpreting the FLSA.[139] This more expansive test allows for a finding of joint employer liability where a more rigid Right to Control Test may be limited.[140]

2. Massachusetts Courts Should Read the Wage Act Harmoniously with the FLSA

Because the FLSA and Wage Act are both corrective statutes that are intended to be construed broadly, and Massachusetts state courts have found that joint employer liability can exist in a number of contexts including under the Wage Act, state courts should adopt the joint employment test under the FLSA.[141] Courts already interpret the Massachusetts Overtime Statute consistently with the FLSA.[142] The Supreme Judicial Court ("SJC") held that the Massachusetts Overtime Statute was "intended to be 'essentially identical'" to the FLSA.[143] As a result, the SJC "ascribe[d] the legislative purpose underlying the FLSA" to the Overtime Statute.[144] Thus, when state courts interpret the Massachusetts Overtime Statute, they routinely look to the FLSA for guidance.[145] Just as state courts interpret the Overtime Statute in adherence with the FLSA, courts should also interpret the concept of joint employment consistently.[146]

Just like the FLSA, the Massachusetts Wage Act is a remedial statute that is meant to be interpreted broadly.[147] Massachusetts courts have regularly

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[138] *See id.*

[139] *See* Mullally v. Waste Mgmt. of Mass., Inc., 895 N.E.2d 1277, 1281 (Mass. 2008); *see also Zheng*, 355 F.3d at 69.

[140] *See Zheng*, 355 F.3d at 69.

[141] *See* Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1067 (Mass. 2013).

[142] *Mullally*, 895 N.E.2d at 1281.

[143] *Id*. (internal quotations omitted).

[144] *Id*.

[145] *See id*. (ascribing the legislative purpose underlying the FLSA to the state Overtime Statute); *see also* Goodrow v. Lane Bryant, Inc., 732 N.E.2d 289, 293 (Mass. 2000) (applying the definition of "bona fide executive" under the FLSA to the state Overtime Statute).

[146] *See Mullally*, 895 N.E.2d at 1281.

[147] *See* Bos. Police Patrolmen's Ass'n, Inc. v. City of Boston, 761 N.E.2d 479, 481 (Mass. 2002); *see also* Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998) ("[T]he remedial

interpreted the Wage Act expansively to effectuate its intended purpose.[148] The FLSA broadly defines "employer," yet the Wage Act is silent as to a formal definition.[149] In *Goodrow v. Lane Bryant, Inc.*, the SJC held that when a statute does not effectively define a term, the Court should assume that the legislature "adopted the common meaning of the word, as assisted by a consideration of the historical origins of the enactment."[150] The SJC noted that the term "*bona fide* executive" does not have a definition in the Overtime Statute and therefore held that "[i]n such instances we may look to interpretations of analogous Federal statutes for guidance . . . ."[151]

While the Wage Act does not have a definition for "employer" that applies to the entirety of the Act, the term is defined in the regulations promulgated by the Department of Labor Standards ("DLS").[152] The regulations define "employ" as "to suffer or permit to work," and "employer" as "[a]n individual, corporation, partnership or other entity, including any agent thereof, that employs an employee or employees for wages, remuneration or other compensation."[153] Notably, the definition of "employ" under the DLS regulations is identical to that of the FLSA.[154] Further, the Wage Act's definition of "employer," while not identical to that in the FLSA, is sufficiently broad to allow for the concept of joint employer liability.[155] The DLS regulations clarify Minimum Fair Wages Act policies, and they apply to any employer who employs any person in an occupation in accordance with Mass. Gen. Laws ch. 151.[156] While the regulations are not binding, the SJC grants "substantial deference to an interpretation of a statute by the administrative agency charged with its administration" unless that interpretation is contrary to the plain language of the statute and its

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purposes of the FLSA require courts to define 'employer' more broadly than the term would be interpreted in traditional common law applications.") (internal quotations omitted).

148 *See, e.g.*, Cook v. Patient Educ., LLC, 989 N.E.2d 847, 852 (Mass. 2013) (expanding individual liability from just the President and Treasurer of a corporation as stated in the statute to Managers of LLCs); DiFiore v. Am. Airlines, Inc., 910 N.E.2d 889, 897 (Mass. 2009) (adjusting the definition of "service charge" by concluding that it need not be charged by an employer, but may be imposed by any person or entity).

149 29 U.S.C. § 203(d), (g) (2018); *see* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 498 (Mass. App. 2017).

150 732 N.E.2d at 294 (citations omitted).

151 *Id.*

152 454 Code Mass. Regs. § 27.02 (2021).

153 *Id.*

154 *Id.*; 29 U.S.C. § 203(g) (2018).

155 *See* 454 Code Mass. Regs. § 27.02.

156 454 Code Mass. Regs. § 27.01.

underlying purpose.[157] Notably, the DLS regulations apply to the Minimum Wage and Overtime Statutes outlined in Mass. Gen. Laws ch. 151, but not to Mass. Gen. Laws ch. 149; thus, the regulations do not apply to the entirety of the Wage Act.[158] Given that the Wage Act lacks a formal definition, the DLS regulations apply to the Minimum Wage and Overtime laws, and the DLS regulations do not conflict with the Wage Act, it is sensible to take these facts into consideration when interpreting the Wage Act.[159] If not taken into account, there may be situations where the courts apply the Wage Act definition when enforcing the timeliness of payment and the DLS definition when enforcing the Overtime or Minimum Wage Statutes.[160]

The purpose of the Wage Act is "to protect employees and their right to wages" by preventing the unwarranted detention of their wages.[161] Massachusetts courts have found joint employer liability can exist under the Wage Act, as well as other employment related statutes.[162] Because the Wage Act is meant to be interpreted expansively, and the DLS definition is consistent with the finding that joint employer liability can exist under the Wage Act, the definition in the DLS regulations should be granted deference.[163] That definition can be construed consistently with the FLSA definition of "employer," and, similar to the Overtime Statute, state courts should look to the interpretation of the FLSA for guidance.[164]

IV. When Interpreting Joint Employment, Massachusetts Courts Should Adopt the *Zheng* Test

A. *The Definition of Employer in the FLSA Has Led to a Circuit Split*

Unlike the Wage Act, the FLSA provides a definition for "employer" and "employ."[165] The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," and it

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[157] Swift v. AutoZone, Inc., 806 N.E.2d 95, 101 (Mass. 2004) (internal citations omitted).

[158] *See* 454 Code Mass. Regs. § 27.01.

[159] *See id.*

[160] *See* MASS. GEN. LAWS ANN. ch. 149, § 148 (West 2009); MASS. GEN. LAWS ANN. ch. 151, § 1 (West 2021).

[161] Electronic Data Sys. Corp. v. Att'y Gen., 907 N.E.2d 635, 641 (Mass. 2009).

[162] *See* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 499 (Mass. App. 2017).

[163] *See Gallagher*, 86 N.E.3d at 499; Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1067 (Mass. 2013).

[164] *See* Mullally v. Waste Mgmt. of Mass., Inc., 895 N.E.2d 1277, 1281 (Mass. 2008).

[165] 29 U.S.C. § 203(d), (g) (2018).

defines "employ" as "suffer or permit to work."[166] The definition for "employ" is one of the broadest that has been included in any one act and encompasses working relationships not covered prior to the FLSA.[167] The purpose of including such broad definitions was to effectuate the remedial and humanitarian purposes of the FLSA by including a large number of workers.[168] The U.S. Supreme Court has noted that the definition does not solve the problem of defining the limits of the employer-employee relationship under the FLSA.[169] However, the Court has been silent on which test to apply to determine joint employer liability, and, as a result, multiple tests have been used by the circuit courts.[170]

Federal courts have generally analyzed joint employment questions using common law agency principles and the economic realities of a situation, though the courts differ on which factors to consider.[171] The Economic Realities Test originated in *Bonnette v. California Health and Welfare Agency* ("*Bonnette*"), a Ninth Circuit case regarding chore workers under California's in-home supportive services program.[172] The Court ruled that two or more employers may jointly employ a person under the FLSA and looked to DOL regulations to provide examples of joint employment.[173] In *Bonnette*, the Court affirmed the district court's ruling, which acknowledged the determination for joint employment "must be based on 'a consideration of the total employment situation and the economic realities of the work relationship,'" and looked to a four factor test: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[174]

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[166] *Id.*

[167] Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003) (internal citations omitted).

[168] Salinas v. Com. Interiors, Inc., 848 F.3d 125, 133 (4th Cir. 2017) ("Consistent with the FLSA's 'remedial and humanitarian' purpose, Congress adopted definitions of 'employ,' 'employee,' and 'employer' that brought a broad swath of workers within the statute's protection.") (internal citations omitted).

[169] Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947).

[170] *See* Vano Haroutunian & Avraham Z. Cutler, *The Conflict Between the Circuits in Analyzing Joint Employment Under the FLSA: Why the Supreme Court Should Grant Certiorari in* Zheng v. Liberty Apparel, 12 ENGAGE, no. 1, June 2011, at 77, 77, https://perma.cc/UQP6-GGB6.

[171] Petkoff, *supra* note 3, at 1133.

[172] 704 F.2d 1465, 1467–68 (9th Cir. 1983); Petkoff, *supra* note 3, at 1133.

[173] *See Bonnette*, 704 F.2d at 1469–70.

[174] *Id.* at 1470.

While circuit courts agree that the Economic Realities Test is the basis for the joint employment determination, there are a number of different iterations of the test across the circuits.[175] Within these variations, the *Bonnette* factors have been adopted either in their entirety or at least as a portion of the joint employment test.[176] For instance, the First Circuit adopted them in their totality in *Baystate Alternative Staffing v. Herman* ("*Baystate*"), whereas the Third Circuit uses a version of the Economic Realities test and considers whether the secondary employer is routinely involved in disciplining employees.[177] The Fifth Circuit also relies on the *Bonnette* factors but clarifies that plaintiff-employees "need not establish each element in every case."[178] Moreover, the Eleventh Circuit's eight-factor test, which includes the *Bonnette* factors, also considers "ownership of facilities where work occurred," "performance of a specialty job integral to the business," and "investment in equipment and facilities."[179] Even though several circuits have adopted the *Bonnette* factors in some form, there are some circuits that have not adopted a test for determining joint employment liability under the FLSA; those include the Sixth, Seventh, Eighth, and Tenth Circuits.[180]

The Second Circuit adopted a six-part test, first developed in *Zheng v. Liberty Apparel Co.* ("*Zheng*"), which weighs the following six factors to determine if the secondary employer exercised "functional control" over the workers:

> (1) whether the putative employer owns the work premises and equipment; (2) whether the nature of the business allows shifting "as a unit from one putative joint employer to another"; (3) whether the worker performed a specific job that was an integral part of the putative employer's production process; (4) whether job functions under particular contracts could pass from one employer to another without material effects; (5) how much supervision the putative employer exerted over the worker; and (6) whether the work was performed "exclusively or predominantly" for the putative employer.[181]

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[175] Haroutunian & Cutler, *supra* note 170 at 77.

[176] Petkoff, *supra* note 3, at 1133–39.

[177] In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 469 (3d Cir. 2012); Petkoff, *supra* note 3, at 1134–35.

[178] Orozco v. Plackis, 757 F.3d 445, 448 (5th Cir. 2014).

[179] Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 1276, 1294 (11th Cir. 2016) (internal quotations omitted); Petkoff, *supra* note 3, at 1138.

[180] Petkoff, *supra* note 3, at 1136–38.

[181] Petkoff, *supra* note 3, at 1134; *see* 355 F.3d at 68; Greenawalt v. AT & T Mobility LLC, 642

The court in *Zheng* held that the *Bonnette* factors were appropriate in some instances, but they were not a sufficient test to cover all employment relationships.[182] The Ninth Circuit has combined the *Bonnette* factors and the Second Circuit's six-factor test to create a thirteen-factor test.[183] Essentially, the test combines the Economic Realities Test and common law agency principles.[184]

Finally, in 2017, the Fourth Circuit established a new joint employment test in *Salinas v. Commercial Interiors, Inc.* ("*Salinas*").[185] In *Salinas*, the court rejected the *Bonnette* factors because the factors "(1) improperly focus on the relationship between the employee and putative joint employer, rather than on the relationship between the putative joint employers, and (2) incorrectly frame the joint employment inquiry as a question of an employee's 'economic dependence' on a putative joint employer."[186] The Court looked to the DOL regulations, which held that joint employment exists if one employer is "not completely disassociated from employment by the other employer."[187] Rather than looking at the economic realities between the secondary employer and the employee, the Court focused solely on the relationship between the two employers.[188] Since the two entities were not "completely disassociated" with respect to the plaintiffs' employment, the Court then turned to a test to analyze whether the workers were employees or independent contractors.[189] The Fourth Circuit test adopted under *Salinas* is a substantial departure from how all other circuits have analyzed the joint employment relationship.[190]

B. *Massachusetts Should Follow the Six-Factor Test from* Zheng

Massachusetts courts should adopt the six-factor test as laid out in *Zheng* and apply it to the Wage Act when determining joint employer liability.[191] The six-factor test from *Zheng* is the best test for joint employment as it looks beyond just common law agency principles while maintaining the focus of

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Fed. Appx. 36, 37–38 (2d Cir. 2016).

[182] *See* 355 F.3d at 68.

[183] Petkoff, *supra* note 3, at 1137.

[184] Petkoff, *supra* note 3, at 1138.

[185] *See* 848 F.3d 125, 137 (4th Cir. 2017).

[186] *Id.*

[187] *Id.*

[188] *Id.* at 142; Petkoff, *supra* note 3, at 1140.

[189] *Salinas*, 848 F.3d at 150.

[190] Petkoff, *supra* note 3, at 1139.

[191] *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003).

the test on the employer-employee relationship.[192] Unlike *Zheng*, the *Bonnette* factors are insufficient to hold joint employers liable, and the *Salinas* test is likely overly expansive.[193]

1. The *Bonnette* Factors Are Too Narrow to Be Relied on as a Stand-Alone Test

The *Bonnette* test has been adopted by the First Circuit in a number of cases and reflects a common law test for determining whether an agency relationship exists.[194] In determining the economic realities, the test instructs the court to "look to the totality of the circumstances, including whether the alleged employer: (1) had the power to hire and fire the employee, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[195] The test is fairly restrictive in its ability to find joint employer liability, as it demands direct control of workers.[196] The test is sufficient to find that a joint employer relationship exists, but it is limited to those situations where employers are directly supervising, hiring and firing employees, and controlling their pay.[197]

As explained in *Zheng*, measured against the expansive definition of "employment" under the FLSA, addressing only the secondary employer's control is "unduly narrow" and "cannot be reconciled with the 'suffer or permit' language . . . which necessarily reaches beyond traditional agency law."[198] The *Bonnette* factors only test for control of the employee and do not focus sufficiently on the economic realities.[199] In an increasingly fissuring economy, a test that finds joint employment only when such a direct level of control exists is insufficient and overly restrictive.[200]

Further, in 2020, DOL issued a final rule announcing a four-factor balancing test for determining if a joint employment relationship exists, thus

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[192] *See* Petkoff, *supra* note 3, at 1142–43.

[193] *See Salinas*, 848 F.3d at 140–42; Bonnette v. Cal. Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

[194] Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 676 (1st Cir. 1998); Romero v. Clean Harbors Surface Rentals USA, Inc., 368 F. Supp. 3d 152, 159 (D. Mass. 2019).

[195] *Romero*, 368 F. Supp. 3d at 159 (citing to *Baystate* in applying the *Bonnette* factors).

[196] *See Bonnette*, 704 F.2d at 1470.

[197] *See id.* at 1470; Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003).

[198] *Zheng*, 355 F.3d at 69.

[199] *See id.*

[200] *See id.*

adopting a slightly more restrictive version of the *Bonnette* factors.[201] That rule was challenged by the attorneys general of eighteen states and Washington, D.C., when they sued and argued that the definition of joint employment was too narrow.[202] In September 2020, a motion for summary judgment was granted in district court, striking down the test as to vertical joint employment and holding it was contrary to the FLSA's definition of employer and employee.[203] There, the Court cited to and agreed with the holding in *Zheng* that the *Bonnette* factors were insufficient because they "focus[] solely on the formal right to control the physical performance of another's work [and are thus] unduly narrow"; the Court also agreed with the holding in *Zheng* that "a control-based test conflicts 'with the "suffer or permit" language in the FLSA'" as the FLSA "reaches beyond traditional agency law."[204] As a result, it appears the *Bonnette* factors, while relevant to finding joint employer liability in certain instances, are insufficient and too narrow when compared to the broad definitions set out in the FLSA.[205]

2. Conversely, the *Salinas* Test Is Likely Too Expansive in Determining Joint Employer Liability

On the other end of the spectrum is the recent Fourth Circuit decision in *Salinas*, which rejected the *Bonnette* factors and instead focused on the economic realities of the situation between the two employers rather than between the employer and the employee.[206] The test in *Salinas* focused more on the horizontal joint employment relationship rather than the typical vertical joint employment relationship.[207] The test holds that if the two entities are not "completely disassociated with respect to [the worker's] employment," they both may be liable as joint employers.[208] The test is a considerable departure from how all other circuits have analyzed the joint employment relationship.[209]

The *Salinas* test is likely too expansive given its low threshold and could lead to unpredictable results and threaten previously accepted business

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[201] New York v. Scalia, 490 F. Supp. 3d 748, 761–62 (S.D.N.Y. 2020).

[202] *Id.* at 785–86.

[203] *Id.* at 796.

[204] *Id.* at 759–60.

[205] *Id.* at 787–89.

[206] Salinas v. Com. Interiors, Inc., 848 F.3d 125, 137 (4th Cir. 2017).

[207] Petkoff, *supra* note 3, at 1139.

[208] *Salinas*, 848 F.3d at 150.

[209] Petkoff, *supra* note 3, at 1139.

relationships.[210] In applying the new test, the Court in *Salinas* rejected the secondary employer's argument that its relationship with the primary employer was "nothing more or less than the contractor-subcontractor relationship which is normal and standard in the construction industry."[211] Many traditional business relationships are in jeopardy of joint employer liability under *Salinas*, such as franchising and contracting arrangements, which occur in a number of industries, including warehousing, logistics, and construction.[212] Under the *Salinas* test, it is possible that nearly all subcontracting arrangements would result in joint employer liability.[213] Thus, employers who may believe they have effectively subcontracted work out to another party may need to "think again" as they could unknowingly "be on the hook" for employee wages.[214]

3. Massachusetts Courts Should Adopt the *Zheng* Test

The six-factor test in *Zheng* strikes the appropriate balance of protecting traditional business arrangements while still allowing for joint employer liability outside of the very narrow instance of direct control by the secondary employer.[215] It interprets the broad language of the FLSA to create a joint employment test that is more expansive than the *Bonnette* factors but restrictive enough to not eliminate all types of subcontracting arrangements.[216] In *Zheng*, the court held that the "'economic reality' test" is meant to "expose outsourcing relationships that lack a substantial economic purpose, but it is manifestly not intended to bring normal, strategically-oriented contracting schemes within the ambit of the FLSA."[217]

The *Zheng t*est is consistent with the state common law Right to Control Test as well as the DLS regulations.[218] The six-factor Economic Realities Test makes clear that the right to control can go beyond just physical control of a worker and instead focuses on if an employer "has functional control over workers even in the absence of the formal control measured" by the *Bonnette*

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[210] Petkoff, *supra* note 3, at 1144.

[211] 848 F.3d at 147.

[212] Petkoff, *supra* note 3, at 1144.

[213] Fiona W. Ong, *DOL Issues Final Joint Employer Rule, Making Such Findings Less Likely*, LAB. & EMP'T REPORT (Jan. 13, 2020), https://perma.cc/EU3H-6XV3.

[214] Michael S. Arnold & Donald C. Davis, *Fourth Circuit Offers New Test for Joint Employment Under FLSA*, NAT'L L. R. (Feb. 21, 2017), https://perma.cc/EKP9-PXSD.

[215] *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003).

[216] *Id.* at 76.

[217] *Id.*

[218] *See id.* at 72; *see also* 454 Code Mass. Regs. § 27.02 (2021).

factors.[219] The test arose by rejecting the unduly narrow interpretation of the *Bonnette* factors as inconsistent with the "suffer or permit" to work language of the FLSA.[220] Because the DLS regulations include the same language, following the *Zheng* interpretation would be consistent with the Wage Act.[221]

Moreover, applying *Zheng* to the Wage Act rather than the *Bonnette* factors, which have been adopted by the First Circuit, will still allow for consistent interpretation in the Commonwealth.[222] The *Zheng* test does not reject the *Bonnette* factors, as it allows for them to be applied in particular circumstances.[223] As noted in *Zheng*, satisfaction of the four "formal control" *Bonnette* factors is sufficient but not necessary to establish a joint employment relationship.[224] Thus, applying *Zheng* to the Wage Act will still allow for predictability for employers in the state of Massachusetts.[225]

In addition, *Zheng* provides supplementary guidance when the employment relationship does not clearly show joint employment based on common law principles of control.[226] The additional factors included in *Zheng* are more in line with determining the economic realities of an employment relationship than the *Bonnette* control factors.[227] When the *Zheng* factors weigh in the employee's favor, they demonstrate that the secondary employer has "functional control over workers even in the absence of . . . formal control."[228] The *Zheng* test appropriately considers typical business arrangements and thus strikes the proper balance between protecting employees from unscrupulous employers and allowing employees to subcontract ethically.[229]

The first factor regarding the use of the secondary employer's property by an employee is relevant as it may support the inference that the secondary employer has control over the employee's work.[230] In addition, the second factor as to "whether the putative joint employees are part of a business

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[219] *Zheng*, 355 F.3d at 72 (analyzing the Second Circuit test, which is identical to the Ninth Circuit *Bonnette* factors).

[220] *Id.* at 68–69.

[221] *See* 454 Code Mass. Regs. § 27.02.

[222] *See* 355 F.3d at 71.

[223] *Id.* at 67.

[224] *Id.* at 71.

[225] *See id.*

[226] *Id.* at 72.

[227] *Id.*

[228] *Zheng*, 355 F.3d at 72.

[229] *See id.*

[230] *Id.*

organization that shifts as a unit from one putative joint employer to another" is useful because a subcontractor that contracts with multiple entities is "less likely to be part of a subterfuge arrangement than a subcontractor that serves a single client."[231] The third factor, which focuses on employees working on the production line, focuses on how "integral" the employee is to the secondary employer's business.[232]

The fourth factor, if the contract for the primary employer could pass to another contractor with no material change, is particularly relevant.[233] If a secondary employer can swap out subcontracting agencies with little change, this demonstrates the employees are more linked to the secondary employer than the primary employer, thus "it is difficult *not* to draw the inference that a subterfuge arrangement exists."[234] However, if changing contracting agencies *would* affect the business, as the employees actually work for their direct employer, then a finding of a joint employment relationship would be inappropriate.[235] The fifth factor relating to the degree of supervision by the primary employer is clarified in *Zheng*, which holds that "extensive supervision weighs in favor of joint employment only if it demonstrates effective control of the terms and conditions of the [worker]'s employment."[236] The Court was clear that regular supervision as to quality and time of delivery is consistent with a typical subcontracting arrangement and thus would have no bearing on joint employment liability.[237] Finally, the sixth factor indicates that if the employee works "exclusively or predominantly" for the secondary employer, that employer may become the de facto employer.[238] Alternately, if the employee simply performs a "majority" of the work for the secondary employer, then no joint employment relationship exists. [239]

Accordingly, Massachusetts courts should adopt the six-factor *Zheng* test when interpreting joint employer liability under the Wage Act.[240] Since the *Zheng* test is consistent with the common law Right to Control Test and

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[231] *Id.*

[232] *Id.* at 73.

[233] *See id.* at 74.

[234] *See Zheng*, 355 F.3d at 74.

[235] *See id.*

[236] *Id.* at 74–75.

[237] *Id.* at 75.

[238] *Id.*

[239] *Id.*

[240] *See generally* 355 F.3d at 75–76.

the DLS regulations, it reads harmoniously with the Wage Act.[241] Moreover, the test strikes the appropriate balance between allowing businesses flexibility and allowing for the continuation of traditional subcontracting relationships while providing protection for employees from unscrupulous employers.[242] Furthermore, the test is consistent with the *Bonnette* factors already adopted by the First Circuit because it still allows for a finding of joint employment if the *Bonnette* factors are met.[243] However, given that the narrow *Bonnette* factors are inconsistent with the broad statutory definitions in the FLSA and DLS regulations, the *Zheng* factors more effectively find joint employer liability where the narrow *Bonnette* factors would not.[244] Finally, the *Zheng* test correctly focuses on the employer-employee relationship, as opposed to the *Salinas* "completely disassociated" test, which makes joint employer liability possible in very traditional subcontracting arrangements.[245]

V. Alternatively, the Legislature Should Amend the Wage Act to Define Employment

A. *The Lack of Clarity Stems in Large Part from the Lack of Definition of Employer*

The Wage Act's failure to include any definition of "employer" has prompted courts to search for a way to comprehensively conceptualize joint employment.[246] The ABC Test is best used to find if an employee has been misclassified as an independent contractor, not if the employee has one or more employers.[247] Likewise, the common-law Right to Control Test is a heavily fact-based inquiry with little judicial explanation as to what constitutes "right to control" under the Wage Act.[248] As a result, the application of both tests has led to inconsistent results at the trial level.[249]

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[241] *See generally* Mullally v. Waste Mgmt. of Mass., Inc., 895 N.E.2d 1277, 1281 (Mass. 2008).

[242] *Zheng*, 355 F.3d at 76.

[243] *Id.* at 69.

[244] *Id.*

[245] *See* Petkoff, *supra* note 3, at 1139–40.

[246] *See, e.g.*, Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 498 (Mass. App. Ct. 2017).

[247] *See* Henderson v. Equilon Enters., LLC, 253 Cal. Rptr. 3d 738, 753 (Cal. Ct. App. 2019).

[248] *See Gallagher*, 86 N.E.3d at 502.

[249] *Compare, e.g.*, Jinks v. Credico (USA) LLC, No. 1784CV02731-BLS2, 2020 WL 1989278, at *3 (Mass. Super. Ct. Mar. 31, 2020), *with, e.g.*, Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *3 (Mass. Super. Ct. Dec. 15, 2017).

The more expansive definition in the FLSA, in conjunction with the DOL regulations and their guidance, has led federal courts to provide more concrete tests for joint employment liability.[250] While state courts may look to the interpretation of the FLSA for guidance, this guidance is limited in part due to the circuit split on the issue of interpretation and because the FLSA and the Wage Act are not as similar as the Overtime statute and the FLSA.[251] Therefore, an appropriate solution for the problem would be for the state legislature to include a more expansive definition of employment in the Wage Act.[252] The legislature has defined employment quite expansively in a number of different employment-based statutes and should apply those definitions to the entirety of the Wage Act, the Overtime statute, and the Minimum Wage statute.[253]

B. *Other Massachusetts Statutes Already Have Expansive Definitions of Employer*

1. The Temporary Worker Right to Know Law

The Temporary Worker Right to Know Law (hereinafter "TWRKL") requires that staffing agencies provide workers with certain basic notice of their rights and limits the amount of fees that worksite employers and staffing agencies may charge.[254] TWRKL makes it unlawful for a "staffing agency or work site employer or a person acting directly or indirectly in either's interest" to make certain deductions from employees or to charge them excessive transportation fees.[255] The "directly or indirectly" language in the statute comes from the FLSA definition of employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[256]

Courts use this more expansive definition of "employer" in TWRKL to find that joint employment relationships can exist in the temporary staffing

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[250] *See generally* Petkoff, *supra* note 3, at 1126–27.

[251] *See* Petkoff, *supra* note 3, at 1126–27; *see also* Mullally v. Waste Mgmt. of Mass., Inc., 895 N.E.2d 1277, 1281 (Mass. 2008) (explaining that the Overtime statute was "intended to be 'essentially identical'" to the FLSA).

[252] *See Gallagher*, 86 N.E.3d at 498 (noting that the Wage Act does not define "employer").

[253] *E.g.*, MASS. GEN. LAWS ANN. ch. 149, § 159C (West 2013); MASS. GEN. LAWS ANN. ch. 152, § 26B (West 2021).

[254] *Employment, Placement, and Staffing Agency Definitions and the Law*, MASS.GOV, https://perma.cc/LS49-DND8 (last visited Jan. 10, 2022).

[255] MASS. GEN. LAWS ANN. ch. 149, § 159C.

[256] Palacio v. Job Done, LLC, No. 1584CV00813BLS2, 2018 WL 3431698, at *2 (Mass. Super. Ct. June 15, 2018).

agency realm.[257] It has been held to mean that workers may be jointly employed by a staffing agency and the job site employer when they work simultaneously for each entity and are subject to the direction and control of each entity.[258] The definition's more inclusive language makes it clear that the legislature intended for joint employment liability to be available when a client company uses a staffing agency.[259]

2. The Workers' Compensation Statute Allows for Concurrent Employment

The Massachusetts Workers' Compensation statute explicitly allows for more than one employer and contains one of the more expansive definitions of employer in the Commonwealth.[260] The section of the Workers' Compensation Statute, titled "Concurrent service of two or more employers; joint and several liability of insurers," states:

> When an employee employed in the concurrent service of two or more insured employers receives a personal injury compensable under this chapter while performing a duty which is common to such employers, the liability of their insurers under this chapter shall be joint and several. Each insurer or self-insurer liable under this section shall pay compensation according to the proportion of the wages paid by its insured in relation to the concurrent wage which the employee received from all insured employers.[261]

As a result, cases interpreting the Workers' Compensation Statute have held that joint employer liability may exist.[262] The cases distinguish between joint employment, which involves "a person under the simultaneous control of two employers simultaneously perform[ing] services for both," and dual employment, where "an employee performs services for each of two employers separately and the services for the two employers are unrelated."[263] Courts have shown an increasing tendency to find that joint employment exists, rather than arbitrarily assigning an employee to either

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[257] *Id.* at *3.

[258] *Id.* at *2.

[259] *See id.* ("The Legislature recognized in § 159C that joint employment occurs when a staffing agency provides temporary or part-time employees to provide services to a work site employer that controls where and when the employees work and how they do their jobs.").

[260] *See* MASS. GEN. LAWS ANN. ch. 152, § 26B (2021).

[261] *Id.*

[262] *E.g.*, Whitman's Case, 952 N.E.2d 983, 984 (Mass. App. Ct. 2011).

[263] Williams v. Westover Finishing Co., 506 N.E.2d 166, 168 (Mass. App. Ct. 1987).

employer.[264]

When the concept of joint employment was challenged, the Massachusetts Appeals Court looked to the more expansive definition in the Workers' Compensation Statute to hold an employer liable.[265] In *Williams v. Westover Finishing Co.*, the Massachusetts Appeals Court noted that joint employment relationships are common and "a well-recognized phenomenon."[266] In discussing the *Williams* decision in a later case, the Appeals Court noted that "[i]n instances of symbiotic business arrangements, the trend of courts is 'to dispose of close cases . . . by finding a joint employment on the theory that the employee is continuously serving both employers under the control of both.'"[267] Notably, the Court pointed to the expansive definition in the Workers' Compensation Statute as the basis for its decisions; it held the "[w]orkers' compensation law in Massachusetts allows separate entities to constitute joint employers."[268] Additionally, the Court observed that Mass. Gen. Laws ch. 152, § 26B "explicitly acknowledges a covered worker's employment 'in the concurrent service of two or more insured employers' and the assignment of joint and several liability to their respective insurers for compensable injury incurred in work 'common to such employers.'"[269] Clearly, a robust and well-articulated definition of "employer" allows for an easier finding of joint employment liability than the current Wage Act.[270]

C. *The Legislature Should Adopt an Expansive Definition of Employer*

The Massachusetts Legislature must correct the ambiguity by providing a comprehensive definition of employer and applying it to the Wage Act, Overtime Statute, and Minimum Wage Statute.[271] Currently, the definition for "employer" in the Wage Act does not apply to the majority of the Wage Act, and the definition that applies to the Minimum Wage and Overtime Statutes is set by nonbinding DLS regulations that also do not apply to the Wage Act.[272] The legislature's definition should be expansive and, similar to the Workers' Compensation definition, explicitly allow for joint employer

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[264] *Id.*

[265] *Whitman's Case*, 952 N.E.2d at 989.

[266] 506 N.E.2d at 168.

[267] *Whitman's Case,* 952 N.E.2d at 989 (internal citation omitted).

[268] *Id.*

[269] *Id.*

[270] *See id.*

[271] *See* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 498 (Mass. App. Ct. 2017).

[272] *Id.*; *see also* 454 Code Mass. Regs. § 27.02 (2021).

liability.[273] Additionally, it should include the language "directly or indirectly" to clarify that it is referencing the FLSA so courts may interpret the Wage Act consistently with the FLSA.[274] The definition should be included in the definition sections of Mass. Gen. Laws chapters 149 and 151 and apply to the entirety of each chapter.[275]

CONCLUSION

In an increasingly fissured economy, strong joint employer liability is more important than ever. From subcontracting out work down multiple levels to undercapitalized entities, to the use of fly by night temp agencies, workers are at risk of wage theft if they cannot hold a worksite employer liable. Moreover, when unscrupulous employers hire the cheapest subcontractor or temp agency without fear of liability under the Wage Act, they can cut labor costs and gain a competitive advantage over conscientious companies. As a result, firms that are following best practices and ensuring that all workers on their projects are being paid appropriately should welcome stronger joint employer liability.

Therefore, it is imperative that Massachusetts courts interpret the Wage Act consistently with the well-developed joint employer doctrine under the FLSA. Ideally, the courts will resist the urge to follow the simple *Bonnette* factors that have already been applied in the First Circuit, and instead use the *Zheng* test, which does a better job of balancing employer-employee interests. Alternatively, the problem could be more easily resolved by the legislature including an expansive and consistent definition of employer in all relevant statutes.

*** This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority. ***

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[273] *See* MASS. GEN. LAWS ANN. ch. 152, § 26B (West 2021).

[274] *See* MASS. GEN. LAWS ANN. ch. 149, § 159C (West 2013).

[275] *See id.* § 1; MASS GEN. LAWS ANN. ch. 151, § 2 (West 2017).

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