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PRESUMING JUSTICE FOR TEMP WORKERS

ANDREW ELMORE, KATI L. GRIFFITH & SACHIN S. PANDYA*

ABSTRACT

Workers need to know who their employers are. Who is responsible for remedying workplace dangers? Who can they sue for restitution when they are discriminated against at work, or do not get paid for all of the hours they work? Temp agency contracts complicate these seemingly simple questions. In workers' rights cases involving

* Author order is in the order of contribution. Elmore is Professor of Law and Barecca Labor Relations Scholar, Boston University School of Law; Griffith is Jean McKelvey-Alice Grant Professor of Labor and Employment Law & Senior Associate Dean, Cornell ILR School and Associate Member of the Faculty, Cornell Law School; Pandya is Professor of Law, University of Connecticut School of Law. The authors would like to thank the participants at the Eighteenth Annual Colloquium on Scholarship in Employment and Labor Law (COSELL) in October 2023 and at the Law & Society Association Meeting in June 2024 for their feedback. We appreciate John Newman, Gali Racabi, and Julia Tomassetti for their close reads and incisive commentary. This project benefitted from conversations about a presumption of joint employment in the fissured workplace with many scholars and practitioners, including Jennifer Abruzzo, Sharon Block, Matt Capece, Hiba Hafiz, Michael Iadevaia, Wilma Liebman, David Michaels, Cathy Ruckelshaus, and Alvin Velazquez. We would also like to thank the law students who provided excellent research assistance for the project, including Emily Espinosa, Cosimo Gaudio, Mimi Goldberg, Paris Guinn, Jess Hwang, Kelsey McCarty, Steven Mitchell, Emma Sheridan, and Caitlin Tabor as well as the editorial staff of the *William & Mary Law Review*.

"temps," courts and administrative agencies often engage in protracted, resource-intensive joint employer inquiries to decide whether the temp agency clients share in employer obligations and liabilities with the agencies. This is the case even when the temp agency client has the key markers of an "employer," such as directly supervising all of the activities of a temp worker on a daily basis. This Article analyzes a first-of-its-kind dataset of thirty-two contracts between leading temp agencies and their clients in blue-collar work. The analysis shows that temp agency contracts often give clients enough control over temporary workers to give rise to employer status and responsibilities under workers' rights laws. This empirical finding sets the foundation for courts and administrative agencies using contract terms to trigger a legal presumption that a client of a temp agency is a joint employer of the temporary workers provided to them for statutory and collective bargaining purposes. Through its unique empirical lens, this Article offers and justifies a joint employer presumption. This intervention is a practical, necessary correction that will expose meritless attempts to contract out of employer responsibilities.

TABLE OF CONTENTS

INTRODUCTION

> *Yeah you can't really speak to anyone [when there's a problem at work] because generally I am contracted through the [temp] agency—I work with the agency not them. So I can't go to them for vindication or claims because I don't work for them directly.*
> —Samuel, Haitian warehouse worker in New Jersey, February 2020[1]

Samuel's statement illustrates a major problem with the temporary staffing agency employment model, whereby one entity (the temp agency) hires and pays workers to perform temporary work for another entity (the client) for a fee. The model often confuses workers about who is responsible for improving their working conditions. The widespread, but wrong, perception is that the temporary staffing agency alone is the employer of a temp worker.

This perception is often nothing more than a sleight of hand. Pulling back the curtain reveals that the client of the temp agency—where the temp worker actually works—typically pulls the strings, dictating the material terms and conditions of employment for the temp employee, including wages, hours, supervision, safety, hiring, and firing, among others. The client, not the temp agency, then, is the key to bargaining for improvements to wages and working conditions. The root of Samuel's problems at work was mismanagement by the warehouse supervisors—who are controlled solely by the client, not the temp agency. Samuel, however, did not think the warehouse was his employer. Despite his problems with scheduling and work hours, he told interviewers that there was no use complaining or "mobilizing in efforts ... to stop this" with his warehouse coworkers because "you are not employed. The union is there for employed workers."[2]

Workers' misperception that the temp agency's client is not their employer feeds workplace injustice. When workers do not complain

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1. Interview by Jhims Gerard with Samuel, in N.J. (Feb. 13, 2020) (on file with authors) *reprinted in* KATI L. GRIFFITH, SHANNON GLEESON, DARLÈNE DUBUISSON & PATRICIA CAMPOS-MEDINA, LEGALIZED INEQUALITIES: IMMIGRATION AND RACE IN THE LOW-WAGE WORKPLACE 49-50 (2025).

2. Interview with Samuel, *supra* note 1.

about their employers' violations it puts a major wrench into the labor and employment law enforcement scheme in the United States.[3] The system heavily relies on workers to serve as private attorneys general, vindicating rights on their own behalf and on the behalf of the public at large.[4] When a temp agency or client tells workers like Samuel that the client is not an employer, workers are also blocked from joining collective efforts to bargain with all of the entities responsible for wages and working conditions.[5] After all, the temp agency is likely to refuse to bargain over working conditions that it ceded to the client, such as supervision.

Even when workers do see that the client is a joint employer with the temp agency that hired them, it often takes lengthy and costly adjudications for a court or administrative agency to come to the same conclusion.[6] Thus, employees face formidable deterrents to pursuing temp agency clients as joint employers. Resolving joint employer disputes is not new[7] but has become more contentious as lead companies increasingly shift labor costs to intermediary businesses instead of employing workers directly. The use of intermediaries such as franchisees,[8] temp agencies, and subcontractors—what David Weil calls the "fissuring" of the employment

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3. *See* Andrew Elmore, *Collaborative Enforcement*, 10 NE. U. L. REV. 72, 84-93 (2018); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMPAR. LAB. L. & POL'Y J. 59, 59 (2005).

4. Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 428-44 (2011).

5. *See, e.g.*, Andrew Elmore, *Confronting Structural Inequality in State Labor Law*, 83 MD. L. REV. 1192, 1205-06 (2024).

6. *See, e.g.*, Lina Fisher, *YouTube Music Workers Laid Off in Possible Retaliation for Organizing*, AUS. CHRON. (Mar. 7, 2024), https://www.austinchronicle.com/news/2024-03-08/youtube-music-workers-laid-off-in-possible-retaliation-for-organizing/ [https://perma.cc/Q74W-6E55] (describing protracted legal battles due to Google's argument that the workers were hired through an intermediary, not directly by Google).

7. *See* Bruce Goldstein, Marc Linder, Laurence E. Norton, II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 997-1002 (1999). *See generally* Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORN. L. REV. 557 (2019) (highlighting the ways that Fair Labor Standards Act (FLSA) questions involving multiple businesses in the 1930s mirrors current questions).

8. *See* Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New "Intermediary" Theory of Joint Employment*, 94 WASH. L. REV. 171, 173-74 (2019); Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907, 939 (2018).

relationship[9]—raises complex questions about whether the intermediary and the lead company are jointly employing the workers. Unlike single-employer workplaces, where there is the possibility of a bargained-for relationship directly between employers and workers,[10] the key substantive terms in fissured workplaces are set by, and are often hidden in, agreements between the putative joint employers. In claims against putative joint employers, most statutes require courts and agencies to engage in a fact-intensive and often indeterminate inquiry over the extent to which each business exercises or reserves control over workers in the workplace, either directly or indirectly.[11] Along with confusing workers like Samuel, this doctrinal ambiguity creates perverse incentives for temp agency clients to exploit this indeterminacy by skirting workers' rights.

This Article draws from a unique dataset of contractual terms from thirty-two contracts between clients and temp agencies that place blue-collar temp workers with clients across the United States. Because temp agency contracts are not publicly available, the authors and their research team conducted an exhaustive search of contracts involving the top fifty industrial staffing temp agencies that appeared as exhibits in lawsuits.[12] Analysis of these contracts exposes the temp agency as a quintessential joint employer business model. To reduce protracted litigation in these cases, we offer a rebuttable presumption that temp agencies and their clients are joint employers of the workers they share.[13]

The temp agency-client relationship is a business structure that has received less attention in the scholarly literature on joint employer law in an era of fissured business models.[14] Hiring

9. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 122-31 (2014).

10. *See* Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 92 (2022).

11. *See* Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CALIF. L. REV. 1317, 1325-28 (2021).

12. *See infra* Part II.B for a description of the methodological approach.

13. *See infra* Part III.

14. Recent scholarship about contracting relationships and joint employer doctrine has focused on franchising. *See* Elmore & Griffith, *supra* note 11; Brian Callaci, *What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices*, 1 J.L. & POL. ECON. 397, 407 tbl. 2 (2021). In the previous decade, public policy scholars examined temporary staffing agencies as representative of a new rise in labor market intermediaries in the years before and after the Great Recession. *See, e.g.*, CHRIS BENNER, LAURA

workers through temp agencies is a longstanding (and growing)[15] business practice, especially in low-wage workplaces. While only 2 percent of the workforce, nearly half of temporary workers work in blue-collar jobs, especially in manufacturing and transportation.[16] Temp agencies purport to relieve their clients from labor and employment law responsibilities to low-wage workers who perform the work they rely on. Despite extensive literature on the temporary staffing industry,[17] including research on the limits of joint-employer doctrine and other regulation as applied to that industry,[18] our study is unique in examining temporary staffing agency and client contract terms to discern their employment relationship with temp workers.[19]

LEETE & MANUEL PASTOR, STAIRCASES OR TREADMILLS?: LABOR MARKET INTERMEDIARIES AND ECONOMIC OPPORTUNITY IN A CHANGING ECONOMY 87-88, 98-99 (2007). Labor historians examine temporary staffing agencies as drivers of contingent work from the 1940s to the early 2000s in the United States. *See, e.g.*, LOUIS HYMAN, TEMP: HOW AMERICAN WORK, AMERICAN BUSINESS, AND THE AMERICAN DREAM BECAME TEMPORARY 255-90 (2018).

15. Temporary employment in the United States has grown dramatically since the 1990s, from less than a quarter million workers in the 1970s to about three million workers today. The growth in temporary employment is accompanied by huge growth in staffing agencies: from roughly 600 in the 1960s, there are now roughly 40,000 staffing agencies, with $72.3 billion in annual earnings. Emine Fidan Elcioglu, *Producing Precarity: The Temporary Staffing Agency in the Labor Market*, 33 QUALITATIVE SOCIO. 117, 119 (2010); *see* News Release, Bureau of Lab. Stat., The Employment Situation—April 2023 (May 5, 2023) [hereinafter BLS April 2023], https://www.bls.gov/news.release/archives/empsit_05052023.pdf [https://perma.cc/S9E5-HEER]; Jamie Peck & Nik Theodore, *Flexible Recession: The Temporary Staffing Industry and Mediated Work in the United States*, 31 CAMBRIDGE J. ECON. 171, 172, 174 (2007); Tian Luo, Amar Mann & Richard Holden, *The Expanding Role of Temporary Help Services from 1990 to 2008*, MONTHLY LAB. REV., Aug. 2010, at 1, 3-5.

16. Luo, Mann & Holden, *supra* note 15, at 6-7. Blue-collar work has come to displace clerical work as the primary source of temporary jobs. Peck & Theodore, *supra* note 15, at 172-73; *see* Matthew Dey, Susan N. Houseman & Anne E. Polivka, *Outsourcing to Staffing Services: How Manufacturers' Use of Staffing Agencies Affects Employment and Productivity Measurement*, W.E. UPJOHN INST. FOR EMP. RSCH., Jan. 2007, at 4, 5.

17. *See, e.g.*, BENNER, LEETE & PASTOR, *supra* note 14, at 87-88; HYMAN, *supra* note 14, at 255-90; Mattia Filomena & Matteo Picchio, *Are Temporary Jobs Stepping Stones or Dead Ends? A Systematic Review of the Literature*, 43 INT'L J. MANPOWER 60, 62-63, 71 (2022).

18. *See* Llezlie L. Green, *Outsourcing Discrimination*, 55 HARV. C.R.-C.L. L. REV. 915, 944-49 (2020); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 259, 264-65 (2006); Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109, 115-16 (2003); George Gonos, *The Contest Over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms*, 31 L. & SOC'Y REV. 81, 81-82 (1997).

19. Jane Flanagan, who is the Director of the Illinois Department of Labor, and law scholar Jonathan Harris have recently studied contracts between temp agencies and clients.

Shedding light on the hidden terms allocating control over temp workers between temp agencies and their clients offers several theoretical and practical contributions to labor and employment law scholarship. First, it shows the importance of examining the contracts between putative joint employers in order to understand the nature of employment relationships in fissured workplaces.[20] Second, while previous scholarship about, and law reform establishing, presumptions of employment in labor and employment law typically assume single-employer workplaces,[21] our empirical findings support a presumption of joint employment in temp agency-client relationships across labor and employment law statutes.

This Article proceeds as follows. Part I elaborates upon the problems that emerge from the temp agency business model, illustrating that, by design, the temp agency business model obfuscates joint employer relationships. Temporary staffing agencies market their services as permitting clients to relinquish their roles as employers. They also often include explicit contractual terms intended to disclaim the client's employer status vis-à-vis its temp workers. The model makes litigation and administrative agency actions over employer status long and complicated and confuses workers, courts, and administrators about who is an "employer."

In Part II we show how useful contractual terms could be to courts and agencies in inferring joint-employer liability of the clients of temp agencies. We find that clients tend to contractually

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Flanagan draws on forty-five agreements between temporary agencies and their clients in order to study mobility restrictions in the temp industry. Jane R. Flanagan, *Fissured Opportunity: How Staffing Agencies Stifle Labor Market Competition and Keep Workers "Temp,"* 20 J.L. SOC'Y 247, 253, 269-70 (2020). Jonathan Harris refers to seventy contracts compiled by Flanagan and others in discussing conversion fees charged by temp agencies of clients that directly hire temp workers. *See* Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1, 20-21 (2024). Flanagan and Harris do not address the probative value of these contract terms for the joint-employer status of the temp agency's client.

20. Elmore & Griffith, *supra* note 11, at 1371.

21. *See* Act of Sep. 19, 2019, ch. 296, 2019 Cal. Stat. 2888 (establishing ABC test to distinguish employees from independent contractors); Racabi, *supra* note 10, at 124; Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 111 (2021). Elmore has argued in favor of a presumption that franchisors who restrict the mobility of their franchisees are joint employers. Andrew Elmore, *Regulating Mobility Limitations in the Franchise Relationship as Dependency in the Joint Employment Doctrine*, 55 U.C. DAVIS L. REV. 1227, 1262-77 (2021).

reserve the right to tell workers how to perform their work. This on-the-ground supervision is a hallmark of "control" over working conditions under even the most stringent legal standard for joint-employer status. Moreover, most clients in our dataset reserve significant power to hire and fire, maintain wage records, and oversee safety procedures, all of which point toward employer status. Workers, regulators, and judges, thus, should be skeptical of marketing statements or legal arguments that the temporary staffing firm is the sole employer of temporary workers.

Part III offers a presumption of joint-employer liability for clients of temp agencies as a better way to address the clients' evasion of legal obligations in the temp agency context. It explains the legal authority of enforcement agencies and courts to adopt a rebuttable presumption of joint-employer status of a temp agency client, given certain contract terms. Finally, it shows that the current judicial hostility to administrative agency independence does not diminish the authority of administrative agencies to streamline the joint employer inquiry through rebuttable presumptions.

I. THE ILLUSION OF CLIENT INSULATION FROM TEMP WORKER EMPLOYMENT

The temp agency-client model obfuscates joint employer relationships. Indeed, it is often *built* to obscure the employment relationship, through marketing and contractual language designating the temp agency as the sole employer of temps. Compounding matters, courts and administrative agencies too often engage in unnecessarily complicated investigations and adjudications about who is an employer in this context. The resulting complexity, and the costs it engenders, is a barrier to the enforcement of labor and employment law against temp agency clients, who, as joint employers, pull the strings that violate temp workers' rights. It can dissuade unions from pursuing representation petitions based on joint-employer theories because of the likely delay before they can even have a vote.

A. A Business Model Built to Obscure

The use of temporary staffing agencies as a business strategy enables clients to have a flexible staffing model that shifts labor and

employment law obligations and liabilities to labor market intermediaries without relinquishing control over the manner and means of the work. In the typical temp agency relationship with its clients, the agency places temporary workers in the client's workplace and handles payroll and other administrative functions, while the client directly trains, supervises, and assigns temporary workers to work alongside their permanent employees.[22] This creates the illusion that the agency is the only common law or statutory employer. Of course, these relationships vary sometimes, such as a client that hires a temporary staffing agency for "on-premise" services, in which the agency undertakes all personnel and supervisory functions for temporary workers.[23] But in the main, this relationship is decidedly triangular: Clients and temporary staffing agencies, collectively, codetermine the work conditions of temp workers.[24]

Despite this codetermination, temp agencies still often present their business model as relieving their clients of an employment relationship with temp workers. As Randstad, a major temporary staffing agency, describes it, temp workers are just one type of "[c]ontingent worker[ ]," which also includes "contractors, independent freelancers, [and] gig workers," which are "alternative[s] to hiring permanent employees."[25] These workers "do not receive salaries or benefits through [clients]."[26] As such, the primary benefits of this arrangement for clients, according to temporary staffing agencies, are ease and lower labor costs. The only client responsibility is to "provide workers with a safe, equitable, and constructive work environment."[27] According to Labor Finders, another temporary staffing agency,

> Not only do staffing firms help companies fill positions with qualified candidates fast, but businesses never have to worry

22. *See* Neil M. Coe, Katharine Jones & Kevin Ward, *The Business of Temporary Staffing: A Developing Research Agenda*, 4 GEOGRAPHY COMPASS 1055, 1057 (2010).

23. BENNER, LEETE & PASTOR, *supra* note 14, at 90.

24. *See* Coe, Jones & Ward, *supra* note 22, at 1057; ERIN HATTON, THE TEMP ECONOMY: FROM KELLY GIRLS TO PERMATEMPS IN POSTWAR AMERICA 11-12 (2011); Gonos, *supra* note 18, at 85.

25. *Flexible Staffing*, RANDSTAD USA, https://www.randstadusa.com/insights-blog/business-insights-old/flexible-staffing/ [https://perma.cc/D3UL-WR48].

26. *Id.*

27. *Id.*

> about setting up payroll and providing benefits for new workers ... and assignments can be terminated at any time without the company's involvement.... This ... lets companies run their business in a strategic manner, where they can respond quickly to changing business needs without the burden of an excessive head count or *unnecessary legal exposure*.[28]

The purported cost-savings benefits of this model, in other words, are driven by insulating clients' legal responsibilities owed to temp workers, often reflected by the designation of temporary staffing agencies as the sole employers of temp workers. As one temp agency executive explains, "[s]taffing firms are generally considered the employer of record when it comes to the temporary associates that are placed, so ... for the most part, the staffing firm maintains full responsibility for the employees while they are on assignment" for the client.[29] Another temporary staffing agency instructs clients that shifting long-term employees off payroll and using temps instead "can be pivotal in insulating your organization from potential co-employment risks ... and [in] eliminat[ing] confusion surrounding the [temp worker]'s actual employer."[30]

As a business model built on fissuring, lowering client labor costs by creating tiered labor markets has harmful effects on low-wage workers.[31] This magnifies the precarity of blue-collar work by segmenting temporary workers into "permatemps" who perform core firm services at lower wages and benefits than employees.[32] Clients are also better situated "to defuse unionization efforts, to avoid the legal liability of being the employer of record, or simply to lower costs by lowering wages."[33] Consistent with temporary staffing

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28. *Why Staffing*, LAB. FINDERS (emphasis added), https://web.archive.org/web/20241103112714/https://www.laborfinders.com/employers/why-staffing/ [https://perma.cc/J7WP-XUEP].

29. Nicole Fallon, *Thinking About Using a Staffing Agency? Here's What You Need to Know*, BUS. NEWS DAILY (Oct. 27, 2023) (quoting Jason Leverant, President, AtWork Group), https://www.businessnewsdaily.com/8750-work-with-staffing-agency.html [https://perma.cc/38J9-834V].

30. *What Exactly Is Payrolling? Why Do I Need It?*, ACARA SOLS. (Mar. 11, 2024), https://acarasolutions.com/blog/payrolling/what-is-payrolling/ [https://perma.cc/6CSX-MDHN].

31. *See* BENNER, LEETE & PASTOR, *supra* note 14, at 17.

32. *See* HYMAN, *supra* note 14, at 255-90.

33. BENNER, LEETE & PASTOR, *supra* note 14, at 16; *see also* Peck & Theodore, *supra* note 15, at 173, 183. Use of staffing agencies can degrade labor standards by minimizing worker

agency publicity about client cost savings,[34] temp workers earn substantially less and are offered fewer employer-provided benefits than permanent employees in similar occupations.[35] In blue-collar occupations, temporary workers may earn 40-50 percent less than permanent employees.[36]

The insistence that clients are not employers appears rooted in the now-discredited argument that clients can shift long-term employees off payroll even though they direct the work by paying them through temporary staffing agencies.[37] The temp industry built its business model around this idea and successfully campaigned for state legislation removing their clients from tax and employment liabilities on this ground.[38] But this practice came under increased scrutiny by courts and administrative agencies with the Microsoft "permatemp" litigation in the 1990s, in which Microsoft ultimately conceded that the workers were "common law employees."[39]

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unemployment insurance coverage during periods of temporary joblessness. *Id.* at 186. Staffing agencies also permit firms to exclude temporary employees from benefits, such as retirement or health care plans, that it must extend to all permanent employees under the Employee Retirement Income and Security Act (ERISA). *See* Susan N. Houseman, *Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey*, 55 INDUS. & LAB. RELS. REV. 149, 156 (2001).

34. One staffing agency we studied, JobsRUs.com (formerly, Cor-Tech), for example, emphasizes its "[h]uge [s]avings" for clients by comparing the labor costs of workers making fourteen dollars an hour hired internally and through an agency, showing that eliminating employer-related taxes, benefits, and administrative costs results in "an annual cost savings of $5,692.96 per employee," not including the savings from "liability costs ... and additional statutory benefits not listed." *Companies Create Huge Savings by Utilizing Staffing Companies*, JOBSRUS.COM (Sep. 28, 2022), https://www.cor-tech.net/news_viewer.asp?id=123 [https://perma.cc/AS8D-Z2UG].

35. BENNER, LEETE & PASTOR, *supra* note 14, at 169 (summarizing surveys in Silicon Valley and Milwaukee showing that "[i]n both regions, temporary agency use is consistently and strongly associated with lower hourly wages and lesser availability of employer-provided pensions and health insurance"); David Finegold, Alec Levenson & Mark Van Buren, *A Temporary Route to Advancement? The Career Opportunities for Low-Skilled Workers in Temporary Employment*, *in* LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING OPPORTUNITY IN THE WORKPLACE 317, 319 (Eileen Appelbaum et al. eds., 2003).

36. *See* Peck & Theodore, *supra* note 15, at 176 ("The occupations with the largest 'wage penalty' for temporary workers are: construction labourer (-$4.59; 49.5% wage penalty); assemblers and fabricators (-$4.66; 49.2% wage penalty); and production workers, all other (-$3.81; 39.4% wage penalty).").

37. *See* Harris Freeman & George Gonos, *Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets*, 13 EMP. RTS. & EMP. POL'Y J. 285, 339-40 (2009).

38. *Id.* at 336-37; Stone, *supra* note 18, at 264-65.

39. Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1010 (9th Cir. 1997).

Yet it persists. In our dataset of contracts, most of them expressly label the temp agency, and not the client, as the sole employer. As Table 1 shows, of the thirty-two contracts we analyzed, nearly two-thirds (twenty out of thirty-two) expressly state that the client is not an employer of temp workers, or that the agency is a sole employer. For example, a client contract with CoWorx Staffing Services states that "[i]t is the parties' intent that [the temp agency] shall be the sole employer/manager of each [temp worker]."[40] No temp agency contract acknowledges the client's joint employer status. This strongly suggests that temp agencies draft contracts with clients with the express purpose of contracting away employer-related legal obligations, while allowing the client to retain control over the temp workers' work.

Table 1. Client Not an Employer

Type of Provision	**Number of Contracts**
Contract states that client is *not* an employer—agency is the sole employer	20
Contract states that client *is* an employer	0
Contract is silent	12

The mere existence of contractual language disclaiming employer status, without more, cannot automatically defeat employer status.[41] But labeling the employment relationship as solely between the agency and temp workers confuses workers, has generated a great deal of unnecessary litigation, and has even persuaded some courts. We need a new approach.

B. An Unnecessarily Protracted Case Law

Despite the hollow pronouncements against joint employment referenced above, after lengthy adjudication, courts routinely find that clients of temp agencies are joint employers with labor and

40. CoWorx Staffing Servs. LLC, Service Agreement with Synchronoss Techs., Inc. § 4(A), at 4 (Jan. 10, 2014) (on file with authors).

41. *See infra* Part II.

employment law responsibilities because they reserve core employer functions. Many clients directly supervise temp workers—for example, by instructing workers regarding where, when, and how to work. They also set and review compliance with performance standards—all telltale signs of an employment relationship. Courts nonetheless still engage in lengthy joint employer analyses to resolve easy cases, which serves as a barrier to worker justice for low-wage temp workers and sometimes leads to conflicting precedent.

Despite variations, labor and employment laws generally require "control" over the workers' terms and conditions of work to establish joint employer liability.[42] Courts treat a putative employer's control over the right to hire, fire, supervise, pay, or maintain payroll records as strong evidence of joint employer status.[43] An entity's ability to directly alter these terms, including by reserving the right to do so by contract, is considered "direct" control. But courts also consider probative factors showing "indirect" or "functional" control,[44] such as the duration of employment, skill required, location of the work, and how much the work is integral to and part of the putative joint employer's regular business.[45] Altogether, these

42. Most statutes consider employer status using the common law of agency "right to control" test. *See* Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195, 1199-201 (D.C. Cir. 2018) (National Labor Relations Act); Faush v. Tuesday Morning, Inc., 808 F.3d 208, 209, 213-14 (3d Cir. 2015) (Title VII and state employment discrimination law). The main alternative to the agency law control test factors is the FLSA's "economic realities test," Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 138, 141-49 (2d Cir. 2008), but most courts apply similar factors in both tests and, as a result, come to similar outcomes. *See, e.g.*, Frey v. Coleman, 903 F.3d 671, 676 (7th Cir. 2018) ("[The] 'economic realities' test ... is, in its essence, an application of general principles of agency law to the facts of the case.").

43. *See* Butler v. Drive Auto. Indus. of Am., 793 F.3d 404, 414-15 (4th Cir. 2015) (Title VII); *Barfield*, 537 F.3d at 142-43 (Fair Labor Standards Act); *Browning-Ferris*, 911 F.3d at 1200-01, 1212 (National Labor Relations Act); *Faush*, 808 F.3d at 212-14 (Title VII and state employment discrimination law); Greene v. Harris Corp., 653 F. App'x 160, 162-64 (4th Cir. 2016) (state employment discrimination law).

44. Carrillo v. Schneider Logistics Trans-Loading & Distrib. Inc., No. 11-cv-8557, 2014 WL 183956, at *16 (C.D. Cal. Jan. 14, 2014) (explaining that Walmart's productivity-improvement recommendations were evidence of indirect control because of Walmart's expectation that the subcontractor would follow them); *Barfield*, 537 F.3d at 143, 145 (referring to these factors as showing "functional" control). Some courts reject the use of these factors. *See, e.g.*, Tolentino v. Starwood Hotels & Resorts Worldwide, Inc., 437 S.W.3d 754, 758 (Mo. 2014).

45. *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 70 (2d Cir. 2003); Torres-Lopez v. May, 111 F.3d 633, 638-44 (9th Cir. 1997); Salinas v. Com. Interiors, Inc., 848 F.3d 125, 141 (4th Cir. 2017).

considerations assess the dependency of the worker on the putative joint employer, and the reality of an employment relationship, notwithstanding what the parties intend. So, rather than turning on a formalistic, "self-serving label" of the employer, this test turns on the extent to which the business entities, either directly or indirectly, are influencing workers' terms and conditions of work.[46]

In the context of temporary staffing agencies and clients, the temporary staffing agency typically recruits and hires the employees that it assigns to a specific user client, and directly pays the employee.[47] But the worker usually works in the client's workplace, under the client's supervision.[48] This active oversight—or "day-to-day" supervision—is central to what an employer does,[49] whether directly or indirectly through an intermediary, or exercised or reserved in a contract.[50] And courts consider these actions as strong evidence of control.[51]

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46. Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988). Most courts, consistent with a control analysis, find that labels in the contract are "not controlling." *See* Miller v. Nordam Grp., Inc., No. 12-CV-563-TCK-PJC, 2013 WL 6080268, at *4 (N.D. Okla. Nov. 19, 2013); *see also* McQueen v. Wells Fargo Home Mortg., 955 F. Supp. 2d 1256, 1278-80 (N.D. Ala. 2013) (finding client to be a joint employer despite employment agreement with employees and staffing agency stating that the worker is "not an employee of the client"), *aff'd*, 573 F. App'x 836 (11th Cir. 2014) (per curiam).

47. *See* Gonos, *supra* note 18, at 785.

48. *See* Arne L. Kalleberg, Barbara F. Reskin & Ken Hudson, *Bad Jobs in America: Standard and Nonstandard Employment Relations and Job Quality in the United States*, 65 AM. SOCIO. REV. 256, 258-60 (2000).

49. *Zheng*, 355 F.3d at 74-75; Abuladze v. Apple Commuter Inc., No. 22 Civ. 8684, 2024 WL 1073121, at *13-14 (S.D.N.Y. Jan. 23, 2024), *report and recommendation adopted*, No. 22-cv-8684, 2024 WL 1073155 (S.D.N.Y. Feb. 7, 2024); Reyes-Trujillo v. Four Star Greenhouse, Inc., 513 F. Supp. 3d 761, 786 (E.D. Mich. 2021); Doe I v. Four Bros. Pizza, Inc., No. 13 CV 1505, 2013 WL 6083414, at *7 (S.D.N.Y. Nov. 19, 2013); Vargas v. HEB Grocery Co., No. SA-12-CV-116, 2012 WL 4098996, at *3 (W.D. Tex. Sep. 17, 2012).

50. Because "the relevant inquiry is whether an employer has the 'right' to control and direct an employee's work, ... not whether the employer exercises that right," Armour v. Homer Tree Servs., Inc., No. 15 C 10305, 2017 WL 4785800, at *7 (N.D. Ill. Oct. 24, 2017) (citation omitted), courts consider reserved control in a joint employer analysis. For this reason, joint employer factors often consider types of control other than routine, day-to-day supervision, which are often the subjects of joint employment litigation. *See* cases cited *supra* notes 43-45.

51. Young v. Act Fast Delivery of W. Va., Inc., No. 16-cv-09788, 2018 WL 279996, at *6 (S.D.W. Va. Jan. 3, 2018) (explaining that preparing schedules, providing work and appearance requirements, and assigning and supervising the work shows sufficient supervision to weigh in favor of a joint employer determination); *see also* Holland v. Mercy Health, 495 F. Supp. 3d 582, 589-90 (N.D. Ohio 2020); Sutton v. Cmty. Health Sys., Inc., No. 16-cv-01318, 2017 WL 3611757, at *5 (W.D. Tenn. Aug. 22, 2017); Jackson v. Fed. Nat'l Mortg. Ass'n, 181

Courts typically find that a temp agency client's day-to-day supervision of temp workers, along with other indicia of control, suffices to establish that the client is an employer.[52] For example, in *Barfield v. New York City Health and Hospitals Corp.*, the Second Circuit considered a hospital's joint employer status over temporary nurses.[53] Finding the hospital was a joint employer, the Second Circuit focused on the hospital's "undisputed power" to supervise and set the temporary nurses' schedules, direct nurses to use its equipment, create nurses' employment records, and assign the nurses to specific facilities where the hospital controlled the on-site conditions, in addition to the right to participate in hiring and firing.[54] Other courts have reached similar conclusions in the presence of these "shared" responsibilities. For example, despite the temp agency's handling of payroll, taxes, and insurance, the client's direct involvement in day-to-day supervision and participation in firing, as the Fifth Circuit held in *Burton v. Freescale Semiconductor, Inc.*, "is dispositive" in favor of employer status.[55] The Fourth Circuit in *Butler v. Drive Automotive Industries of America*, likewise, found "a high degree of control" of the client over the temp workers, as shown from the client's right to instruct the agency to fire temps, and the fact that plaintiff worked alongside the client's employees performing the same work, under the client's supervision.[56] In this analysis, temp agencies and their clients are joint employers so long as they codetermine core employer functions.[57]

F. Supp. 3d 1044, 1054-56 (N.D. Ga. 2016).

52. *See, e.g.*, Williams v. Grimes Aerospace Co., 988 F. Supp. 925, 935-36 (D.S.C. 1997) (citation omitted) (finding that staffing agency's payment of wages, benefits, and employment taxes; and right to hire and fire individual temporary employees; and client's "power to set her wage amount; the authority to assign and control her work detail; and, most importantly, the right to terminate [plaintiff's] employment," were sufficient to consider both to be joint employers).

53. 537 F.3d 132, 135 (2d Cir. 2008) (referring to these factors as showing "functional" control).

54. *Id.* at 144-45.

55. 798 F.3d 222, 227-28 (5th Cir. 2015).

56. 793 F.3d 404, 415 (4th Cir. 2015); *see also Jackson*, 181 F. Supp. 3d at 1048, 1055.

57. To be sure, there are some atypical arrangements in which the client has substantially delegated employer functions to a staffing agency that may require a different analysis. *See infra* note 71. An agency that maintains complete control through its own supervisors over temporary employees in the client's workplace, for example, presents a weaker case for joint employment if the staffing agency has complete, independent discretion to control how the work is performed. *See, e.g.*, Browning-Ferris Indus. of Cal., Inc., 362 NLRB 1599, 1604 (2015)

Although these courts found clients to be joint employers, they reached this conclusion only after years of intensive fact-gathering and litigation.[58] And this approach, moreover, can lead to conflicting results. For example, some courts, particularly in Title VII claims alleging discriminatory failure to hire, reject a client's severing of the plaintiff from the assignment as sufficient evidence of the client's right to fire the plaintiff.[59] Thus, an approach that cuts through these often difficult and fact-intensive analyses is needed.

II. CONTRACTUAL CLIENT CONTROL EXPOSES THE ILLUSION

As discussed above, the notion that the temp agency business model automatically relieves clients of their employer obligations and liabilities is wrong as a doctrinal matter. Our dataset of contracts bolsters that reality and sets the stage for a solution that could accelerate workers' access to justice in joint employer cases involving temp workers. In fact, the client's control over working conditions for temp workers is often embedded in typical contractual terms. Thus, acknowledging contractual client control is an important step toward exposing the temp agency illusion and the worker injustice it engenders.

(explaining that a Regional Director for the NLRB found a staffing agency's client was *not* a joint employer because "employees were supervised solely by the [staffing agency's] onsite manager and leads"), *aff'd in part, rev'd in part*, 911 F.3d 1195 (D.C. Cir. 2018). But these arrangements are the exceptions that prove the rule. In typical staffing agency relationships, there is little question that clients codetermine the essential terms and conditions of employment with staffing agencies. *See supra* text accompanying notes 22-24, 47-48.

58. In *Butler*, for example, after discovery the trial court dismissed the plaintiff's 2012 employment discrimination complaint against the client because it found that the staffing agency was the plaintiff's sole employer, which the Fourth Circuit reversed and remanded in 2015. Butler v. Drive Auto. Indus. of Am., Inc., No. 12-cv-03608, 2014 WL 11511732, at *5 (D.S.C. Apr. 10, 2014), *rev'd and remanded*, 793 F.3d 404 (4th Cir. 2015).

59. *See* Felder v. U.S. Tennis Ass'n, 27 F.4th 834, 846-47 (2d Cir. 2022) ("refusing to issue [the plaintiff's] credentials" permitting him to start work was insufficient to show "the essential Title VII requirement of an employment relationship"); Greene v. Harris Corp., 653 F. App'x 160 (4th Cir. 2016) (affirming dismissal of state employment discrimination complaint against the company that subcontracted for janitorial services because the plaintiff could not establish that the company jointly employed the plaintiff).

A. Justifying Contracts as Control

There is a need for a more streamlined approach that allows courts and administrative agencies to cut through the often-exhaustive joint employer analysis without undue deference to the client's insistence that the temp agency is the sole employer. We propose that the contract between the temp agency and client can offer an evidentiary solution. Contracts can illuminate the allocation of employer rights and responsibilities between the two parties.[60]

While few courts utilize contracts in joint employer determinations, those that do find that they can easily resolve the underlying question. The contract between the temp agency and client in *Faush v. Tuesday Morning, Inc.*,[61] for example, gave crucial context to the Third Circuit in considering the joint employer status in a Title VII and state employment discrimination claim. In *Faush*, the plaintiff was a Black temp worker assigned by Labor Ready (a temp agency) to unload merchandise for a retailer client.[62] The plaintiff alleged that the retailer client, not the temp agency, fired him because of his race.[63] As in other cases, the court in *Faush* found that the shared allocation of employer rights and responsibilities strongly showed a joint employer relationship.[64] Critically, the court in *Faush* found substantial support for this conclusion in the contract between the temp agency and client. The agreement provided that the client was responsible for (a) "approv[ing] [the] time card for each [temporary employee], or otherwise accurately report[ing] the daily hours worked";[65] (b) "supervising and directing [his or her] activities";[66] (c) providing "necessary 'site specific safety orientation and training,' as well as any 'Personal Protective Equipment, clothing, or devices necessary for any work to be performed'";[67] (d) "notify[ing] Labor Ready if any 'government mandated minimum statutory wage' should be paid to temporary employees, and

60. Griffith, *supra* note 8, at 183-85.

61. *See* 808 F.3d 208, 210-12 (3d Cir. 2015).

62. *See id.* at 210.

63. *See id.*

64. *See id.* at 209, 215.

65. *Id.* at 210 (second and third alterations in original) (quoting Brief of Appellant and Volume Two of app. at 56, *Faush*, 808 F.3d 208 (No. 14-1452)).

66. *Id.* (alteration in original) (quoting same).

67. *Id.* at 211 (quoting same).

retain[ing] its 'primary responsibility' for ensuring compliance with prevailing-wage laws";[68] and (e) if the client was "'unhappy with any [temporary employee] for any reason,' informing Labor Ready 'within the first two (2) hours,' and Labor Ready would 'send out a replacement immediately.'"[69] This evidence, along with relevant testimony, was "more than sufficient to preclude summary judgment" on whether the client was a joint employer.[70]

Administrative agencies apply a similar approach. In a well-known example, *Browning-Ferris Industries of California, Inc.*, the National Labor Relations Board used the agreement between the client and the staffing agency in much the same way that the court in *Faush* did.[71] The Board credited the agreement terms that permitted the client to reject any worker that the temp agency referred for work "for any or no reason."[72] Also probative of control, the contract allowed the client to "discontinue" any use of any temp worker and prohibited the temp agency from paying temp workers more than what the client paid its permanent employees.[73] As with *Faush*, this did not end the analysis. Although the temp agency reserved the right to supervise in the contract and placed managers on site to supervise temp workers, the Board also looked at exercised control and found that the client's "unilateral control over the speed of the streams and specific productivity standards for sorting" showed substantial supervisory control as well.[74] While on review, the D.C. Circuit remanded for a reconsideration of how the Board considered evidence of "indirect control," or client control, exercised through the temp agency.[75] It did not disturb the Board's findings that the joint employer test considers reserved control in the contract between the parties, and that the client reserved substantial control in that case.[76]

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68. *Id.* at 215 (quoting same).

69. *Id.* at 211 (alteration in original) (quoting same at 55).

70. *Id.* at 215.

71. 362 NLRB 1599, 1616 (2015), *aff'd in part, rev'd in part*, 911 F.3d 1195, 1223 (D.C. Cir. 2018). This arrangement was unusual insofar as the temporary staffing agency, Leadpoint, provided its own managers to supervise the temp workers in the client's workplace. *Id.* at 1601.

72. *Id.* at 1616.

73. *Id.* at 1616-17.

74. *Id.*

75. *Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1199-200.

76. *Id.* at 1200.

B. Specifying the Methodological Approach

Assessing the client's contractual control over low-wage temp workers requires access to their contracts with temp agencies. There is no reliable repository for temporary staffing agency contracts. Unlike franchising, there is no regulatory requirement for staffing agencies to publicly maintain or post agreements with clients. The only publicly available contracts are those that are produced in litigation. Compounding matters, the number of temporary jobs is fluctuating in the United States.[77] In undertaking this project, we were mindful that a comprehensive survey would be impossible. We therefore sought to obtain a dataset of temporary agency contracts involving low-wage work from leaders in the industry. We focused on the largest industrial temporary staffing agencies that place temporary employees in blue-collar workplaces. Our assumptions are that (a) blue-collar is an adequate proxy for low-wage, and (b) the largest temp agencies are most likely to use terms that are common in the industry.

We used a 2021 report from Staffing Industry Analysts (SIA), a leading trade publication in the field, to identify the temp agencies to target in our searches.[78] SIA publishes an annual report of the "Largest Industrial Staffing Firms in the US," which ranks the top-fifty staffing agencies that place workers in blue-collar workplaces.[79] From this list, we assigned a team of research assistants the task of searching for recent commercial litigation involving these fifty agencies (or one of their subsidiary companies) using the Bloomberg Law database. To search for cases that might include a contract in the docket, we primarily used two methods: company profiles and docket searches. We used the former method to find subsidiaries and aliases that the companies operate under and added those to our search terms (along with the common name of the agency). If the company had a profile on Bloomberg Law, we relied on Bloomberg's Litigation Analytics tool to display all the court cases

77. BLS April 2023, *supra* note 15.

78. Timothy Landhuis & Curtis Starkey, *Largest Industrial Staffing Firms in the US: 2021 Update*, STAFFING INDUS. ANALYSTS (Nov. 30, 2021), https://www.staffingindustry.com/Research/Research-Reports/Americas/Largest-Industrial-Staffing-Firms-in-the-US-2021-Update [https://perma.cc/9WMQ-UPGA].

79. *Id.*

that Bloomberg has linked to that company as a party.

After opening the litigation analytics tool, we read all the case entries, regardless of the case type. We also separately ran docket searches for each agency. Once we found a case docket, we opened any entries that contained exhibits. We then opened the complaint to see if the contract was contained there. We used Bloomberg's search tool to filter the results by searching "agreement," "contract," and "terms." We ensured that for each agency, there were two separate searches for unredacted contracts in the available litigation documents. Research assistants worked with the authors to perform these searches in 2023 and 2024, and ultimately identified thirty-two unique contracts that fit this description.

Given the difficulty in finding contracts, there are some limitations to the dataset. While we always used the most recent contract available (mostly since 2012), the dataset of contracts ranges in years from 2004 to 2022. We acknowledge that the temp agencies' current contracts might offer different terms than what we present here. Despite this limitation, the dataset is still robust and provides a pathway forward. It represents common terms in nearly two-thirds, or thirty-two of the top fifty, of the leading industrial staffing agencies in the United States (with heavy representation at the very top, including twenty-four of the top thirty and nine out of the top ten). Most importantly, it provides examples of common contractual terms that are relevant to joint employer inquiries. These contracts shed light on how temp agencies and client firms structure their relationships with temp workers as a domestic outsourcing strategy. In particular, they illuminate the extent to which clients may be influencing or codetermining the wages and working conditions of temp workers. It includes agencies, such as Manpower and Kelly Services, that have been leaders in the temp industry since the 1940s. We expect that these agencies are more aware of joint-employer doctrine and more averse to the reputational harm of mischaracterizing the client's employer status than smaller, less established agencies. Any selection bias from selecting these agencies, accordingly, would tend to underreport temp agency mischaracterizations that clients are not joint employers of temp workers.

We extracted from these contracts the terms that refer to clients' rights and responsibilities to supervise, hire, fire, keep records, and

maintain practices relating to wages and hours and safety and health, among other terms. In particular, we asked the following questions:

1. Does the contract provide the client with a primary role in on-site supervision?
2. Does the contract provide the client with the right to sever the temp from the client's job during the probationary period without agency approval?
3. Does the contract require the client to keep records/develop specific procedures with respect to wages and hours, or safety and health?
4. Does the contract give the client any role in selecting temps beyond setting qualifications?
5. Does the contract explicitly state that the client is not an employer, or that the agency is the sole employer?

For each of these questions, we answered "yes," "no," or "silent." At least two members of the research team independently reviewed the contract language to ensure consistency in the coding. For "yes" and "no" responses based on specific contract terms, we identified and preserved those terms in our database.

C. Locating Client Control in the Contracts

Our analysis shows that temp agency contracts contain several key signals that many clients are indeed employers of the temps they contract for. They commonly call for clients to primarily supervise temp workers and provide the client with some role in hiring. They regularly provide clients with the right to sever the temp worker from the client's workplace without the agency's approval. Most contracts also require the client to create or maintain records of wages or hours and specific procedures related to safety. For thematic clarity, we will present our findings and their doctrinal implications as (a) supervision; (b) procedures and record-keeping for hours worked, wages paid, and safety and health; and (c) hiring and firing.

1. Supervision

Employers supervise work and thus have work law obligations to their employees. Even in contracts that state that the client is not an employer, clients often reserve for themselves the right to directly supervise temporary workers in their day-to-day work. As Table 2 illuminates, twenty-three of the thirty-two contracts in our dataset explicitly delegate the right to supervise temporary workers to clients. In most cases, the contract provides clients with complete supervisory control over the temp workers. The Manpower contract, for instance, provides that the temps work "at the Client's direction," and the "Client agrees to supervise and control the work, premises, processes and systems to be performed by Temporary employee(s) and to review and approve the corresponding work product."[80] Most of these contracts discuss supervision as a "responsibility" and entirely delegate supervisory responsibilities to clients. In the case of Accurate Personnel, for example, the client is "solely responsible for management relating to the day-to-day supervision of" temporary workers.[81] PeopleReady, Inc. states that it "will not supervise" temporary workers, that temporary workers will work "under [the client's] direction and supervision," and that the client "shall be responsible to provide [temporary workers] adequate supervision, direction, and control."[82] Some contracts emphasize that the extent of supervision of temp workers is coextensive with that of other employees, as with an AtWork contract: The client must "[p]roperly supervise and train, in the same manner as its own employees," the temporary workers assigned to work for it.[83]

Only in three of the contracts does the agency reserve the right to expressly and solely supervise the temporary employees.[84] The other

80. Manpower Grp. Inc., Fast Track Agreement—Professional Resourcing § 1, at 1, § 5, at 2 (June 19, 2019) (on file with authors).

81. Accurate Pers. LLC, Staffing Services Agreement with Grunt Style § 2(e), at 1 (July 29, 2017) (on file with authors).

82. PeopleReady, Inc., Agreement to Supply Temporary Staffing § 1(a), at 1, § 3(a), at 2 (Mar. 17, 2020) (on file with authors).

83. AtWork Pers. Servs., AtWork Staffing Agreement with Heritage Hosiery § 2, at 1 (Aug. 18, 2017) (on file with authors).

84. TransForce, Inc., Service Agreement with NYK Logistics, Inc. § 4(d), at 1 (Aug. 10, 2007) (on file with authors) (allocating to the agency the obligation "to direct and control [employees] in all matters including hiring, termination, and discipline").

contracts that do not explicitly delegate primary supervision to clients are either silent or use vague terms to describe the relationship. Chartwell Staffing Service's (CSS's) contract with its client, for instance, delimits the client's supervisory role to "quality control and work site safety," while CSS's own supervisory rights are to "supervise, physically inspect the work site and work processes; to review and address unilaterally ... work performance issues; and to enforce CSS's employment policies relating to [the workers'] conduct at the worksite."[85]

Even when the contract is ambiguous as to supervision, the client is uniquely situated to supervise the day-to-day work of temporary employees, and must do so with respect to worker safety and worker use of the client's equipment, unless the agency provides its own supervisory staff for this purpose.[86] For this reason, even when an agency provides an on-site supervisor, as in the CBS Personnel Services contract, clients typically reserve some supervisory rights, in that case, "to supervise [temporary] employees in the actual production areas while on assignment" for the client.[87] CBS Personnel Services's recognition of the client's right to supervise workers on its premises, and Chartwell's defined supervisory rights alongside its client's vague reserved right to supervise for "quality control," suggest that the client reserves the right to supervise the temporary workers in order to control the day-to-day activities that occur in its workplace.

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85. Chartwell Staffing Servs., Inc., Chartwell Service Agreement with American International Industries § 1.2, at 1, § 3(a), at 2 (May 19, 2020) (on file with authors).

86. *See* Onin Staffing, LLC, Staffing Services Agreement with AGC Flat Glass North America, Inc. § 2, at 1 (Aug. 10, 2018) (on file with authors) (agency provides managers to supervise temporary workers). CorTech's contract with its client, for example, provides that CorTech "shall have a qualified supervisor at the facility at all times ... and shall effectively supervise its work force to work in conformity" with the contract. CorTech, LLC, Master Agreement with Kimberly-Clark Corporation for Plant Operations Support Services § 3.4, at 4 (Sep. 28, 2012) (on file with authors). The contract says elsewhere that the agency is responsible for "managing and coordinating" the work, and that this includes "daily work direction, Workers' performance evaluations and disciplinary actions." *Id.* § 3.1, at 3, § 7.5(d), at 7.

87. CBS Pers. Servs., LLC, Temporary Labor Agreement with Prestige Display and Packaging, LLC § 2(d), at 2 (Feb. 4, 2004) (on file with authors).

Table 2. Client Right to Supervise

Type of Provision	Number of Contracts
Supervision: Client primarily or exclusively	23
Supervision: Client does not primarily supervise	5
Supervision: Contract is silent	4

Supervision is a key factor in all joint employer tests.[88] In *Vega v. Contract Cleaning Maintenance, Inc.*, for example, a trial court found that United Parcel Service (UPS) could be a joint employer of temporary workers who worked in UPS's worksite and who UPS directly supervised despite the fact that UPS did not hire, fire, or pay them.[89] In conjunction with evidence of participation in hiring, firing, and maintaining employment records, courts uniformly find that such entities are joint employers.[90] In temporary staffing

88. *See* Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983), (finding that "periodic and significant involvement in" supervision was an important factor in favor of joint employer determination in FLSA claim), *disapproved of on other grounds by*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Butler v. Drive Auto. Indus. of Am., 793 F.3d 404, 415 (4th Cir. 2015) (concluding that a business was a joint employer with a temporary staffing agency under Title VII after evaluating the business's "day-to-day" supervision over the employee); Sanford v. Main St. Baptist Church Manor, Inc., 449 F. App'x 488, 492 (6th Cir. 2011) (emphasizing that whether entities "direct and supervise performance" is one of three factors to consider in Title VII joint employment test); Williams v. King Bee Delivery, LLC, 199 F. Supp. 3d 1175, 1180-81 (E.D. Ky. 2016) (restating three factors as articulated by the Sixth Circuit); Sanford v. Main St. Baptist Church Manor, Inc., 327 F. App'x 587, 594 (6th Cir. 2009) (identifying supervision as an important factor in a joint employer determination in National Labor Relations Act (NLRA) and Title VII claims); Hickton v. Enter. Holdings, Inc., 683 F.3d 462, 469 (3d Cir. 2012) ("involvement in day-to-day employee supervision" is one of four factors in FLSA economic realities test); Williams v. Henagan, 595 F.3d 610, 620 (5th Cir. 2010) (whether the entity "supervised and controlled employee work schedules or conditions of employment" is among "the four standard factors under the economic reality test"); Newman v. Gagan LLC, 939 F. Supp. 2d 883, 893-94 (N.D. Ind. 2013) (examining supervision to determine joint employer status under the Family and Medical Leave Act).

89. No. 03 C 9130, 2004 WL 2358274, at *6-7 (N.D. Ill. Oct. 18, 2004).

90. *See id.* at *7; Luna v. Del Monte Fresh Produce (Se.), Inc., No. 06-CV-2000, 2008 WL 754452, at *4 (N.D. Ga. Mar. 19, 2008) (finding that allegations that entity's supervisors "routinely walk[ing] through" a workplace "to observe the progress of the work," and "directly confront[ing] the worker" or the person responsible for overseeing the worker when they "observed problems with particular workers" are sufficient to show a joint employer relationship), *amended in part*, No. 06-CV-2000, 2009 WL 10670185 (N.D. Ga. Mar. 3, 2009), *aff'd*, 354 F. App'x 422 (11th Cir. 2009); *see also* Salinas v. Com. Interiors, Inc., 848 F.3d 125,

agency cases, the client's day-to-day supervision, reflected in its right to assign shifts, set performance standards, and oversee work performed by workers in their workplaces, is a common and strong indicator of the client's joint employer status. As the Fourth Circuit stated in *Butler*, a client's day-to-day supervision, under which temporary employees work "side by side" with the client's employees, "perform[] the same tasks, and use[] the same equipment," evinces "a high degree of control" of the client over the temporary employee.[91] Other courts have similarly found clients' day-to-day supervision of temporary workers to strongly indicate joint employer status.[92] Given the day-to-day supervision common among clients that contract with staffing agencies for temporary workers in their worksite, administrative agencies consider these clients to be joint employers as well.[93]

148-49 (4th Cir. 2017) (holding that one entity's communication of directions to workers through another entity's supervisors supports finding that both entities jointly employed plaintiffs); Antenor v. D & S Farms, 88 F.3d 925, 934 (11th Cir. 1996) (stating the FLSA's "'suffer or permit to work' standard was developed in large part to assign responsibility to businesses which did *not* directly supervise the activities of putative employees"). In contrast, limited, sporadic supervision alone is insufficient to demonstrate a joint employer relationship. Clinton's Ditch Coop. Co. v. NLRB, 778 F.2d 132, 138-40 (2d Cir. 1985) (holding that sporadic, insignificant instructions and assignments did not amount to "day-to-day" supervision and, given the lack of any other evidence of control, did not constitute a joint employment relationship); Boutin v. Exxon Mobil Corp., 730 F. Supp. 2d 660, 682 (S.D. Tex. 2010) ("[L]imited and routine supervision, without an ability to hire, fire, or discipline, cannot justify a finding of joint employer status." (quoting AT & T v. NLRB, 67 F.3d 446, 452 (2d Cir. 1995))).

91. *Butler*, 793 F.3d at 414-15 (citation omitted).

92. *See* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 145 (2d Cir. 2008) (finding that right to supervise and set schedule, direct temps to use its equipment, and assign temps to specific facilities, where the client controls the on-site conditions, is substantial evidence of the client's right to control); Faush v. Tuesday Morning, Inc., 808 F.3d 208, 218 (3d Cir. 2015) (holding that the client's "immediate supervision and direction of" temporary employees was sufficient to defeat summary judgment regarding its joint employer status); U.S. Equal Emp. Opportunity Comm'n v. CACI Secured Transformations, LLC, No. JKB-19-2693, 2021 WL 1840807, at *8 (D. Md. May 6, 2021) (finding client's and temporary employees' "side by side" work and performance of the same tasks strongly indicated joint employment status); Jackson v. Fed. Nat'l Mortg. Ass'n, 181 F. Supp. 3d 1044, 1062 (N.D. Ga. 2016); Reyes v. Goya Foods, Inc., No. 12-21799-CIV, 2013 WL 12133928, at *4 (S.D. Fla. Apr. 16, 2013); Beaulieu v. Northrop Grumman Corp., 161 F. Supp. 2d 1135, 1142 (D. Haw. 2000), *aff'd*, 23 F. App'x 811 (9th Cir. 2001) (finding that client's day-to-day supervision, including setting schedule and reviewing plaintiff's work, sufficed to show that it was a joint employer despite the fact that the agency provided the plaintiff with pay and benefits).

93. According to the Equal Employment Opportunity Commission (EEOC), "[a] client of a temporary employment agency typically qualifies as an employer of the temporary worker

2. Procedures and Recordkeeping for Hours Worked, Wages Paid, and Safety and Health

Another contractual trend that also signals joint employer status is client oversight of wage-and-hour and safety practices involving temp workers. As with supervision, the temporary worker's physical presence in the client's workplace makes the client uniquely situated to directly control workplace safety, approve the workers' time worked, and keep records of workplace injuries, hours worked, and wages paid. Express delegation of these responsibilities to the party best situated to comply with wage and hour and safety and health law recordkeeping requirements reflects a recognition of these legal obligations. Twenty-two of the contracts in our dataset require the client to create or maintain records of hours worked and wages paid, while only two delegated these responsibilities to the agency. Twenty-seven of the thirty-two contracts (or roughly 85 percent) expressly require the client to develop specific procedures to ensure temporary worker safety. Only one contract requires the agency to oversee safety.

a. Procedures and Recordkeeping for Hours Worked and Wages Paid

Two-thirds of contracts between temp agencies and clients require the client to maintain records of hours worked or wages paid, a factor commonly identified in joint employer analyses. These twenty-two contracts expressly delegate responsibility for accurate

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during the job assignment ... because the client usually exercises significant supervisory control over the worker." U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 914.002, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (1997), 1997 WL 33159161, at *5-6. The Occupational Safety and Health Administration (OSHA), likewise, instructs its field staff that staffing agencies and clients are joint employers responsible for complying with OSHA requirements. *Protecting Temporary Workers*, U.S. DEP'T OF LAB.: OCCUPATIONAL SAFETY AND HEALTH ADMIN., https://www.osha.gov/temporaryworkers [https://perma.cc/U9GV-PGDU]. The U.S. Department of Labor states that for the purposes of the Family and Medical Leave Act, "joint employment ordinarily will exist when a temporary employment agency supplies employees to a second employer." *Fact Sheet #28N: Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act (FMLA)*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV. (Jan. 2020), https://www.dol.gov/agencies/whd/fact-sheets/28n-fmla-joint-employment [https://perma.cc/7DYK-BDXF].

recordkeeping to the client.[94] The Labor Finders contract, for example, requires the client to "accurately record the hours of assigned [temporary] [p]ersonnel on the work order," which permits the agency to bill the client based on the hours in these records.[95] The Onin Group contract, similarly, in delegating the responsibility to the client to approve wage records in writing, states that the client has the duty to make "timely and accurate reporting in accordance with [the] [c]lient's internal procedures to [the agency] of all hours worked by [temp workers] and retention of all records regarding hours worked as required by applicable law."[96]

Clients' approval of time records is often a function of their direct supervision of temporary workers. Trillium Staffing, for example, delegates to the client the role of "worksite supervisor" and requires the on-site supervisor to approve the time records.[97] Other contracts, in delegating this role to clients, permit the client to use any "agreed method of approval" to certify temporary worker hours.[98] The express nature of this duty is also reflected in its conclusive effect on wages that the client must pay, as in the Surge Staffing contract, which states that client creation and signing of the temporary

94. The Tradesmen International contract, for example, states that the client "is solely responsible for verifying the accuracy of the records of actual time worked by [temporary] employees." Tradesmen Int'l, LLC, Client Services Agreement with East Coast Facilities, Inc. § 3, at 1 (Dec. 14, 2015) (on file with authors).

95. Lab. Finders, Subcontract Agreement § 1, at 4 (May 23, 2013) (on file with authors). Hospitality Staffing Solutions, likewise, requires the client to appoint a representative who must sign for the temporary workers' work hours on a weekly basis and send to the agency at a particular time "for the purposes of accurate payroll and billing processing." Hosp. Staffing Sols., LLC, Staffing Services Agreement with Embassy Suites and Conference Center Kansas City Olathe § 9(a), (d), at 2 (Aug. 7, 2016) (on file with authors). In some cases, the client supervises temporary worker self-reporting of hours, which the client must "approve or dispute" as it "is reported by an automated timekeeping system." Peoplelink, LLC, Staffing Services Agreement with Autotrol Corporation § 15, at 3 (Feb. 26, 2020) (on file with authors). For example, the AtWork contract requires the client to direct the temporary worker "to record all hours worked, not permit any off the clock work," and review and sign the temporary workers' "time card[s] each week authorizing Client to be billed for the Services." AtWork Pers. Servs., *supra* note 83, § 2(B), (C), at 1.

96. Onin Staffing, LLC, *supra* note 86, § 3(a), at 3.

97. Trillium Constr. Servs., Staffing Services Agreement § 6, at 1 (May 26, 2016) (on file with authors).

98. Integrity Staffing Sols., Inc., Staffing Service Agreement with Telefix Technologies, Inc. § 2(e), at 3 (Apr. 11, 2019) (on file with authors); *see also* PeopleReady, Inc., *supra* note 82, § 2(a), at 2 (stating that the client must create time records "or otherwise accurately report the daily hours worked by" temporary worker).

workers' time records is "conclusive as to the number of compensable hours worked by [the temporary workers] for that workweek."[99]

Of the remaining ten contracts, eight do not expressly state how wage and hour records are kept, while two delegate the responsibility to on-site agency supervisors. One contract expressly does not require clients to maintain records of hours worked or wages paid because it contemplates that the agency (not the client) directly supervises the temporary workers.[100] In only one case, client approval of hours is not contingent on client maintenance of records.[101] Because clients are ultimately responsible for temporary worker payments and most temporary workers work in client workplaces, it is a fair inference that when the contract is silent, the clients play some role in approving the time records generated on their worksite.

Table 3. Client Role in Wage and Hour Procedures and Recordkeeping

Type of Provision	**Number of Contracts**
Procedures and recordkeeping: Client required to create or maintain records of hours worked/wages paid	22
Procedures and recordkeeping: Client *not* required to create or maintain records of hours worked/wages paid	2
Procedures and recordkeeping: Contract is silent	8

Evidence of retaining control over payroll, including procedures and recording of hours worked and wages paid, is an important factor in favor of employer status for temp agency clients, especially in a FLSA claim for owed wages.[102] Here, the focus is not on *access*

99. Surge Staffing, LLC, Service Agreement with Eva Logistics § 4(b), at 2 (Sep. 22, 2022) (on file with authors).

100. *See* CorTech, LLC, *supra* note 86, § 3.4, at 4 (requiring agency to provide a supervisor "at the facility at all times").

101. SureStaff, LLC, Third-Party Temporary Employee Supplier Agreement with Synchronized Services, LLC § 5, at 4 (June 30, 2021) (on file with authors).

102. *See* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 144-45 (2d Cir. 2008);

to payroll information, but on the putative joint employer's *control* over the records, usually by maintaining employment documents.[103] In FLSA litigation, such as in *Barfield*, a client's maintenance of "employment records on the matter most relevant to overtime obligations under the FLSA: the hours worked ... by temporary employees," was strong evidence of control over working conditions, payroll, and employee performance.[104] As in the vast majority of contracts we analyzed, the reserved, shared responsibility to verify timesheets for pay purposes evinces a "codetermination or allocation of responsibility over functions ordinarily carried out by employers."[105]

b. Procedures and Recordkeeping for Safety and Health

Contractual terms relating to safety and health of workers also underscore employer status for many temp agency clients. Safety contract terms clarify that the possibility of workplace injuries and death creates a need for clients, as the owners of the worksite property and equipment, to oversee "site-specific" safety practices, and to prohibit temporary employees from operating dangerous

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Vega v. Cont. Cleaning Maint., Inc., No. 03 C 9130, 2004 WL 2358274, at *7 (N.D. Ill. Oct. 18, 2004) (finding allegations that defendant maintained "records of the hours [employees] worked" weighed in favor of joint employer status).

103. Access to wage records alone does not indicate joint employer status. *See* Zhao v. Bebe Stores, Inc., 247 F. Supp. 2d 1154, 1160 (C.D. Cal. 2003) (finding that "access to ... payroll records ... should not be equated with Bebe Stores' control, either direct or indirect, over Plaintiffs' payroll records, wages, or working conditions").

104. *Barfield*, 537 F.3d at 144; *accord* Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999), *holding modified by*, Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003); Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983); Paz v. Piedra, No. 09 Civ 03977, 2012 WL 12518495, at *6 (S.D.N.Y. Jan. 11, 2012); Pelico v. SD Auto. Inc., No. 21 CV 4215, 2022 WL 17820136, at *5 (E.D.N.Y. Aug. 25, 2022) (identifying allegations that defendant "was responsible for determining the employees' wages and compensation, establishing the employees' schedules, and maintaining employee records" as sufficient to establish that defendant was an employer); Perez v. Lantern Light Corp., No. C12-01406, 2015 WL 3451268, at *11-12 (W.D. Wash. May 29, 2015) (distinguishing creation of employee time records, which is highly probative of an employment relationship, from mere access to records as a form of quality control).

105. Salinas v. Com. Interiors, Inc., 848 F.3d 125, 147 (4th Cir. 2017); *see also* Moses v. Griffin Indus., LLC, 369 F. Supp. 3d 538, 544 (S.D.N.Y. 2019) (allegations that include that defendants jointly maintained employment records sufficed to state a claim "that [defendants] were joint employers").

machinery or working in hazardous workplace conditions.[106]

All but one of the twenty-eight contracts that mention safety procedures delegate some responsibilities to the client. To illustrate, Peoplelink provides that "[t]he client holds the primary responsibility for site/job specific training and hazard communication ... [and] also agrees ... to record and report any temporary employee recordable injuries and illnesses ... on the client's log."[107] Most contracts prohibit clients from assigning temporary employees to operate dangerous machinery or work in hazardous workplace conditions, and require clients to provide safety training and instructions related to workplace safety. The client in the Peoplelink contract cannot permit temporary employees to "operate heavy equipment or unprotected machinery, perform any work duties on ladders or scaffolding more than [six] feet off the floor, work in positions requiring the use of respirators or where exposure to lead or asbestos is possible, work in positions requiring confined space entry, or operate a vehicle."[108] In a number of cases, temp agencies require coordination with clients in ensuring safety practices, with the clients performing the role of on-site supervisor.[109] While some contracts are silent with respect to safety, no contracts expressly delegate safety procedures only to the temp agency. The only

106. *See* NSC Holdings, Client Service Agreement with Southern Spear Ironworks § 7, at 2 (Mar. 10, 2021) (client must "orient and train" temp "in site-specific safety and operational instructions in the same manner as its own employees"); Randstad, Service Terms Agreement 1 (Apr. 6, 2016) (client responsible for providing "all necessary site-specific safety training and equipment"); SureStaff, LLC, *supra* note 101, § 3 (client must provide "all necessary site-specific information, training, instructions and safety equipment").

107. Peoplelink, LLC, *supra* note 95, §§ 17, 19, at 4.

108. *Id.* § 4(g), at 2. In its contract with Elwood Staffing, similarly, the client is responsible for any decisions for temporary employees to use vehicles, mobile equipment, and motorized equipment; cannot instruct temporary workers to transport hazardous materials, or work at heights over six feet without the agency's consent; must "[m]aintain and inspect" equipment and get all necessary licenses and permits; and must provide "appropriate information, training, and safety equipment as necessary." Elwood Staffing, Staffing Services Agreement Terms & Conditions of Service §§ 6-8, at 2 (Dec. 7, 2015).

109. Integrity requires clients to "comply with all sections of the 'Safety Partnership Letter'" and provide "information, training, safety and personal protective equipment" appropriate for their job and exposure to hazardous conditions. Integrity Staffing Sols., Inc., *supra* note 98, § 1(b)(iii)-(iv), at 1. Remedy Intelligent Staffing requires its client to implement safety procedures "in accordance with the Safety Partnership Communication, at the Client's worksite on the types of" powered industrial truck equipment. Remedy Intelligent Staffing, LLC, Service Letter Agreement with Environmental Operations, Inc. 2 (Jan. 31, 2018) (on file with authors).

contract that expressly does not require the client to adopt safety procedures is CorTech, which states that the client "may specify procedures" related to safety but does not have to.[110]

Table 4. Client Role in Safety Procedures and Recordkeeping

Type of Provision	Number of Contracts
Procedures and recordkeeping: Client required to develop specific safety procedures	27
Procedures and recordkeeping: Client *not* required to develop specific safety procedures	1
Procedures and recordkeeping: Contract is silent	4

The right to set safety standards and the "indirect power to enforce them," both weigh in favor of a finding of joint employment.[111] As with payroll records, however, courts mainly focus on an entity's maintenance of safety records as a form of control over the work relationship. Some courts find that supervision "largely focused on workplace safety issues ... [is] consistent with a client-vendor relationship" rather than a joint employment one.[112] The Ninth Circuit in *Moreau v. Air France*, for example, rejected "compliance with various safety and security regulations" as a basis for holding airlines liable as joint employers for work performed by ground companies in airports, because legal compliance in that instance is related to passenger safety rather than control over cargo

110. CorTech, LLC, *supra* note 86, § 6.1, at 6.

111. Perez v. Lantern Light Corp., No. C12-01406, 2015 WL 3451268, at *7 (W.D. Wash. May 29, 2015).

112. As the Tenth Circuit reasoned, companies could be concerned about safety, "even if only for liability purposes, just as they would for any employee or non-employee on premises." Knitter v. Corvias Mil. Living, LLC, 758 F.3d 1214, 1230 (10th Cir. 2014); *see also* Valle v. AA & K Restoration Grp. LLC, No. 19-cv-20873, 2020 WL 10055325, at *8 (S.D. Fla. Sep. 29, 2020) (finding that "safety meetings to ensure that workers were apprised of [legal] requirements and other safety guidelines does not support an inference" of joint employment), *aff'd sub nom.*, Valle v. Ceres Env't Servs., Inc., No. 21-12020, 2022 WL 1667015 (11th Cir. May 25, 2022); Sigui v. M + M Commc'ns, Inc., 310 F. Supp. 3d 313, 331 (D.R.I. 2018); Crumpley v. Associated Wholesale Grocers, No. 16-2298, 2018 WL 1933743, at *36 (D. Kan. Apr. 23, 2018); Crosby v. Cox Commc'ns, Inc., No. 16-6700, 2017 WL 1549552, at *6 (E.D. La. May 1, 2017); Gremillion v. Cox Commc'ns La., No. 16-9849, 2017 WL 1321318, at *6 (E.D. La. Apr. 3, 2017).

handlers.[113] But courts, distinguishing *Moreau*, have found that safety policies can show joint employer status if the entity oversees safety policies in its day-to-day supervision, particularly in overseeing safety practices and use of its equipment in its own premises.[114] In *Di-az v. Tesla, Inc.*, for instance, the trial court permitted a temporary worker's hostile workplace environment claim to proceed against Tesla as a joint employer because of Tesla's uncontested, substantial supervision, including Tesla's required safety trainings regarding the use of its equipment and routine inspections for compliance with safety policies in its manufacturing plant.[115] As in *Tesla*, clients that establish and implement safety policies to control the work performed in their workplace, rather than simply to comply with industry-specific safety regulations or to protect third-parties such as customers, do so as joint employers.

Safety records, moreover, are central to the Occupational Safety and Health Act's requirement that all companies maintain a safe workspace.[116] The Occupational Safety and Health Administration (OSHA) uses a "multi-employer doctrine" to impose liability on companies for hazards caused by conditions they create or which are under their control, irrespective of employer status.[117] Temporary workers are a special concern for OSHA. The agency considers

113. 356 F.3d 942, 950-52 (9th Cir. 2004).

114. *See* Salinas v. Com. Interiors, Inc., 848 F.3d 125, 148 (4th Cir. 2017) (finding that extensive supervision and instruction in safety protocols indicate an employment relationship); *Perez*, 2015 WL 3451268, at *7; Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc., No. 11-cv-8557, 2014 WL 183956, at *10 (C.D. Cal. Jan. 14, 2014) (distinguishing *Moreau* on the ground that Amazon's "ownership or control of the premises of employment is a key consideration in determining joint employer liability").

115. No. 17-cv-06748, 2019 WL 7311990, at *10 (N.D. Cal. Dec. 30, 2019).

116. *See* 29 U.S.C. § 651(b) (requiring that every worker has "safe and healthful working conditions").

117. OSHA grounds this authority in the broad requirement that employers "comply with occupational safety and health standards promulgated under this chapter." 29 U.S.C. § 654(a)(2). OSHA established this standard in the 1970s, which has been generally accepted by courts. *See id.*; Universal Constr. Co. v. Occupational Safety & Health Rev. Comm'n, 182 F.3d 726, 728 (10th Cir. 1999); R.P. Carbone Constr. Co. v. Occupational Safety & Health Rev. Comm'n, 166 F.3d 815, 818 (6th Cir. 1998); Beatty Equip. Leasing, Inc. v. Sec'y of Lab., 577 F.2d 534 (9th Cir. 1978); Marshall v. Knutson Constr. Co., 566 F.2d 596 (8th Cir. 1977); Brennan v. Occupational Safety & Health Rev. Comm'n, 513 F.2d 1032 (2d Cir. 1975). *But see* Se. Contractors, Inc. v. Dunlop, 512 F.2d 675 (5th Cir. 1975). OSHA, additionally, has imposed liability on multiple entities for OSHA violations as joint employers, which courts have upheld using the right to control test. *See, e.g.*, Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1262 (4th Cir. 1974).

temporary workers to be at special risk of workplace injury and death because new employees are most likely to be unaware of workplace dangers.[118] Under OSHA's multi-employer doctrine, widely followed by courts, client oversight of worksite safety practices extends OSHA liability to them in cases in which client-controlled hazards cause injury to temporary workers, "regardless of whether the employees threatened are its own or those of another employer on the site."[119] In issuing citations, OSHA places "primary reliance upon who has control over the work environment such that abatement of the hazards can be obtained."[120] State-approved OSHA plans adopt versions of the multi-employer doctrine on similar grounds.[121]

3. Hiring and Firing

Also relevant to joint employer analyses is the client's ability to hire and fire workers, which is expressly reserved in the majority of contracts in the dataset that discuss hiring and firing of workers. Of the twenty-three contracts that discuss the client's right to hire, fifteen expressly reserve a role for the client in hiring. Contracts typically do this by allocating to the client the right to require hiring screens that are more rigorous than the default ones used by the agency, giving clients "veto" power, or by permitting the client to participate in interviews. Only eight of the contracts solely delegate hiring to the agency.

Most contracts, additionally, permit clients to sever temporary workers from their projects without agency approval. Of the twenty-three contracts we reviewed that discuss the client's right to "sever," every contract, except for one, permits the client to replace temporary workers at will. No agency approval is needed for temporary worker replacement, so long as the reason is not unlawful. And the

118. *See* Thomas Galassi, *Policy Background on the Temporary Worker Initiative*, U.S. DEP'T OF LAB.: OSHA (July 15, 2014), https://www.osha.gov/memos/2014-07-15/policy-background-temporary-worker-initiative [https://perma.cc/MBY3-SYWN].

119. United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 982 (7th Cir. 1999) (explaining OSHA multi-employer doctrine).

120. MLB Indus., 1985 CCH OSHD ¶ 27408 (No. 83-231, 1985).

121. *See, e.g.*, Staffmark Inv., LLC v. Wash. State Dep't of Lab. & Indus., No. 52837-1-II, 2020 WL 824709, at *5 (Wash. Ct. App. Feb. 19, 2020) (explaining state "multi-employee worksite liability" under the Washington Industrial Safety and Health Act of 1973).

client may be required to pay a minimum charge for a portion of the worker's shift if the client provides insufficient notice of discharge.

a. Hiring

The most common form of client participation in hiring is through participation and intervention in hiring screens, such as the right to shape the nature of background checks and to evaluate candidates with a criminal record. Some contracts permit the client to interview, test, and make or overrule hiring decisions. The Remedy Intelligent Staffing contract, for instance, provides that if the client "requires an interview, Client will be available to interview candidates within a reasonable timeframe of Client's request."[122] The CorTech contract states, similarly, that if the agency's background check raises "concerns," the client "shall have the sole discretion to determine whether the worker at issue should be acceptable to perform" work for the client.[123] The Kelly Services contract generally provides that, while the agency "is responsible for screening and selecting for all training and skills necessary to quality [sic] and perform at a satisfactory level during their assignments," the client can "reserve the right to test [temporary workers] to validate and determine proper skill level for equipment they are expected to operate."[124]

Many contracts provide a default screening process that the agency uses for hiring, but permit clients to alter it, or to replace it with its own, in return for a fee and assumption of liability. The BelFlex Staffing contract, for instance, states that the agency's primary role is "to screen, select and assign employees," but that the client can alter the agency's standard check and screening criteria if the client agrees to indemnify the agency "for the consequences of those decisions."[125] Some of the contracts that permit clients to participate in hiring decisions link hiring procedures to Title VII compliance. The Elwood Staffing contract, for example, permits

122. Remedy Intelligent Staffing, LLC, *supra* note 109, at 2.

123. CorTech, LLC, *supra* note 86, § 7.5(h), at 8.

124. Kelly Services, Inc., Master Terms Agreement with United Technologies Corp. § 4, at 6 (Mar. 10, 2012) (on file with authors).

125. BelFlex Staffing Network, LLC, Business Agreement with Liquidity Services, at 2 (Nov. 12, 2018) (on file with authors).

clients to require an additional "post-offer" (pre-employment) criminal history background check, so long as the client, in identifying "disqualifying criminal convictions," represents that they are, echoing the employer defense to a Title VII disparate impact claim, "position-related and based upon [c]lient's legitimate business necessity."[126] Eight, or one-quarter, of contracts reserve hiring solely to the agency. The Chartwell Staffing Services contract, for example, allocates to the agency the right to "[r]ecruit, screen, interview, hire, supervise and assign its employees with appropriate skills and experience," with no mention of the client's participation.[127] Some contracts have ambiguous terms, for instance, permitting clients to "audit" the agency's procedures for compliance with its policies.[128] We coded these terms as granting no express right to a role in hiring.

Table 5. Client Role in Hiring

Type of Provision	Number of Contracts
Client has express right to some role in hiring	15
Client has *no* express right to some role in hiring	8
Client right to hire: Contract is silent	9

Despite the varying degrees, client participation in hiring decisions can weigh in favor of a joint employment determination.[129] Some courts discount a company's hiring criteria and requirements of routine criminal background checks and drug screening tests as

126. Elwood Staffing, *supra* note 108, § 13, at 3.

127. Chartwell Staffing Servs., Inc., *supra* note 85, § 1(a), at 1.

128. *See, e.g.*, AllStaff, Service Agreement with Ebates Performance Marketing, Inc. § 6, at 4 (July 27, 2017) (on file with authors).

129. *See* Guifu Li v. A Perfect Day Franchise, Inc, 281 F.R.D. 373, 402 (N.D. Cal. 2012); *see also* U.S. Equal Emp. Opportunity Comm'n v. CACI Secured Transformations, LLC, No. 19-2693, 2021 WL 1840807, at *6 (D. Md. May 6, 2021) (finding that the defendant's review of resumes and participation in interviews to review candidates shows right to hire). In *Butterbaugh v. Chertoff*, for example, a trial court considering an argument that the government jointly employed a contractor's employee found that the public agency's right to amend the contractor's "personnel and staffing plan, set parameters for the transition period between contractors, and vet new hires for compliance with applicable qualifications," was a sufficient "degree of control" to constitute the right to indirectly hire the contractor's employees. 479 F. Supp. 2d 485, 495 (W.D. Pa. 2007).

"quality control" standards that are not probative of control over hiring.[130] Discounting a client's secondary participation in hiring as "quality control," however, systematically minimizes the role of clients in hiring. In fact, active client participation in hiring can demonstrate that the client retains ultimate control over hiring. For example, *Farzan v. Wells Fargo Bank, N.A.*, involved a Title VII claim by a temporary employee against a staffing agency and client, as joint employers.[131] The plaintiff first interviewed for a position with several employees of the client, Wells Fargo, who offered him the position contingent on his signing an employment contract with the staffing agency.[132] Both the client and temp agency later separated the plaintiff from the assignment at Wells Fargo and from the agency's employment.[133] Rejecting Wells Fargo's argument that the staffing agency was the plaintiff's sole employer, the court held that both entities were joint employers because the "two entities acted in concert in hiring [the temporary employee] and later in jointly deliberating about firing him, thereby both exercising authority over his initial and continued access to employment."[134] In *Thange v. Oxford Global Resources, LLC*, likewise, while a temporary staffing agency provided initial screening services, the court found that the client's interview and selection of temporary worker applicants showed the client's "ultimate control over whether [the temporary worker] was permitted to work at its company."[135]

These principles are true even if a temporary staffing agency

130. Layton v. DHL Express (USA), Inc., 686 F.3d 1172, 1179 (11th Cir. 2012) (requiring that workers "pass a basic background check" does not evince a joint employment relationship without evidence of participation in the hiring process); Roslov v. DirecTV Inc., 218 F. Supp. 3d 965, 973 (E.D. Ark. 2016); Crosby v. Cox Commc'ns, Inc., No. 16-6700, 2017 WL 1549552, at *2 (E.D. La. May 1, 2017).

131. No. 12 Civ. 1217, 2013 WL 6231615, at *2 (S.D.N.Y. Dec. 2, 2013), *aff'd sub nom.*, Farzan v. Genesis 10, 619 F. App'x 15 (2d Cir. 2015).

132. *Id.* at *1.

133. *Id.* at *8.

134. *Id.* at *16.

135. No. 19-5979, 2022 WL 2046938, at *5 (D.N.J. June 7, 2022); *see also* Hunt v. Mo. Dep't of Corr., 297 F.3d 735, 742 (8th Cir. 2002) (affirming determination that the client was an employer, partially based on evidence that client "contacted, interviewed, and hired" plaintiffs); Karupaiyan v. CVS Health Corp., No. 19 Civ. 8814, 2023 WL 5713714, at *16 (S.D.N.Y. Sep. 1, 2023) (finding that the client, and not the temp agency, had the right to hire the temporary employee because the client interviewed and selected the employee, while the agency "merely effectuated the hiring and termination decisions made" by the client).

retains ultimate control over hiring.[136] In *Barfield*, a public hospital secured temporary nurses through a network of staffing agencies, through which nurses contacted the hospital to confirm their shifts with the hospital.[137] The Second Circuit found that while "the referral agencies themselves may have exercised 'ultimate' authority [over hiring]," the hospital's "undisputed power to hire ... agency employees referred to work on hospital premises ... helps establish the economic reality of its status as a joint employer."[138] As in *Barfield*, even though agencies in the contracts may retain ultimate authority over hiring, clients also retained significant reserved control over the hiring process, including requiring specialized hiring screens, selecting resumes for applicant interviews, participating in interviews, and vetoing agency selections. These forms of client participation in hiring all weigh in favor of joint employer status.

In these cases, assessing the client's right to hire requires an inquiry into the participation of the client in hiring practices. Most contracts from our dataset show that clients retain some power to shape and intervene in hiring practices in order to participate in the hiring process, and these varying degrees of control are all probative of joint employer status.

b. Separation

Twenty-two of the contracts afford clients the right to "sever," or separate at-will the temporary worker from the position, without the agency's approval. An NSC Technologies contract, for example, reserves to the client the right, "in its sole discretion, [to] release a[ ] [temporary worker] from assignment to [c]lient under this [a]greement at any time for any lawful reason" with no approval required, and with payment only if there is insufficient notice.[139] In most cases, the client agrees to a minimum charge (for example, for

136. *See* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 136-37 (2d Cir. 2008); *see also* Short v. Churchill Benefit Corp., No. 14-CV-4561, 2016 WL 8711349, at *19 (E.D.N.Y. Apr. 8, 2016) (finding a client's secondary authority over hiring to support claim that it is a joint employer).

137. *Barfield*, 537 F.3d at 136.

138. *Id.* at 144 (quoting Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984)).

139. NSC Holdings, *supra* note 106, § 4(h), at 2.

four hours) unless the client notifies the agency that the worker's work is dissatisfactory during an initial or probationary period.[140] But even in these cases, the client's dissatisfaction is not limited to specific reasons (so long as lawful) or subject to agency approval.[141] For instance, an Adecco contract provides, "[i]f for any reason you are dissatisfied with an Associate's qualifications on the first day of assignment and let us know immediately, your charges will be reduced or eliminated in accordance with our Associate Guarantee, and we will make reasonable efforts to replace the Associate immediately."[142] In essence, clients in these contracts may remove the temporary worker from the worksite at-will, either without payment if within a certain period of time, or with payment representing a portion of the worker's daily schedule.

Few contracts impose limitations on the client's right to sever the temporary worker from the position without the agency's approval. Some contracts, for example, permit the client to replace a temporary worker without charge if the replacement is "for cause," but this reference to cause is only relevant for the cost of replacement, not approval.[143] A CoWorx Staffing Services contract similarly limits client separation of the temporary worker to a "request from [the] [c]lient that does not violate any law," and affords the agency the right to require the client to provide "a detailed statement" of the basis for removal.[144] But that contract requires immediate replacement of a temporary worker at the client's request unless doing so would be unlawful.[145] Only one contract, with AtWork Group, does not provide the client with any right to sever a temporary worker from the position at will.[146] While the client in that contract may "request" that the agency remove the temporary worker "for any reason that is not illegal," the agency has the ultimate right to remove, provided that the client can terminate the agreement with thirty-day notice.[147]

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140. *See* Adecco, Agreement with The Electro Prime Group LLC 1 (Apr. 3, 2009) (on file with authors); Remedy Intelligent Staffing, LLC, *supra* note 109, at 1.

141. Adecco, *supra* note 140, at 1.

142. *Id.*

143. BelFlex Staffing Network, LLC, *supra* note 125, at 1.

144. CoWorx Staffing Servs., LLC, *supra* note 40, § 4(D), at 5.

145. *Id.*

146. AtWork Pers. Servs., *supra* note 83, § 5(B), at 2.

147. *Id.*

Table 6. Client Right to Sever Worker from Job

Type of Provision	Number of Contracts
Client has express right to sever worker from job without agency approval	22
Client has *no* express right to sever worker from job without agency approval	1
Client right to sever: Contract is silent	9

Removing a temporary worker from an assignment is evidence of the client's right to fire.[148] A client's request to sever the employee from an assignment removes the temporary worker from the payroll of client and agency,[149] which operates as a constructive discharge.[150] This is because "[w]hen a temporary employee's placement ends, generally, the employee is no longer working or compensated, and the ending of the placement acts as a sort of constructive termination."[151] In agreement, the Third Circuit in *Faush* elaborated on this inference:

> To be sure, ... [the client] obviously did not have the power to terminate [the plaintiff's] employment with Labor Ready or any obligation to pay him unemployment benefits. [The client] did, however, have ultimate control over whether [the plaintiff] was

148. *See* Butler v. Drive Auto. Indus. of Am., Inc., 793 F.3d 404, 415 (4th Cir. 2015).

149. *Id.*

150. A constructive discharge is a set of conditions by the employer that creates working conditions "so intolerable that the employee is effectively discharged." M.P.C. Plating, Inc. v. NLRB, 912 F.2d 883, 887 (6th Cir. 1990). For this analysis, right to constructively discharge is a form of control as a right to fire rather than an underlying claim, most commonly alleged under the NLRA and Title VII. In *M.P.C. Plating*, for example, the primary employer engaged in an unfair labor practice by conditioning pro-union employees' continuing work on their conversion to temporary employees employed by a temp agency. *Id.* at 887-88. The court affirmed the conclusion that this was a constructive discharge because it presented employees with a "Hobson's choice of either continuing to work or foregoing the rights guaranteed him under Section 7 of the Act." *Id.* at 887 (quoting Remodeling by Oltmanns, Inc., 263 N.L.R.B. 1152 (1982), *enforced*, 719 F.2d 1420 (8th Cir.1983)). Under Title VII, a constructive discharge claim must show that harassment because of plaintiff's protected class is "sufficiently severe and pervasive to cause a reasonable person to quit." Wilborn v. S. Union State Cmty. Coll., 720 F. Supp. 2d 1274, 1298 (M.D. Ala. 2010).

151. Liotard v. Fedex Corp., No. 14-cv-2083, 2016 WL 1071034, at *5 (S.D.N.Y. Mar. 17, 2016).

> permitted to work at its store. If [the client] was unhappy with any temporary employee for any reason, it had the power to demand a replacement from Labor Ready and to prevent the ejected employee from returning to the store. Nothing in the record suggests that Labor Ready had any policy or practice, much less obligation, to continue to pay a temporary employee who was not then on a temporary assignment or to provide an immediate alternative assignment for an employee turned away from a job.[152]

So, for the Third Circuit, Labor Ready's "ultimate power to fire" the plaintiff only weakly supported the client's argument against joint employer status because the worker's continued employment is contingent on the agency re-hiring the worker by providing a new assignment with a different client.[153]

The Fourth Circuit in *Butler* also found that the right to remove shows control over firing with evidence that removal can and does result in termination from the agency.[154] Butler, a woman hired by a staffing agency and assigned to an automotive manufacturer, filed a claim against the client for sexual harassment by Green, her supervisor and an employee of the client.[155] When Butler complained to Green's supervisor (another employee of the client), that employee contacted the agency and requested Butler's termination.[156] A few days later the agency's "supervisor then called her to tell her she had been terminated from" the client.[157] While the agency "was the entity that formally fired Butler," the Fourth Circuit concluded that the removal showed "a high degree of control over the terms of Butler's employment" because the client's requested removal resulted in termination, and the agency representative "could not recall an instance when [the client] requested an [agency] employee

152. Faush v. Tuesday Morning, Inc., 808 F.3d 208, 216 (3d Cir. 2015).

153. *Id.* at 216, 218.

154. *Butler*, 793 F.3d at 415; *see also* Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc., No. 11-cv-8557, 2014 WL 183965, at *5 (C.D. Cal. Jan. 14, 2014) (finding that a lead firm's "authority to remove employees from the [workplace], combined with the evidence that this removal resulted in termination on several occasions, is sufficient to create a genuine dispute of material fact as to whether [lead firm] had the power to indirectly fire employees").

155. *Butler*, 793 F.3d at 406-07.

156. *Id.* at 407.

157. *Id.*

to be disciplined or terminated and it was not done."[158] The Fourth Circuit found the client to be a joint employer as a matter of law because it "had effective control over Butler's employment."[159]

Some courts, in contrast, have held that a client's removal power is *irrelevant* unless the plaintiff can show that the removal was accompanied by a direction to the temp agency to fire the employee.[160] These rulings pose a significant barrier for temp workers seeking to vindicate Title VII rights, who must often show not only an employment relationship but also that the defendant either participated in the unlawful discrimination or was otherwise negligent.[161] Remedying client behavior such as discriminatory failure to hire or sexual harassment under Title VII, as a result, can require the temp worker to show the client's status as an employer, unless she is able to show that the temp agency had sufficient notice of the client's unlawful conduct.[162] In *Felder v. United States Tennis Ass'n*, for example, the Second Circuit dismissed the pro se Title VII complaint of a temporary security guard against the client, the United States Tennis Association (USTA), because his allegation that the USTA refused to issue him credentials necessary to begin

158. *Id.* at 415.

159. *Id.*

160. *See* U.S. Equal Emp. Opportunity Comm'n v. CACI Secured Transformations, LLC, No. 19-2693, 2021 WL 1840807, at *7 (D. Md. May 6, 2021) (reasoning that whether the power to remove from a project is effectively control over firing hinges on whether the worker's employment is "contingent on [the worker's] continued work" for the putative joint employer); Conde v. Sisley Cosms. USA, Inc., No. 11 Civ. 4010, 2012 WL 1883508, at *4 (S.D.N.Y. May 23, 2012) ("[A]n entity that has the power to request that an employee be moved but not to cause her to be terminated is not a joint employer.").

161. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 93, at *4, *11; U.S. Equal Emp. Opportunity Comm'n v. Glob. Horizons, Inc., 915 F.3d 631, 641 (9th Cir. 2019); Nicholson v. Securitas Sec. Servs. USA, Inc., 830 F.3d 186, 190 (5th Cir. 2016); Whitaker v. Milwaukee Cnty., 772 F.3d 802, 812 (7th Cir. 2014).

162. For an example of an employment discrimination claim dismissed on the ground that the client was not a joint employer, see *Greene v. Harris Corp.*, 653 F. App'x 160, 161-66 (4th Cir. 2016) (affirming dismissal of state employment discrimination complaint against company that subcontracted for janitorial services because the plaintiff could not establish that company jointly employed the plaintiff). For an example of a temp agency's notice of a client's unlawful conduct sufficient for a Title VII claim against the agency to survive summary judgment, see *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 229 (5th Cir. 2015) (temp agency's uncontested participation in firing plaintiff after acknowledging that it was "legally dubious," and participation in "communication plan" that could be inferred provided false reasons for the termination to the EEOC and plaintiff, were sufficient to survive summary judgment).

work for unlawful reasons was insufficient to show "the essential Title VII requirement of an employment relationship."[163]

These courts nevertheless miss the crucial point, overlooking the very logic of temporary work, where temporary workers work alongside the client's employees in client premises, use client equipment, and their employment is contingent on continued placement in the client's workplace. As explained in *Faush*, in these instances, a contractual right to sever a temporary worker's assignment creates, at minimum, a genuine issue of material fact regarding whether removal shows the right to fire.[164] In *Tesla*, for example, a trial court found that the plaintiff temporary worker satisfied this burden with testimony that he was effectively fired after Tesla severed him from his assignment for complaining about racial harassment.[165] While the temp agency initially informed him "that he was eligible for another work assignment, [the plaintiff's] staffing representative stopped returning his calls."[166] As *Faush* instructs, and as the court in *Tesla* held, these facts should suffice, at minimum, to permit an inference that that right to sever a temporary worker from an assignment serves as a constructive termination.[167]

* * *

In sum, although most contracts provide that clients do not employ temp workers, most contracts in our dataset delegated the right to day-to-day supervision of temporary workers to clients, and in many cases, clients additionally reserved the right to maintain employment records and to participate in hiring and firing. This high level of reserved control suggests that temp agency clients

163. 27 F.4th 834, 846-47 (2d Cir. 2022).

164. Faush v. Tuesday Morning, Inc., 808 F.3d 208, 216-17 (3d Cir. 2015).

165. *See* Di-az v. Tesla, Inc., No. 17-cv-06748, 2019 WL 7311990, at *13 (N.D. Cal. Dec. 30, 2019).

166. *Id.* at *6.

167. *Id.* at *10-11; *see also* Thange v. Oxford Glob. Res., LLC, No. 19-5979, 2022 WL 2046938, at *6 (D.N.J. June 7, 2022) (finding that, despite contractual terms suggesting that plaintiff was an independent contractor, "the *Faush* factors support his status as an employee. Thus, a reasonable jury could find the existence of an employment relationship between" the plaintiff and the client); Lazard v. All Restore, LLC, No. 19-6040, 2021 WL 1175137, at *6 (E.D. Pa. Mar. 29, 2021).

often jointly employ temp workers, given the applicable law. Temp agency claims that clients cannot be construed as employers ring hollow. In most cases, they are nothing more than an illusion.

III. A PRESUMPTION OF CLIENT JOINT EMPLOYER STATUS

This Part points to a new approach of rebuttable presumptions in joint employer cases involving temp agency clients that can effectively illuminate the employment status of temp workers like Samuel. A client's extensive reserved control leaves little question that the client is a joint employer even by the strictest definitions. This should invite an inquiry into whether such joint employer status should be presumed to streamline the analysis and make decisions about the client's joint employer status faster and more uniform. This Part will first set forth the legal authority for presumptions in joint employment determinations, and then explain why recent rulings constraining administrative agency discretion are unlikely to apply here.

A. Legal Authority for a Presumption that Temp Agency Clients Are Joint Employers

Temp agency-client contracts can point so clearly in favor of the client's day-to-day supervision of temp workers that a presumption of the client's status as an employer is in order, requiring the employers to rebut their joint employer status.[168] If temp workers like Samuel can show that their temporary staffing agency entered into a contract with the client that delegates to the client the right to directly supervise them, the factfinder should presume that the client has sufficient control over the temp workers to be considered a joint employer.

Legal presumptions are common in labor and employment law.[169]

168. 1 CLIFFORD S. FISHMAN & ANNE TOOMEY MCKENNA, JONES ON EVIDENCE § 4:2 (7th ed. 2024), Westlaw.

169. *See* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946) (establishing the presumption that if an employee shows improper compensation for work performed "as a matter of just and reasonable inference," the burden shifts to the employer to produce evidence that negates the inference); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945) (affirming the presumption that employer rules against solicitation violate the NLRA absent unusual circumstances).

Title VII's *McDonnell-Douglas* doctrine may be best described, for example, as a legal presumption of an employer's illegal discriminatory motive that the Supreme Court read into Section 703(a) of Title VII.[170] Once a plaintiff establishes a *prima facie* case, the burden shifts to the employer to rebut that presumption by establishing it had a legitimate nondiscriminatory reason for the employment action.[171] Presumptions of employment status have also been used by states to combat the problem of employers that misclassify their employees as independent contractors.[172] Twenty-two states use some version of a test, typically called the ABC test for its three elements, that presumes employer status in at least some of their labor and employment laws.[173] Andrew Elmore has argued in favor of applying a version of the ABC test to the joint-employer doctrine, and Elmore and Hiba Hafiz have independently proposed a presumption of joint-employer status for franchisors under certain conditions.[174] But little prior work exists on how courts and administrative agencies can establish joint-employer presumptions within existing federal labor and employment law.[175] Here we consider for the first time presumptions of joint employment in the temp industry, and explain the legal authority for presumptions in the three primary statutes we discuss: the FLSA, the NLRA, and Title VII.

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170. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing a Title VII burden-shifting framework that, after an employee establishes a prima facie case, the burden shifts "to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection"); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07, 510-11 (1993).

171. *McDonnell Douglas Corp.*, 411 U.S. at 802.

172. Elmore, *supra* note 21, at 1268.

173. *Id.* While the ABC test is not expressly limited to single-employer relationships, courts primarily apply it to cases in which workers allege that they have been misclassified as independent contractors instead of employees. *Id.* at 1268-69 (discussing CAL. LAB. CODE § 2750.3(a)(1)(A)-(C) (repealed 2020)); Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 7 (Cal. 2018)); Goldman & Weil, *supra* note 21, at 111.

174. Elmore, *supra* note 21, at 1233, 1262-66 (arguing in favor of a presumption of joint employment for franchisors that limit the mobility of franchisees); Hiba Hafiz, *The Brand Defense*, 43 BERKELEY J. EMP. & LAB. L. 1, 72 (2022) (proposing a presumption of joint employment for franchisors that "impose any service-related quality control provisions in franchising and licensing agreements with their direct employer").

175. *See* Sachin S. Pandya, Kate Griffith & Andrew Elmore, *Rebooting Joint-Employer with Presumptions—A Modest Proposal*, ONLABOR (July 7, 2022), https://onlabor.org/rebooting-joint-employer-with-presumptions-a-modest-proposal/ [https://perma.cc/T9V4-DL39] (arguing that the National Labor Relations Board should adopt presumptions in specific types of cases in which it is more likely than not that an entity is a joint employer).

We propose that courts and administrative agencies establish a presumption that is triggered upon an initial showing that the client in the temp agency-client agreement reserves the right to directly supervise the temp workers' work, either through worker testimony or through the staffing agency-client contract. Should workers like Samuel meet this burden, the burden would then shift to the client to produce evidence that it did not in fact reserve supervisory control over the employee or cannot otherwise be held liable as an employer. Such clients that fail to meet this burden would be presumed to employ the temp workers. In practice, this would enable temp workers like Samuel to plausibly allege a joint employer relationship based on a claim that the client directly supervised the worker. At the summary judgment stage, the client could rebut its joint employer status by producing evidence disproving its supervision or control over other terms and conditions of employment. Focusing on the key factor of direct supervision would encourage courts to carefully scrutinize this evidence for inconsistencies that would tend to show, at minimum, that the client's status as an employer is a genuine issue of material fact.

Such a presumption is authorized by the FLSA, the NLRA, and Title VII and does not raise due process concerns. Courts and administrative agencies can, by interpretation or rulemaking, adopt a legal presumption for a law, provided that (1) the law itself does not preclude that presumption and (2) that the presumption satisfies a minimum rationality requirement under the Fifth and Fourteenth Amendment Due Process Clauses: "some rational connection between the fact proved and the ultimate fact presumed."[176] First, the FLSA, the NLRA, and Title VII do not prohibit courts and administrative agencies from establishing a presumption that clients of temp agencies are joint employers. To the contrary, the FLSA, the NLRA, and Title VII all expressly contemplate that multiple entities can employ an individual employee.[177]

176. Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910) (Fourteenth Amendment); Luria v. United States, 231 U.S. 9, 25 (1913) (Fifth Amendment); *see* Sachin S. Pandya, *Presuming Damages for Unemployment Distress*, 19 EMP. RTS. & EMP. POL'Y J. 85, 100 (2015).

177. All three statutes define "employer" broadly to include multiple people or entities. Congress defined "employer" in the FLSA such that every "employer" is a "person," 29 U.S.C. § 203(d), and defines "person" to mean "an individual, partnership, association, corporation, business trust, legal representative, or *any organized group of persons*." 29 U.S.C. § 203(a)

Second, our proposed presumption supplies the constitutionally required "rational connection" between the proven fact of reserved supervisory control and the presumed fact of joint employer status. All three statutes consider people and entities to be joint employers if they meet the common law definition of an employer.[178] This test primarily considers the putative joint-employer's right to control the employees' terms and conditions of work, whether or not the entity exercises that right.[179] It is rational to infer that clients that reserve primary supervision over temp workers in temp agency-client agreements employ temp workers under this test. An entity's reserved control over the direct supervision of temp workers is highly probative of a joint employer relationship. Active oversight of a worker, instructing workers regarding where, when, and how to work, is the hallmark of employer status. Courts universally find that clients that reserve or provide day-to-day supervision over temp workers are joint employers.[180] Reserving such supervision in their agreements with temp agencies provides the necessary "substantial assurance" that the client is a joint employer.[181]

We propose this burden-shifting framework as a rebuttable

(emphasis added). Absent certain exceptions, "employer" in the NLRA "includes any person acting as an agent of an employer, directly or indirectly," including "*one or more* individuals," or entities. 28 U.S.C. § 152(1)-(2) (emphasis added). Title VII statutory authority for joint-employer liability can be located in the phrase "one or more" in the definition of "person" and that an "employer" is a "person" under that definition. 42 U.S.C. § 2000e(a)-(b) ("The term 'employer' means a *person*[.]" (emphasis added)).

178. The NLRA's joint-employer right-to-control test "has deep roots in the common law," Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195, 1199-200 (D.C. Cir. 2018), and courts will uphold Board determinations that an entity that possesses "sufficient control over the work of the employees," is a joint employer. *See also* Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964). The Title VII joint-employer doctrine is similarly derived from the common law of agency and considers people and entities to be joint employers if, "according to common law principles, [they] share significant control of the same employee." Felder v. U.S. Tennis Ass'n, 27 F.4th 834, 843 (2d Cir. 2022). FLSA's "economic realities test," while intended to extend beyond the reach of the common law control test, would consider people and entities that reserve or exercise direct control over employees to be joint employers. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 726-30 (1947); Torres-Lopez v. May, 111 F.3d 633, 640 (9th Cir. 1997).

179. *See Boire*, 376 U.S. at 481; *Felder*, 27 F.4th at 843; *Rutherford*, 331 U.S. at 726-30; Armour v. Homer Tree Servs., Inc., No. 15 C 10305, 2017 WL 4785800, at *7 (N.D. Ill. Oct. 24, 2017) ("[T]he relevant inquiry is whether an employer has the 'right' to control and direct an employee's work ... not whether the employer exercises that right.").

180. *See supra* Part I & notes 53-59 and accompanying text.

181. Leary v. United States, 395 U.S. 6, 36 (1969); *see* Pandya, *supra* note 176, at 100.

presumption that shifts the burden of production, not the burden of persuasion. Presumptions that are judicially crafted or set by administrative agency rulemaking, if triggered, typically shift only the burden of production (legal presumptions that affect who bears the burden of production as to a material fact), not the burden of persuasion, and are rebuttable. Unless Congress indicates otherwise, the Federal Rules of Evidence only permit a burden of production in civil cases,[182] and the Administrative Procedure Act (APA) bars federal agencies from adopting a legal presumption that shifts the burden of persuasion.[183] But the APA permits agencies to adopt rebuttable presumptions that shift the burden of production so long as the burden of persuasion remains with the "proponent" of an agency rule or order.[184] In this case, even if the client meets its evidentiary burden, the burden of persuasion remains with the plaintiff. Finally, we do not propose a presumption to substitute any existing joint employer standard. As with any legal presumption, the litigant can opt to invoke it or to ignore it altogether.[185]

B. Agency-Established Presumptions and Loper Bright

A proposal of administrative presumptions, however, must contend with the Supreme Court's sweeping remaking of administrative law and hostility to agency discretion.[186] The most plausible

182. *See, e.g.*, FED. R. EVID. 301. This limitation also applies to NLRB unfair-labor-practice (ULP) hearings. States may follow or depart from this standard in their own evidence rules. *See generally* 21B WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 5121.2 (2d ed. updated 2025) (compiling state rules of evidence on presumptions).

183. The APA provides that, for APA-required hearings for agency adjudication or formal rulemaking, "[e]xcept as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." Administrative Procedure Act, 60 Stat. 237, 79th Cong. (1946). The statutory phrase "burden of proof" here denotes the burden of persuasion, not the burden of production, because "as of 1946 the ordinary meaning of burden of proof was burden of persuasion." Dir., Off. of Workers' Compen. Programs v. Greenwich Collieries, 512 U.S. 267, 276 (1994).

184. Garvey v. Nat'l Transp. Safety Bd., 190 F.3d 571, 579-80 (D.C. Cir. 1999) ("[*Greenwich*] indicated ... that a presumption that did not shift the burden of persuasion would be acceptable under the APA because it would not affect the 'burden of proof.'").

185. *See, e.g.*, Health Acquisition Corp., 332 N.L.R.B. 1308, 1309 (2000).

186. *See* Fred B. Jacob, *The National Labor Relations Act, The Major Questions Doctrine, and Labor Peace in the Modern Workplace*, 65 B.C. L. REV. 1381, 1393 (2024); Joel Seligman, *The Judicial Assault on the Administrative State*, 100 WASH. U. L. REV. 1687, 1691-92 (2023); *Labor Law—National Labor Relations Board—Deference*—Starbucks Corp. v. McKinney *ex*

challenge follows the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo*,[187] which overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[188] In *Loper Bright*, the Supreme Court rejected the "familiar two-step approach" from *Chevron* of determining if an agency interpretation involved an area in which the statute was silent or ambiguous, and if so, defering to the agency if it had offered "a permissible construction of the statute," even if the court would arrive at a different interpretation.[189] Reinterpreting the APA as reflecting "the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions," the Court in *Loper Bright* rejected the agency deference demanded by *Chevron*.[190] Now, the Supreme Court instructs courts to independently interpret statutory ambiguities when reviewing agency actions, with only "due respect" for agency interpretations.[191] The Court justified its rejection of *Chevron* deference as consistent with judicial review of administrative decisionmaking prior to *Chevron*.[192]

Since *Loper Bright*, employer-backed groups have stepped up their challenges to agency decision-making for exceeding the agency's authority, including in Board adjudication.[193] Recent

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rel. NLRB, 138 HARV. L. REV. 416, 416-17 (2023).

187. *See* 144 S. Ct. 2244, 2273 (2024).

188. 467 U.S. 837 (1984).

189. *Loper Bright*, 144 S. Ct. at 2264 (quoting *Chevron*, 467 U.S. at 843).

190. *Id.* at 2262.

191. *Id.* at 2267.

192. *Id.* at 2257-62.

193. At writing, the Third, Fourth, Fifth, Sixth, and Tenth Circuits have all applied *Loper Bright* to NLRB adjudications but have not consistently given weight to the Board's interpretation of the NLRA. *See* Miller Plastic Prods. Inc. v. NLRB, 141 F.4th 492, 502-03 (3d Cir. 2025) (finding that courts should consider the Board's "body of experience and informed judgment" in its NLRA interpretations (quoting *Loper Bright*, 144 S. Ct. at 2262)); Garten Trucking LC v. NLRB, 139 F.4th 269, 276 (4th Cir. 2025) (reviewing NLRB's application of "undisputed" law to fact using a substantial evidence standard, but considering Board interpretations of law only by the "power to persuade" (quoting *Loper Bright*, 144 S. Ct. at 2259)); Hudson Inst. of Process Rsch. Inc. v. NLRB, 117 F.4th 692, 700 (5th Cir. 2024) (NLRB interpretations of NLRA upheld if reasonable and not inconsistent with law); NLRB v. Macomb, Nos. 23-1335/1403, 2024 WL 4240545, at *3 (6th Cir. Sep. 19, 2024) (applying "de novo review" to Board interpretations of law but paying "careful attention" to agency judgment (quoting Rieth-Riley Constr. Co. v. NLRB, 114 F.4th 519, 529 (6th Cir. 2024)); 3484, Inc. v. NLRB, 137 F.4th 1093, 1103-04 (10th Cir. 2025) (applying substantial evidence review for NLRB factfinding with no deference for Board interpretations of law).

challenges to U.S. Department of Labor (DOL) rulemaking have had mixed success,[194] while most appellate courts have upheld Board adjudications using different standards.[195] It is too early to tell the full impact of *Loper Bright*, in particular, whether courts will consistently apply *Skidmore v. Swift & Co.* deference to agency adjudications[196] and whether pre-*Chevron* Supreme Court precedent granting agency deference remains good law.[197] But it has limited agency deference as a ground to uphold agency rulemaking and

194. The Fifth Circuit struck down a U.S. Department of Labor (DOL) regulation prohibiting employers from claiming a tip credit for employees who are "engaged in an occupation" earning tips, which the DOL has interpreted for decades to mean only if the employees spend 20 percent or less of their time on non-tipped activities. Rest. L. Ctr. v. U.S. Dep't of Lab., 120 F.4th 163, 166 (5th Cir. 2024) (quoting 29 U.S.C. § 203(t)). The Fifth Circuit vacated the DOL rule for impermissibly setting a limit on the specific duties within an occupation—a limitation that does not appear in the statute. *Id.* at 173. In contrast, the Fifth Circuit upheld a DOL regulation setting a minimum salary necessary for an employee to qualify for a "White Collar" overtime exemption, because the FLSA gives the DOL express authority to "define[ ] and delimit[ ]" the exemption terms. Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 617-20 (5th Cir. 2024) (quoting 29 U.S.C. § 213(a)(1)). A trial court later vacated a later version of the white-collar exemption threshold. *See* Texas v. U.S. Dep't of Lab., 756 F. Supp. 3d 361, 399 (E.D. Tex. 2024); *see also* Teche Vermilion Sugar Cane Growers Ass'n v. Su, 749 F. Supp. 3d 697, 723-31 (W.D. La. 2024) (finding that DOL's regulation setting a minimum wage rate for H-2A agricultural transportation workers based on average wages of "non-farm" domestic transportation worker wages exceeded its authority because the two groups are not "similarly employed"), *opinion clarified*, No. 23-CV-831, 2024 WL 4729319 (W.D. La. Nov. 7, 2024), *and amended by*, No. 23-CV-831, 2025 WL 1969937 (W.D. La. July 16, 2025); Hansen v. Lab'y Corp. of Am., No. 24-CV-807, 2024 WL 4564357, at *7 (E.D. Wis. Oct. 24, 2024) (finding that DOL properly interpreted "payroll practices" that are not "employee welfare benefit plan[s]" regulated by ERISA).

195. Most appellate courts have upheld Board adjudications after *Loper Bright*. *Compare Miller Plastic Prods. Inc.*, 141 F.4th at 502, 509 (upholding Board finding that "concerted activity" includes an employee who raises "group concerns" even if no group action results), *Garten Trucking LC*, 139 F.4th at 280-81 (Board finding that an employer's comment that employees would have a raise if they did not have union representation is an unfair labor practice is supported by substantial evidence), *Macomb*, 2024 WL 4240545, at *5 (affirming Board determination that refusing to bargain over layoffs is an unfair labor practice), *3484, Inc.*, 137 F.4th at 1107-09 (upholding Board determination that coercive statements of employer were an unfair labor practice, and order to reinstate strikers), *with Hudson Inst. of Process Rsch. Inc.*, 117 F.4th at 697-98, 701-05 (refusing to enforce Board decision that employees who used software to assign work were not supervisors under NLRA because employees retained independent judgment).

196. *Compare, e.g.*, *Miller Plastic Prods. Inc.*, 141 F.4th at 502 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)), *with 3484, Inc.*, 137 F.4th at 1104 (stating standard as de novo without citing *Skidmore*).

197. The Third Circuit has opined that Board determinations about subjects of bargaining are due deference under *Ford Motor Co. v. NLRB*, which pre-dates *Chevron*. Alaris Health at Boulevard E. v. NLRB, 123 F.4th 107, 121 (3d Cir. 2024).

adjudication unless such deference is contemplated in the statute.[198]

The *Loper Bright* Court, nonetheless, provides that agency decisionmaking of the type we propose in this Part merits deference because it is necessarily intertwined with the agencies' factfinding role. *Loper Bright* acknowledged that even prior to *Chevron*, the Supreme Court "applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency."[199] Invoking *NLRB v. Hearst Publications, Inc.* as a leading example of where agency deference is warranted, the Court observed that in that case, deference to the determination of the National Labor Relations Board that newsboys were "employee[s]" under the NLRA was in order.[200] This is because Congress "assigned primarily" to the Board the task of marking a "definitive limitation around the term 'employee.'"[201] *Hearst* and like cases correctly defer to agency decisionmaking because the "application of a statutory term [i]s sufficiently intertwined with the agency's factfinding."[202]

The Court's discussion of *Hearst* in *Loper Bright* is an important point of departure for understanding why courts have solid ground to affirm agency use of presumptions in joint employment decisions. Like the question of whether workers are employees or independent contractors in *Hearst*, whether temp workers are employed by staffing agency clients is necessarily "intertwined with" factfinding.[203] While they are formally separate questions, in both misclassification and joint employment cases, the putative employer's control is "at the center of the inquiry."[204] Courts and agencies in assessing the putative employer's control use some variation of a balancing test that weighs evidence of non-dispositive

198. *See* Robin Kundis Craig, *The Impact of* Loper Bright v. Raimondo*: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671, 2677-78, 2732 (2025) (presenting empirical review of court review of agency interpretations of law after *Loper Bright*, and finding that "early signs indicate that federal courts will be looking skeptically at agency actions—especially new agency rules").

199. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2259 (2024).

200. *Id.* (citing NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944)).

201. *Id.* (quoting *Hearst Publ'ns, Inc.*, 322 U.S. at 130).

202. *Id.* at 2260.

203. *See id.* at 2259-60.

204. Cynthia Estlund, *Losing Leverage: Employee Replaceability and Labor Market Power*, 90 U. CHI. L. REV. 437, 460 (2023).

factors drawn from agency law.[205] Courts and agencies engage in a totality of the circumstances inquiry to consider the putative employer's extent of reserved and exercised control over hiring, supervision, compensation, firing, and other direct and indirect indicia of an employment relationship.[206] Many observers, including the authors, critique this approach and conclude that a more streamlined approach would offer greater consistency and justice to the prompt resolution of labor and employment law disputes.[207]

To resolve legal questions similarly composed of non-dispositive factors, agencies routinely use rebuttable presumptions to streamline the factfinding process. To decide if a proposed bargaining unit is "appropriate" under NLRA Section 9(b),[208] for example, the Board asks whether the employees in the proposed unit share a "community of interest,"[209] and considers multiple non-dispositive factors of unspecified weight.[210] To streamline this multi-factor inquiry, the Board in the 1960s established a rebuttable presumption that a single store in a multistore enterprise "is *presumptively* an appropriate unit for bargaining."[211] Numerous circuit courts before *Chevron* affirmed the single-store presumption as within the Board's authority.[212] Pre-*Chevron* courts that rejected single-store

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205. *See id.*

206. *See* Elmore, *supra* note 21, at 1241 (summarizing control test used for joint employer analysis); Griffith, *supra* note 7, at 599-602 (control test used in misclassification cases).

207. *See* Estlund, *supra* note 204, at 460 (concluding that the test used for both inquiries is a "morass"); Elmore, *supra* note 21, at 1262-63; Griffith, *supra* note 7, at 602-03; Pandya, Griffith & Elmore, *supra* note 175; Steven A. Carvell & David Sherwyn, *It Is Time for Something New: A 21st Century Joint-Employer Doctrine for 21st Century Franchising*, 5 AM. U. BUS. L. REV. 5, 16-17 (2015).

208. 29 U.S.C. § 159(b).

209. NLRB v. Action Auto., Inc., 469 U.S. 490, 494 (1985) (quoting S. Prairie Constr. Co. v. Loc. No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 805 (1976)).

210. These include whether:

> employees in the proposed unit have different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit.

Blue Man Vegas, LLC v. NLRB, 529 F.3d 417, 421 (D.C. Cir. 2008) (citation and internal quotation marks omitted); *see* NLRB v. Tito Contractors, Inc., 847 F.3d 724, 732 (D.C. Cir. 2017) (listing factors).

211. Haag Drug Co., 169 NLRB 877, 877 (1968).

212. *See* NLRB v. Foodland, Inc., 744 F.2d 735, 738 (10th Cir. 1984) (upholding the Board's reliance on single-store presumption in finding that single store was the appropriate unit

bargaining units did so because the Board's factual findings were not supported by substantial evidence.[213] They did not cast doubt on the Board's authority to establish and rely on the presumption.

While this analysis applies to all agencies making joint employer determinations, deference to the National Labor Relations Board is particularly warranted. As the Supreme Court reasoned in *Hearst*, Congress delegated the task of making NLRA determinations in the first instance through its adjudicatory powers.[214] For this reason, as the D.C. Circuit reiterated shortly after *Loper Bright*, courts review Board decisions with a "very high degree of deference."[215] The Board, moreover, acts well within its statutory authority in crafting rebuttable presumptions for its adjudications. The NLRA provides that NLRB unfair-labor-practice hearings "shall, so far as practicable, be conducted in accordance with" the Federal Rules of Evidence,[216] which itself permits rebuttable presumptions that shift the burden of production.[217] When deciding cases, the NLRB has long adopted rebuttable presumptions for the NLRA in the decades before *Chevron*. As the Supreme Court held before *Chevron* in 1984, the Board has the statutory authority to adopt rebuttable presumptions for the NLRA, so long as such presumptions "rest on a sound factual connection between the

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given its significant autonomy was "supported by substantial evidence on the record"); Friendly Ice Cream Corp. v. NLRB, 705 F.2d 570, 576 (1st Cir. 1983) (finding that the "rebuttable presumption is consistent with the Act, has a rational foundation, and reflects the Board's expertise"); NLRB v. J.W. Mays, Inc., 675 F.2d 442, 444 (2d Cir. 1982) (finding that "the Board could properly rely on its presumption in favor of single-store units ... given the substantial evidence supporting the choice of single-store units in this case"); Victoria Station, Inc. v. NLRB, 586 F.2d 672, 675 (9th Cir. 1978) (concluding that in light of factual determinations and Board's reliance on presumption to find single-store bargaining unit appropriate is supported "we cannot conclude that the Board's unit determination is arbitrary, capricious, and not supported by substantial evidence").

213. *See* NLRB v. Chi. Health & Tennis Clubs, Inc., 567 F.2d 331, 339 (7th Cir. 1977) (upholding Board determination of a single-store bargaining unit in one instance, but finding reliance on the presumption in another "not supported by substantial evidence[,] ... arbitrary and unreasonable"); NLRB v. Solis Theatre Corp., 403 F.2d 381, 381-82 (2d Cir. 1968) (finding that Board's reliance on single-store presumption was "not supported by substantial evidence" given interrelated operations of the multi-store enterprise, lack of local autonomy, and history of enterprise-wide collective bargaining).

214. *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130-31 (1944).

215. Hosp. de la Concepcion v. NLRB, 106 F.4th 69, 76 (D.C. Cir. 2024) (citation omitted).

216. 29 U.S.C. § 160(b).

217. *See* FED. R. EVID. 301.

proved and inferred facts."[218] Appellate courts before and since *Chevron* have upheld Board presumptions as rational and consistent with the NLRA.[219]

After *Loper Bright*, courts that review agency reliance on our proposed presumption are likely to use a similar standard. Consistent with this standard, agencies may rely on our proposed presumption because it is authorized by the FLSA, Title VII, and the NLRA, and there is a rational connection between the proven and presumed facts. Our proposed presumption is consistent with the common law right-to-control test, in which parties with the right to day-to-day supervision are routinely found to be employers. So long as there is substantial evidence of the client's reserved right to supervise temp workers, a court is likely to find that a rebuttable presumption that the client is an employer is appropriate.

There are, to be sure, other possible administrative challenges to our proposed presumption—most prominently, the major questions doctrine and a Seventh Amendment challenge to Board adjudications lacking a jury.[220] But these are insubstantial challenges to our proposed presumption. The major questions doctrine disallows agencies from asserting "highly consequential" power, which the Supreme Court in *West Virginia v. EPA*[221] in 2022 defined as decisions of "economic and political significance," absent clear congressional authorization.[222] Our proposal, however, is unlikely to

218. NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 787 (1979).

219. *See* Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 786-87 (1996); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 804 (1945); Lee Lumber & Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1458-59 (D.C. Cir. 1997).

220. There is a current controversy about whether removal protections for administrative law judges and NLRB members are constitutional. *See* Trump v. Wilcox, 145 S. Ct. 1415 (2025) (granting government's motion to stay lower court injunction of President's removal of NLRB member Gwynne Wilcox pending appeal); Energy Transfer, LP v. NLRB, 742 F. Supp. 3d 755, 758-59 (S.D. Tex. 2024) (finding the removal protections for ALJs unconstitutional under Article II of the U.S. Constitution); Space Expl. Techs. Corp. v. NLRB, 741 F. Supp. 3d 630, 636-37 (W.D. Tex. 2024) (same). These sweeping challenges to removal protections, even if successful, would not prevent the Board from adopting our proposed presumption.

221. 142 S. Ct. 2587, 2620 (2022).

222. *Id.* at 2608 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)); *see* Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 1060 (2024) (cautioning that the major questions doctrine has the potential to "eviscerate existing labor law and hamstring the NLRB, the Department of Labor, and other social welfare agencies").

be considered such a "highly consequential" assertion of agency power. Temp workers, while a significant share of low-wage workers, are a small proportion of the overall workforce.[223] And unlike the rule struck down in *West Virginia*, which the Court found "would impose billions in compliance costs,"[224] our proposal seeks to streamline the process of decisionmaking rather than expand or contract legal obligations or liabilities.

Seventh Amendment challenges to administrative adjudications that are "legal in nature" without juries, likewise, do not pose a serious threat to our proposal.[225] Historically, Seventh Amendment jurisprudence found a right to trial by jury only for rights that existed in common law at the time of the Seventh Amendment's adoption, not to later-enacted statutory (or public) rights.[226] For this reason, the Supreme Court rejected a Seventh Amendment challenge to NLRB adjudications under the public-rights exception eighty-eight years ago in upholding the NLRA's constitutionality in *NLRB v. Jones & Laughlin Steel Corp.*[227] The Supreme Court in 2024 found in *SEC v. Jarkesy*, however, that the Seventh Amendment's right to trial by jury extends to administrative proceedings regarding alleged statutory violations that are "legal in nature."[228] In delimiting adjudications that are "legal in nature," the Supreme Court in *Jarkesy* distinguished between adjudications in which agencies seek civil penalties, to which a right to trial by jury attaches, and adjudications that seek to restore the status quo, which do not implicate this Seventh Amendment right.[229] The only agency that would adjudicate such a presumption is the NLRB,

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223. *See* Bureau of Lab. Stat., *supra* note 15 (estimating that there are about three million temp workers, out of a total workforce of nearly 170 million workers, in the United States); *see also* Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 617 (5th Cir. 2024) (finding that the DOL's white-collar overtime rule "does not trigger the major questions doctrine" because it only affects 1.2 million workers); State v. Su, 121 F.4th 1, 14 (9th Cir. 2024) (rejecting major questions challenge to DOL wage mandate for federal contractors because it was not a "transformative" expansion of its authority under the Federal Property and Administrative Services Act).

224. *West Virginia*, 142 S. Ct. at 2593.

225. SEC v. Jarkesy, 603 U.S. 109, 122 (2024) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989)).

226. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937).

227. *See id.*

228. *See Jarkesy*, 603 U.S. at 120, 122 (quoting *Granfinanciera, S.A.*, 492 U.S. at 53).

229. *Id.* at 122-24.

which is limited in its remedial authority to restoring the status quo.[230] For this reason, all courts that have considered this Seventh Amendment challenge to Board proceedings have rejected it.[231]

CONCLUSION

This Article pulls back the curtain on the common practice of clients maintaining substantial control over temp work while disclaiming joint employer status. It reveals that the discredited assumption that clients can relieve themselves of employer obligations, while controlling temp work remains alive and well, hidden in private contracts with staffing agencies. The control clients reserve in most of the contracts we analyzed (directly supervising temp workers, maintaining wage and safety policies and records, and participating in hiring and firing) are all hallmarks of an employment relationship, even by the strictest definitions. This empirical contribution justifies a presumption by courts and administrative agencies of the client's joint employment of temp workers.

Revealing this hidden employment relationship underscores the importance of remaining vigilant to the constant changes in business practices that produce precarious work. Labor and employment laws work effectively only if courts and administrative agencies adapt to new business practices, especially in the fissured workplace. In pulling back this curtain, we also implore courts and administrative agencies to make more aggressive use of contracts between the companies that coordinate low-wage work in fissured workplaces. Too often, courts and administrative agencies engage in unnecessarily long and complex analyses about how control is exercised on the ground, when the reserved control between the

230. *See* Camelot Terrace, Inc. v. NLRB, 824 F.3d 1085, 1092-93 (D.C. Cir. 2016) (holding § 10(c) of the NLRA authorizes the Board "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice"); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) (finding that § 10(c) authorizes Board to "restor[e] ... the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination").

231. *See* YAPP USA Auto. Sys., Inc. v. NLRB, 748 F. Supp. 3d 497, 517 (E.D. Mich. 2024) (denying preliminary injunction of NLRB adjudication on Seventh Amendment grounds); Alivio Med. Ctr. v. Abruzzo, No. 24-cv-7217, 2024 WL 4188068, at *11 (N.D. Ill. Sep. 13, 2024) (same); Nexstar Media, Inc. Grp. v. NLRB, 746 F. Supp. 3d 464, 473 (N.D. Ohio 2024) (same).

parties points only in one direction. By shining a spotlight on the ambiguity and confusion that flows from this staffing agency practice, we offer a method for courts and administrative agencies to cut through the thicket in discerning whether companies that coordinate low-wage work should be held responsible for labor and employment law obligations. So doing can contribute to a more stable set of workplace protections in the fissured workplace and more just and certain outcomes for low-wage temp workers like Samuel.