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State Joint Employer Liability Laws and Pro Se Back Wage Claims in the Garment Industry: A Federalist Approach to a National Crisis

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STATE JOINT EMPLOYER LIABILITY LAWS AND *PRO SE* BACK WAGE CLAIMS IN THE GARMENT INDUSTRY: A FEDERALIST APPROACH TO A NATIONAL CRISIS

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The garment industry, one of the largest manufacturing bases in the United States, withholds millions of dollars annually from its employees in unpaid minimum wages. However, courts have not clearly addressed the question of whether the Fair Labor Standards Act, which establishes federal wage and hour laws, makes garment manufacturers and retailers liable for the minimum wage violations of their contractors. The U.S. Department of Labor (DOL), the federal agency that enforces wage and hour laws, investigates few garment contractors, and collects little of the total owed back wages. Further, the DOL's relationship with the INS compromises its ability to advocate on behalf of immigrant workers, who form the backbone of the garment industry.

In the wake of federal inaction, some states have implemented antisweatshop laws designed to enforce minimum wage and hour laws. For example, New York has focused on manufacturer and contractor registration enforcement. However, New York's efforts have not resulted in increased wage and hour compliance. California's new law, Assembly Bill 633 (AB633), the Sweatshop Accountability Bill, improves on New York's approach by considering manufacturers and retailers "guarantors" of back wages owed by their contractors, and by providing a private cause of action for workers to assert claims against manufacturers through a Labor Commission hearing. However, AB633 lacks an efficient and effective adjudicative process, and suffers from vagueness on joint liability provisions. States where the garment industry flourishes should independently investigate garment employees' claims for owed back wages in Labor Commission hearings, and add a presumption that retailers and manufacturers are joint employers unless the contractor provided a unique service separate from the company's production process.

Critics may argue that (1) joint liability collapses the distinction between employers and entities that utilize legitimate independent contractors, (2) admitting a state investigation in the hearing denies due process to the parties, and (3) aggressive minimum wage enforcement will hasten globalization and worsen

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overall employee conditions. However, presuming joint liability is appropriate in industries that use contingent labor to avoid liability. Further, any loss in due process by admitting investigations does not prejudice either party disproportionally, and is outweighed by efficiency and fairness. Finally, even if enforcing labor laws results in contracting overseas, states should defend a basic standard of living over subpoverty employment.

Alternatively, critics may respond that a hearing process does not remove enough barriers, and that states should establish a strict liability insurance regime, like unemployment insurance, to reimburse workers for owed back wages. However, assuming the equal efficacy of both approaches, a state-led joint liability/pro se approach is superior because it maintains due process protections and treats nonpayment of back wages as an illicit act. Nevertheless, if guarantors restructure their production process to defeat the joint employer presumption, or if hearings fail to provide sufficient procedural protections for workers, states should consider a strict liability, insurance-based regime to help resolve this national crisis.

INTRODUCTION

The garment industry in the United States has gross sales of forty-five billion dollars a year and employs more than one million U.S. employees,[1] with Los Angeles and New York City representing nearly a quarter million of the employees.[2] The U.S. Department of Labor (DOL) reports "minimum wage and overtime violations of the Fair Labor Standards Act[3]

1. *See* U.S. Dep't of Labor, *No Sweat Initiative Fact Sheet*, *at* http://www.dol.gov/dol/esa/public/forum/fact.htm (last visited June 17, 2001).

2. In 1999, there were 144,000 garment employees in Los Angeles. *See* EDNA BONACICH & RICHARD P. APPELBAUM, BEHIND THE LABEL: INEQUALITY IN THE LOS ANGELES APPAREL INDUSTRY 16 (2000). New York in 1990 counted 87,800 garment employees. *See* THE NELSON A. ROCKEFELLER INST. OF GOV'T, NEW YORK STATE STATISTICAL YEARBOOK 101 (23d ed. 1998). Almost all of New York's registered contractors are in New York City. *See* Telephone Interview with Thomas Glubiack, Chief Investigator, Apparel Industry Task Force (Oct. 26, 2000).

3. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201 (1994).

[FLSA] occurring in 40 to 60 percent of investigated establishments."[4] The size of the garment industry and the magnitude of wage violations have a grave national impact. Paying garment employees subminimum wages[5] causes severe employee poverty,[6] with a disproportionate impact on women and on people of color,[7] and an underground economy that results in billions of dollars of lost tax revenue.[8] Currently, unions represent a small number of garment employees, and are unable to exert the influence necessary to improve the lives of their members.[9] The federal government has

4. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-88-130BR, "SWEATSHOPS" IN THE U.S.: OPINIONS ON THEIR EXTENT AND POSSIBLE ENFORCEMENT OPTIONS 2 (1988). The U.S. Department of Labor (DOL) reports that 2000 investigators found wage violations in 58.4 percent of investigated shops. Seventy-seven percent of DOL's 1999 nation-wide investigations that found wage and hour law violations were conducted in New York or California. The investigations found minimum wage violations in New York and California in 61.4 percent of investigated shops, 10 percent higher than the national average. *See* U.S. Dep't of Labor, *Garment Enforcement Report* (July 2000–Sept. 2000), *at* http://www.dol.gov/dol/esa/public/nosweat/garment20.htm (last visited Sept. 20, 2001).

5. California's twenty-eight billion dollar garment industry withholds seventy-three million dollars annually in unpaid wages from the State's 160,000 employees. *See* BONACICH & APPELBAUM, *supra* note 2, at 3.

6. The average apparel employee earned the least of all employees in nonagricultural industries in the United States. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 428–30 (120th ed. 2000) (comparing average hourly rates of pay of employees in nonagricultural industries). In 1990, the "average garment worker in Los Angeles made only $7200, less than three quarters of the poverty-level income for a family of three that year." BONACICH & APPELBAUM, *supra* note 2, at 16. Garment employees can also be deprived of basic legal protections, such as unemployment insurance and workers' compensation, if contractors do not report their income to the government.

7. "According to the 1990 Census, 67 percent of apparel and knitwear workers in New York City are women and nearly 70 percent are minorities." Jonathan Bowles, Ctr. for an Urban Future, *The Empire Has No Clothes* 26 (Feb. 2000), http://www.nycfuture.org/econdev/clothes.htm. In Los Angeles, "[w]omen [made] up 72 percent of the garment workers . . . [,] Latinos accounted for two-thirds of the industry as a whole . . . [, and Asians] accounted for 14 percent of all workers." BONACICH & APPELBAUM, *supra* note 2, at 170–71.

8. A 1993 California survey concluded that "thirteen percent of . . . employers failed to report and pay employment taxes," and estimated that "the state was losing approximately three billion dollars each year in income taxes alone, and millions more in unemployment and disability taxes." Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2179 (1994).

9. *See* BONACICH & APPELBAUM, *supra* note 2, at 265 ("By the end of 1997, [the garment workers union] UNITE represented about 300,000 workers, down from the 800,000 workers represented by two component unions in the late 1960's."). Low union density is acute in Los Angeles, where "by 1998 UNITE represented only a few hundred garment workers." *Id.* at 266. The failure of unions to organize garment employees may be correlated with the NLRB's interpretation of a joint employer, which one commentator argues is so narrow that "the restructuring of employment through the injection of a contractor between the client and the employees utterly insulates the client from the basic legal obligation to recognize and bargain with the employees' representative." Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1543 (1996). *But see* Annotation, *When Are Separate Business Entities "Joint Employers" of Same Employees for Purposes of Application of Federal Labor Laws*, 73 A.L.R. FED. 609, 619 n.16 (1985) ("The

recognized that garment sweatshops[10] are a national, as well as an international, human rights crisis.[11]

Exposés of high-profile retailers utilizing sweatshops to produce their apparel, and the mobilization of garment employees, consumer groups, student groups, and legal agencies pressuring the federal and state governments have resulted in a flurry of new antisweatshop laws and bills intended to combat the underground economy and to assist garment employees with recovering back wages.[12] Specifically, in 1987 New York created the Apparel Industry Task Force to inspect garment contractors and manufacturers and to enforce state registration and labor laws; since 1995, the DOL has implemented a "No Sweat" campaign to investigate contractor workplaces and to collect back wages from contractors and manufacturers that violate federal wage and hour laws; and in 1999, California amended its labor law to hold manufacturers and retailers liable for garment employee back wages claimed in Labor Commission hearings. In addition, New Jersey recently introduced a number of antisweatshop bills.[13] Thus, in this time of unprecedented legislative activity, it is imperative to assess the efficacy of state and federal mechanisms to deter garment industry wage and hour violations.

This Comment analyzes the federal approach and two state approaches to combating garment sweatshops. It recommends state laws that (1) presume that manufacturers and retailers are joint employers who integrate interchangeable contractors into their production process, and that (2) create a viable pro se process for garment employees to assert back wage claims. Part I describes the garment industry and three hypothetical

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NLRB has proved reasonably adept at parting the veils of legal formality in order to uncover actual employer-employee relationships.").

10. The U.S. General Accounting Office defines a sweatshop as "an employer that violates more than one federal or state labor, industrial homework, occupational safety and health, workers' compensation, or industry registration law." U.S. GEN. ACCOUNTING OFFICE, *supra* note 4, at 15.

11. Former President Bill Clinton publicly stated that "[a]s has now been painfully well documented, some of the clothes and shoes we buy here in America are manufactured under working conditions which are deplorable and unacceptable . . . sometimes here at home . . . ." President Bill Clinton, Remarks at Apparel Industry Partnership Event (Apr. 14, 1997), *available at* http://www.dol.gov/dol/esa/public/nosweat/partnership/remarks.htm.

12. *See* Katie Quan, Ctr. for Labor Research & Educ.—Inst. of Indus. Relations, Legislating Sweatshop Accountability 6 (Apr. 20, 2001) (unpublished manuscript, on file with author) (attributing legislative momentum to exposés of labor practices of Kathie Lee Gifford, Gap, and Guess?).

13. *See, e.g.*, Assemb. 1796, 209th Leg. (N.J. 2000) (doubling the number of inspections for the Apparel Industry Unit of the Division of Workplace Standards); S. 350, 209th Leg. (N.J. 2000) (holding manufacturers liable for contractor labor law violations); Assemb. 1285, 209th Leg. (N.J. 2000) (increasing manufacturer and contractor registration fees).

manufacturers, and then applies FLSA joint employer doctrine to each, demonstrating the difficulties a garment employee faces when attempting to privately recover back wages from companies that manufacture apparel. Part II describes the DOL's "No Sweat" initiative, New York's Apparel Industry Task Force, and California's AB633 liability regime and Labor Commission hearing process. Part III compares the federal and state approaches. Part IV suggests language for a model state antisweatshop law that establishes joint employer liability for manufacturers and retailers and creates a fair and efficient pro se claim process for garment employees. Part V discusses criticisms and potential barriers created or not resolved by these recommendations, and addresses those criticisms. Part VI concludes that of the existing approaches, state laws that establish joint employer liability and provide garment employees with a pro se forum, are an important incremental strategy in enforcing wage and hour laws in the garment industry.

I. THE PRICE OF SWEAT: THE GARMENT INDUSTRY AND FLSA JOINT EMPLOYER DOCTRINE

The garment industry is built upon an urban workforce of immigrant women, and it is driven by urban fashion centers. The garment industry resembles a three-tier pyramid: a few garment retailers at the top,[14] buying from many different manufacturers in the middle, with thousands of contractors assembling the garments at the bottom. Retailers set retail prices, purchase the finished product from manufacturers, and keep around 50 percent of the price of retail apparel.[15] Manufacturers design garments, compete for retailers, purchase the materials, and hire and instruct contractors about how to assemble the apparel.[16] Contractors recruit employees, rent space and equipment, and extract profits by "sweating" the difference between the

14. *See* BONACICH & APPELBAUM, *supra* note 2, at 1, 14 ("The highly competitive nature of the apparel industry enables giant retailers to gain power over the manufacturers, a phenomenon that has increased as retailers have consolidated.").

15. *See id.* at 1.

16. Manufacturers keep approximately 35 percent of the retail price of clothing. *See id.*; Fang-Lian Liao, *Illegal Immigrants in Garment Sweatshops: The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, 3 SW. J. L. & TRADE AM. 487, 496 (1996) (arguing that "'garment manufacturers . . . contract[] for two reasons: they can control how much or how little contractors are paid, and they can take advantage of the prevailing presumption that they are not liable for wage violations in their contractors' sweatshops'" (quoting Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 YALE J. INT'L L. 195, 200 (1992))). One study of Los Angeles' 184 largest manufacturers found that they accounted for close to 3000 overlapping sewing contractors, providing an enormous amount of control over the factories that provided them with contracted labor. *See* L.A. JEWISH COMM'N ON SWEATSHOPS, REPORT ON LOS ANGELES SWEATSHOPS 13 (1999), *available at* http://www.ajcongress-ne.org/issues/sweatshops/CommReport.pdf.

manufacturing contract and the labor and overhead costs.[17] Contractors tacitly assume responsibility for their employees, but the contractors' low contract prices with manufacturers do not account for a legal minimum wage for garment employees.[18] Often, when confronted with a wage claim, contractors hide assets, declare bankruptcy, and open under a new name,[19] sometimes using the same manufacturers and employees as before.[20] Thus, retailers and manufacturers shift the cost of garment industry profits directly to garment employees, who earn merely 6 percent of the price of retail apparel.[21]

Although categorizing the garment industry into retailers, manufacturers, and contractors helps explain how the industry operates, garment industry practices blur these categories. For example, retailers contract directly with contractors to manufacture clothing under private labels,[22] manufacturers operate retail stores,[23] and contractors contract out to subcontractors.[24] This part presents three hypothetical companies and demonstrates how the ambiguity between retailers and manufacturers can defy FLSA joint employer doctrine and federal and state approaches to define which companies are employers and which are contractees.

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17. *See* Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1055–57 (1999) (describing the transformation of the word "sweatshop" to mean by the 1890s a workplace that requires long hours at low pay with no breaks in unsafe and unsanitary conditions).

18. A contractor retains merely 5 percent of the price of retail clothing. *See* BONACICH & APPELBAUM, *supra* note 2, at 6.

19. Even if contractors are unable to hide assets quickly enough to avoid payment, bankruptcy law gives secured creditors priority over employees attempting to recover owed back wages. *See* Foo, *supra* note 8, at 2188–92 (discussing *In re* USM Tech. Corp., 158 B.R. 821, 824–27 (Bankr. N.D. Cal. 1993)). *But see In re* Russell Transfer, Inc., 107 B.R. 535, 536 (Bankr. W.D. Va. 1989) (interpreting *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27 (1987), as holding that employee wages are not part of the bankruptcy estate, but the property of the employee); Henry Bregstein, Note, *Secured Creditors and Section 15(a)(1) of the Fair Labor Standards Act: The Supreme Court Creates a New Property Interest*, 14 CARDOZO L. REV. 1965 (1993).

20. *See* Foo, *supra* note 8, at 2188–90 (describing the history of the contractor in *In re USM Technology Corp.*, 158 B.R. at 824–27, who had closed and opened numerous times to escape liability for hundreds of thousands of dollars in unpaid wages).

21. *See* BONACICH & APPELBAUM, *supra* note 2, at 1.

22. *See id.* at 99–100 ("Private label has been growing dramatically for the obvious reason that it is more profitable to the retailers. In 1998, private-label merchandise accounted for 32 percent, $29.3 billion, of the sales of women's apparel in the United States.").

23. *See id.* at 52, 101 (describing the retail practices of Guess?, a manufacturer).

24. Garment industry practices also differ regionally. *See id.* at 28 (noting that New York City manufacturers produce apparel in-house, while Los Angeles manufacturers tend to contract out).

A. Retailer or Manufacturer? Three Hypothetical Companies

(1) *The Chasm*[25] is a large national apparel retailer, with more than 3300 outlets and over five billion dollars in annual gross sales. *The Chasm* specializes in low- to mid-priced men's and women's apparel, and sells mostly in the United States, but also in Canada, France, Germany, Japan, and the UK. It designs and manufactures the apparel itself, contracting out the assembly of the products directly to contractors. *The Chasm* sells clothes under its own label, and does not sell its apparel to other retailers. *The Chasm* requires its contractors to sign "full package contracts" in which contractors purchase the materials, produce the clothing, and provide quality oversight themselves.

(2) *Connie Dolon*[26] (*CD*) is a manufacturer of high-end men's and women's apparel, and over $500 million in annual gross sales. *CD* sells in the United States through ninety outlets and 3000 retailers, and sells worldwide through nearly 230 licensed stores. *CD* streamlines its operations by contracting directly with contractors to produce *CD*'s apparel.

(3) *Sherry*[27] is a small company owned by an independent businessperson. Within the garment industry *Sherry* is known as a "jobber,"[28] and is registered with the state as a manufacturer. Retailers and manufacturers send orders to *Sherry*, specifying the exact quantity of apparel, the design, and including instructions how to make the apparel. *Sherry* purchases the material, and contracts with contractors to sew, press, and finish the cut fabric. *Sherry* receives the garments from the contractor, and ships the finished products directly to the retailers and manufacturers. *Sherry* does not keep written records of its dealings with contractors, instead relying on oral contracts.

All three companies send their inspectors to contractors' shops to monitor the garment quality, and all require contractors to stipulate in their

25. *The Chasm* is loosely based on retailers such as the Gap, which contract directly with contractors and design and market apparel using their own labels directly to consumers. *See* Hoover's Company Profile Database, American Public Companies, the Gap, *available at* LEXIS, U.S. Company Reports Library (last visited Oct. 1, 2001).

26. *Connie Dolon* is loosely based on manufacturers such as Guess? and Donna Karan, which design and market apparel both to retailers and directly to consumers. *See* Hoover's Company Profile Database, *American Public Companies, Guess?*, *available at* LEXIS, U.S. Company Reports Library (last visited Oct. 1, 2001); Hoover's Company Profile Database, *American Public Companies, Donna Karan International*, *available at* LEXIS, U.S. Company Reports Library.

27. *Sherry* is loosely based on several jobbers listed as "guarantors" in Labor Commission hearings in California.

28. A jobber is a manufacturer that does not have an owned and operated factory. *See* Quan, *supra* note 12, at 6.

contracts that the contractors are the sole employers of their employees, and that the garment production complies with federal and state law.

Despite the close relationship that *The Chasm*, *CD*, and *Sherry* have with their contractors' employees, the FLSA would not automatically hold these entities liable for the employees' owed back wages.

B. Joint Employer Doctrine Under the FLSA and the Economic Realities Test

A garment employee seeking to recover back wages from *The Chasm*, *CD*, or *Sherry* under the FLSA faces the barrier[29] of showing that these entities are joint employers, and not merely contractees.[30] The FLSA defines employer broadly as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[31] Lacking clarity about how to distinguish between an employer and a contractee of an independent contractor under the FLSA, courts fashioned an "economic realities" test to determine the degree of control that the entity has over the employee. Under a traditional application of the economic realities test, a court considers whether the entity "(1) had the power to hire or fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and methods of payment, and (4) maintained employment records."[32] These factors measure the *direct* ability of the entity to control the employee's terms and conditions of employment. For example, a garment contractor who hires, fires, pays and supervises an employee, and may maintain employee records, is an employer under this test. By contrast, a garment manufacturer who has merely indirect control over the contractors' employees would be a contractee under the traditional application, not a joint employer.[33]

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29. A garment employee faces many other barriers, such as finding representation, meeting the burden of production that the contractor worked with that particular manufacturer, and defending herself against possible employer retaliation. Although the FLSA does contain an antiretaliation provision, its burden of proof has an onerous intent requirement. *See, e.g.*, Cross v. Bally's Health & Tennis Corp., 945 F. Supp. 883, 887–88 (D. Md. 1996) (reasoning that the FLSA employer retaliation intent requirement mirrors the Title VII intent requirement).

30. This Comment uses the term "contractee" to describe a person or entity that hires the independent contractor. Other sources may use the term "licensee."

31. 29 U.S.C. § 203(d) (1994). The FLSA considers "employ" to mean "to suffer or permit to work." *Id.* § 203(g). An "employee" is "any individual employed by an employer." *Id.* § 203(e)(1).

32. Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999); *see also* Villarreal v. Woodham, 113 F.3d 202, 205 (11th Cir. 1997); Hinsdale v. City of Liberal, No. 93-1201, 1997 U.S. Dist. LEXIS 8642, at *14 n.3 (D. Kan. May 13, 1997).

33. *See, e.g.*, Derewiecka v. Zlored, Inc., No. 96 Civ. 3382, 1999 U.S. Dist. LEXIS 15021, at *3 (S.D.N.Y. Sept. 27, 1999).

The traditional interpretation of the economic realities test makes sense in industries in which overlapping ownership and management suggest only a nominal distinction between otherwise separate entities.[34] However, noting the "striking breadth"[35] of the FLSA's employer definition, courts tend to adopt a looser economic realities test for industries that use contractors and contingent labor, such as the meatpacking,[36] agriculture,[37] and garment industries.[38] Entities in these industries can maintain indirect control of employees without directly controlling the terms and conditions of the employees' employment.[39]

Accordingly, the Supreme Court interprets the FLSA to consider as employers entities that "might not qualify as such under a strict application of traditional agency law principles."[40] The Supreme Court in *Rutherford Food Corp. v. McComb*[41] analyzed a slaughterhouse operator's defense to an FLSA claim, in which it asserted that it was not a joint employer because it was the labor contractor that recruited, hired, and supervised employees.[42] The Court noted that the employees were "part of the integrated unit of [the operator's] production,"[43] and that the work was "piecework,"[44] occurring inside the operator's slaughterhouse and in the middle of the slaughtering process.[45] Reasoning that the slaughterhouse operator fully integrated the contractor's employees into his operation, the Court held that the operator

34. *See, e.g.*, Sakrete of N. Cal., Inc. v. N.L.R.B., 332 F.2d 902, 907 (9th Cir. 1964).

35. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

36. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 727–30 (1947).

37. *See* Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir. 1994); Howard v. Malcolm, 852 F.2d 101, 105 (4th Cir. 1988); Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984); Charles v. Burton, 857 F. Supp. 1574 (M.D. Ga. 1994).

38. *See* Lopez v. Silverman, 14 F. Supp. 2d 405 (S.D.N.Y. 1998). In January 1999, Congress attempted to add clarity to the joint liability test for garment manufacturers in the "Stop Sweatshops Act." *See* H.R. 90, 106th Cong. (1999). Congress found that the FLSA violations in garment manufacturing are "detrimental . . . [to] the maintenance of minimum standards of living necessary for health, efficiency, and general well-being of workers." *Id.* § 2(2). The bill would have amended the FLSA to hold manufacturers "civilly liable, with respect to those garment manufacturing operations, to the same extent as the contractor for any violation by the contractor . . . ." *Id.* § 14A(a)(1). However, the bill was referred to the House Committee on Education and the Workforce, and was never reintroduced. *See* Bill Tracking Report H.R. 90, 106th Cong., *available at* LEXIS, Legislative Histories & Materials Library (last visited Oct. 1, 2001).

39. DOL regulations interpret the FLSA employer definitions loosely to encompass employers that act "directly or indirectly in the interest of the other employer;" or who "are not completely disassociated . . . and may be deemed to share control of the employee . . . ." 29 C.F.R. § 791.2(a)–(b) (2000).

40. *Darden*, 503 U.S. at 326.

41. 331 U.S. 722 (1947).

42. *See Id.* at 730.

43. *Id.* at 729.

44. *Id.* at 730.

45. *See id.* at 726.

fell within the FLSA definition of a joint employer.[46] This holding departed from the traditional economic realities approach, because it considered the entity's *indirect* control over the employee. In addition to the inquiry into the terms and conditions of employment traditionally applied under the economic realities test, the *McComb* Court considered the integration of the employee in the entity's production process, the interchangeability of the contractor's services, and the entity's ownership of the workplace and equipment.

Courts inconsistently apply the *McComb* approach to other industries that depend on contingent labor. In *Aimable v. Long & Scott Farms*,[47] the Eleventh Circuit held an agricultural[48] picker to be an independent contractor of the grower. The court found that the grower did not meet any of the four direct control factors of the traditional economic realities test. The court discounted the ownership and piecework factors. Despite finding that the growers integrated the picking crew into their production process, and that the crews signed identical contracts, the court found that the presence of the integration and interchangeability factors failed to outweigh the evidence of the grower's lack of direct control. Thus, the *Aimable* court determined that the grower was not an employer.[49]

However, other courts consider both *direct* and *indirect* control factors in the economic realities test.[50] In *Antenor v. D & S Farms*,[51] the Eleventh Circuit (one year after deciding *Aimable*), considered the *McComb* integration, interchangeability, and piecework factors,[52] and interpreted the

46. *See id.* at 730.

47. 20 F.3d 434 (11th Cir. 1994).

48. The Migrant and Seasonal Agricultural Worker Protection Act (AWPA) adopts the FLSA definition of the FLSA for employment and joint employment. *See* 29 U.S.C. §§ 1801–1872 (1994). In addition, the AWPA adds clarity to the joint employer test in the agricultural industry by describing the traditional test as non-exhaustive, and citing to a number of cases, including *McComb*, 331 U.S. at 730, that enumerate additional indirect control factors.

49. *See Aimable*, 20 F.3d at 445.

50. *See* Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997) (applying the economic realities test to agriculture, adding integration and ownership); Antenor v. D & S Farms, 88 F.3d 925, 952 (11th Cir. 1996) (applying the economic realities test to agriculture, adding integration and ownership); Lopez v. Silverman, 14 F. Supp. 2d 405, 419–24 (S.D.N.Y. 1998) (applying the economic realities test to the garment industry, adding integration and ownership); *see also* Horkan v. Command Sec. Corp., 179 Misc. 2d 108, 109 (N.Y. Sup. Ct. 1998) (reasoning that a proper application of the FLSA economic realities test considers the indirect control factors enumerated in *Antenor*); 29 C.F.R. § 791.2(b)(3) (2000) (stating, per DOL regulations, that employers "may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer").

51. 88 F.3d 925 (11th Cir. 1996).

52. *See id.* at 937. The court found that the picking crew was "but one part of an integrated economic unit operated by the growers." *Id.* (citation omitted).

supervision factor to include indirect supervision "through the contractor."[53] In *Antenor*, the grower incorporated picking crews interchangeably into its production process to perform discrete, unskilled tasks, and supervised the pickers through crew leaders. The circuit court found that the evidence of indirect control was sufficient to reverse a summary judgment against the employees.[54]

Similarly, in *Torres-Lopez v. May*[55] the Ninth Circuit reversed a lower court analysis based on *Aimable* and found that growers exercised sufficient indirect control over pickers to constitute a joint employer relationship with the crew leader.[56] Applying the indirect factors enumerated in *McComb*, the court found that:

1. the pickers performed production line work;
2. the contracts with the labor contractor were standard and did not require negotiation;
3. the grower leased the field, and provided the pickers with equipment and transportation;
4. the pickers did not shift as a unit from one workplace to another;
5. the job of picking is piecework that requires no special skills;
6. the pickers' income was solely determined by the piece rate; and
7. the growers integrated the pickers in their production; but
8. the pickers lacked a permanent relationship with the growers.[57]

Considering the totality of circumstances, the Ninth Circuit found that the growers exercised control over the pickers and that the pickers were dependent on the growers, and held that the grower was a joint employer.[58]

There is a surprising dearth of cases addressing joint employers in the garment industry. The only case that has resulted in a decision concerning garment manufacturer joint employment is from the Southern District of New York, in *Lopez v. Silverman*.[59] The court, finding an analogy between

53. *Id.* at 934 (quoting *Aimable*, 20 F.3d at 441 (citation omitted)).

54. *See id.*

55. 111 F.3d 633 (9th Cir. 1997).

56. *See id.* at 644–45. The court criticized *Aimable* as having "misconstrued" the economic realities test by downplaying the importance of the indirect control factors. *Id.* at 641.

57. *See id.* at 643–44.

58. *See id.* at 644. The dissent, however, reasoning that indirect control would create strict liability for growers, argued for a test that favored direct control factors over indirect control. *See id.* at 647–50 (Aldisert, J., dissenting). For an argument that the direct control test is most appropriate for the agricultural industry, see Gary D. Brunsvik, Comment, *The Seven Deadly Sins of MSPA Joint Employer Liability: Strict Liability, the Department of Labor's Hidden Agenda!*, 9 SAN JOAQUIN AGRIC. L. REV. 117 (1999).

59. 14 F. Supp. 2d 405 (S.D.N.Y. 1998). For a comprehensive analysis of the *Lopez* reasoning, see Goldstein et al., *supra* note 17. There have, however, been a number of decisions

agricultural pickers and garment employees, reasoned that the indirect control factors discussed in *Antenor* were relevant to the garment industry, and described them as follows:

1. the manufacturer's integration of the employee's work as a discrete line job in the production process;[60]
2. the manufacturer's ownership of buildings, equipment, and materials;[61]
3. the proportion of the employee's work performed for the manufacturer;[62]
4. the permanence of the relationship between the manufacturer and the contractor;[63]
5. the manufacturer's degree of supervision over the employee;[64]
6. the interchangeability of the contractor (how easily the manufacturer could replace one contractor with another);[65] and
7. whether the contractor marketed the employees' services as a unit.[66]

Reasoning that under the FLSA, joint employer analysis looks to the "totality of the evidence,"[67] the court held that the employees were economically dependent on the manufacturer, and thus, that the manufacturer was a joint employer.[68]

Applying the *Lopez* analysis to *The Chasm*, *CD*, and *Sherry*, all companies would probably meet the integration and interchangeability factors. The integration factor favors joint employer liability for all companies, because

based on manufacturer motions to dismiss. The Central District of California and Southern District of New York each found that a joint employment claim that alleges manufacturer and retailer direct or indirect control suffices to survive a motion to dismiss. *See* Liu v. Donna Karan Int'l, Inc., No. 00 Civ. 4221, 2000 U.S. Dist. LEXIS 18847, at *11 (S.D.N.Y. Jan. 2, 2001); Bureerong v. Uvawas, 922 F. Supp. 1450, 1469 (C.D. Cal. 1996).

60. The court found that the garment workers performed work that was integrated into the manufacturer's production process. *See Lopez*, 14 F. Supp. 2d at 420.

61. The court found that the lack of ownership of facility and equipment carried little weight in the garment industry, and is mitigated by the manufacturer's procurement of the materials. *See id.* at 420–21.

62. The court found that the two entities contracted primarily with each other. *See id.*

63. The court found that the entities had a regular relationship. *See id.* at 421.

64. The court found that the manufacturer directly supervised the employee's work through a quality manager. *See id.*

65. The court found that the manufacturer offered the same contract terms and conditions with various contractors. *See id.* at 422.

66. The court found that the contractor marketed its services to different manufacturers. *See id.* This was the only factor that weighed against the manufacturer as a joint employer. Unlike *Torres-Lopez*, *Lopez* does not consider whether the employee's salary depends upon the profits or losses of the contractee.

67. *Id.* at 423 (quoting Antenor v. D & S Farms, 88 F.3d 925, 938 (11th Cir. 1996)); *see also* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 13 (2d Cir. 1984) (reasoning that an FLSA joint employer inquiry is based on a "particularized inquiry into the facts of each case").

68. *See Lopez*, 14 F. Supp. 2d at 423.

contractors for *The Chasm*, *CD*, and *Sherry* perform discrete, routine tasks essential to the garment production, and are thus integrated into the manufacturers' "process of production."[69] The contractors recruit employees and rent space and equipment, which are routine services that could be performed by any other contractor or directly by *The Chasm*, *CD*, or *Sherry*. The contractors are interchangeable, because the manufacturers determine the price of the contract, the type and quantity of garments, and the work schedule; and contractors have little bargaining power to change terms in the contract.[70] Because there is little difference between the services offered by contractors, and because manufacturers have little difficulty replacing one contractor with another, courts would consider the contractors interchangeable.

The ownership factor favors joint liability for *CD* and *Sherry*, because they buy the fabric and deliver it to the contractors.[71] However, this factor would not be satisfied for *The Chasm*, because *The Chasm* requires contractors to purchase the materials. The degree of control over workers factor also favors joint liability for *CD* and *Sherry*, because they send supervisors to the contractor's workplace to inspect the garments, and instruct the contractors about how to cut and sew the apparel. Yet, because *The Chasm* requires contractors to perform quality oversight themselves, this factor may not be met.

The Chasm, *CD*, and *Sherry* probably would not satisfy the proportion of work, permanence of relationship, or shifting unit factors. The companies all work with many different contractors, so each contractor only performs a small proportion of the manufacturers' total work.[72] Because each company contracts with many different contractors, each individual contractor has a short working relationship with the manufacturer.[73] Therefore, the companies would not be considered to have a permanent relationship. Finally, because the contractors market their employees as a unit to multiple manufacturers, like the contractor in *Lopez*, the companies would not meet the shifting unit factor.[74]

In summary, a court relying on the *Lopez* interpretation of the economic realities test could find that all entities satisfy the integration and interchangeability factors: *CD* and *Sherry*, but not *The Chasm*, would satisfy the ownership and supervision factors, while no company would satisfy the

69. *Id.* at 419.
70. *See id.* at 422.
71. *See id.* at 420–21.
72. *See id.* at 421.
73. *See id.*
74. *See id.* at 422.

proportion of work, permanence of relationship, or shifting unit factors. Analyzing the totality of the circumstances, a court relying on *Lopez* may find *CD* and *Sherry* to be joint employers because they exerted a degree of indirect control similar to that exerted by the defendant manufacturer in *Lopez*. However, *The Chasm* may escape liability as a joint employer, because it only satisfies two of the test's seven factors.

Moreover, a judge narrowly interpreting *Lopez* could distinguish *CD* and *Sherry* from the contractor-manufacturer relationship in *Lopez*.[75] While the contractor in *Lopez* was located a couple blocks away from the manufacturer to facilitate the manufacturer's production process,[76] *The Chasm*'s, *CD*'s, and *Sherry*'s contractors are not centrally located. Further, in *Lopez*, the contractor and manufacturer contracted mostly with each other, and the contractor's son worked as a production manager for the manufacturer, while *The Chasm*, *CD*, and *Sherry* contract with many contractors and have little personal interaction with the contractors.[77] A garment employee may not satisfy the *Lopez* interpretation of the economic realities test with mere proof of the manufacturer's indirect control.[78]

As shown by the application of the joint employer doctrine to *The Chasm*, *CD*, and *Sherry*, the economic realities test articulated in *Lopez* is problematic as a measure of manufacturer control.[79] On the one hand, a test that considers indirect economic control would find that most garment manufacturers and retailers that contract with contractors are joint employers.[80] Employees perform piecework that manufacturers integrate into their production process, and employees depend on retailers and manufacturers for the work that the contractor has them perform. On the other hand, a direct economic control inquiry will fail to find most garment retailers and manufacturers to be joint employers, because these companies do not directly control the garment employees.[81] The contractors control the

75. *But see id.* at 410 ("[I]t is undisputed that neither [the manufacturer] nor any [of the manufacturer's employees] exercised direct control over the wages or hours of the [contractor's] workers . . . .").

76. *See id.* at 420.

77. *See id.* at 407–09.

78. Some courts have interpreted the economic realities totality-of-the-circumstances test to mean an *ad hoc* decision without applying any factors. *See, e.g.*, Johns v. Stewart, 57 F.3d 1544, 1557 (10th Cir. 1995) (holding that "welfare-to-work" participants are not "employees" under the FLSA).

79. *But see* Liu v. Donna Karan Int'l, Inc., No. 00 Civ. 4221, 2000 U.S. Dist. LEXIS 18847, at *10 (S.D.N.Y. Jan. 2, 2001) ("[T]he 'economic reality' test is determined based upon all the circumstances, [and] any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition." (citation omitted)).

80. *See, e.g.*, Brock v. Superior Care, Inc., 840 F.2d 1054, 1058–59 (2d Cir. 1988).

81. *See, e.g.*, Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984).

terms and conditions of employment in the factory. Contractors alone maintain employee records, dictate the exact piece rate offered to employees, distribute the employee's pay, and manage the shop hiring and firing. Combining these two sets of factors, as in *Antenor* and *Lopez*, courts attempt to strike a reasonable balance between preserving independent contractors as a discrete legal category and crafting a sensible joint employer doctrine for contingent labor. However, this combination can also muddle the analysis.

Although several recent district court decisions in the Second Circuit interpret *Lopez* as holding that a claim of indirect control suffices to survive a motion to dismiss,[82] lacking a larger base of precedent to draw upon, a court will likely consider a manufacturer to be a contractee or a joint employer depending on whether the court (and its jurisdiction) interprets the economic realities test to assess only direct, or to include indirect, control of the manufacturer. The barriers that a garment employee faces in asserting an FLSA (or state)[83] claim against garment manufacturers highlights the need for the federal and state governments to develop an approach that assists the garment employee in recovering owed back wages.

II. FEDERAL, NEW YORK, AND CALIFORNIA APPROACHES TO COMBATING SWEATSHOPS

A. U.S. Department of Labor (DOL)

1. DOL's "No Sweat" Campaign

Since the late 1980s, the DOL has identified the garment industry as among the least compliant industries in the country.[84] Responding to the

82. *See, e.g.*, *Liu*, 2000 U.S. Dist. LEXIS 18847, at *11; Derewiecka v. Zlored, Inc., No. 96 Civ. 3382, 1999 U.S. Dist. LEXIS 15021, at *3 (S.D.N.Y. Sept. 27, 1999); Samborski v. Linear Abatement, Corp., No. 96 Civ. 1405, 1999 U.S. Dist. LEXIS 14571, at *3 (S.D.N.Y. Sept. 21, 1999); Grochowski v. Ajet Constr. Corp., No. 97 Civ. 6269, 1999 U.S. Dist. LEXIS 13473, at *3 (S.D.N.Y. Sept. 1, 1999).

83. California labor law is silent on the definition of an employer. *See* CAL. LAB. CODE §§ 1171–1205 (West 1993). Although California case law has not squarely addressed whether state labor law would apply the economic realities test, the court in *Bureerong v. Uvawas* reasoned that "[t]he California courts would likely focus on the 'economic realities' of the relationship, rather than on mere contractual or technical distinctions." Bureerong v. Uvawas, 922 F. Supp. 1450, 1470 (C.D. Cal. 1996). New York's definition of employer, "any person, corporation or association employing any individual in any occupation, industry, trade, business or service," seems analogous to the FLSA definition. N.Y. LAB. LAW § 190 (McKinney Supp. 2001).

84. "In 1988, the U.S. DOL completed a nationwide survey of chronic and multiple labor law violators, and concluded that the garment, meatpacking, and restaurant industries were the most egregious violators." U.S. GEN. ACCOUNTING OFFICE, *supra* note 4, at 2.

crisis, the Wage and Hour Division of the DOL implemented a "No Sweat" Campaign[85] to reduce garment manufacturer and contractor wage and hour law violations. That strategy includes (1) targeted inspections of garment shops, (2) pressuring manufacturers to monitor their contractors' wage compliance, (3) asserting "hot goods"[86] claims under the FLSA to seize apparel from contractors and manufacturers made in violation of the FLSA, and (4) prosecuting contractors who violate wage and hour law or who give false information to DOL inspectors.

2. Scope of Liability

The hot goods provision prohibits any person from transporting goods in interstate commerce if they were produced in violation of the FLSA's wage and hour requirements.[87] However, an entity is not subject to the hot goods provision if it is a common carrier or a good faith purchaser who acquired the goods for value, without notice of any violations, and "in reliance on written assurance from the producer that the goods were produced in compliance with the requirements"[88] of the FLSA. In a hot goods claim, DOL can demand the garment employees' owed back wages and liquidated damages.

3. Inspections

The DOL has less than 800 investigators to enforce wage requirements for the country's 110 million employees. To effectively allocate investigative resources, DOL inspectors target a few noncompliant industries, including the garment industry.[89] A federal DOL investigator targets a garment contractor identified through employee complaints or through a DOL garment industry initiative.[90] Investigators then demand payment from contractors and manufacturers for owed back wages, and make a recommendation to the DOL as to whether it should settle or litigate.[91] The

85. Although the "No Sweat" Campaign officially began in 1997, the DOL has targeted the garment industry for wage and hour inspections since at least 1995. *See* U.S. Dep't of Labor, *Garment Enforcement Timeline: June 1995–June 1999*, *at* http://www.dol.gov/dol/esa/public/forum/timeline.htm (last visited June 17, 2001).

86. *See* 29 U.S.C. § 215 (1994).

87. *See id.* § 215(a).

88. *Id.*

89. *See* Telephone Interview with Jerry Hall, U.S. Department of Labor (Nov. 21, 2000).

90. *See id.* Employee-driven complaints comprise less than 100 of the nearly 500 annual complaints. *See id.*

91. *See id.*

DOL issues quarterly reports, listing the results of the investigations and the cited contractors and manufacturers.[92]

4. Monitoring

In a hot goods suit against a manufacturer, the DOL demands that the manufacturer agree to monitor its contractors' shops for wage and hour violations.[93] After signing such an agreement, the manufacturer can be liable for future contractor noncompliance.[94] In addition, the DOL implements pilot projects for manufacturers to agree to monitor their contractors' workplaces.[95]

5. Litigation

When the DOL investigates a contractor and finds a violation, it attempts to recover back wages for the garment employees by asserting a hot goods claim in federal court.[96] The hot goods provision authorizes the DOL to enjoin a garment manufacturer from selling garments, and to seize the goods to recover owed back wages for garment employees. In addition, the DOL works with the U.S. Attorney's Office to prosecute contractors that repeatedly violate wage and hour law,[97] or who give false information to investigators.[98]

B. New York's Apparel Industry Task Force

1. Intent of Creating Special Task Force for the Apparel Industry

New York state labor law vests the labor commissioner with the power to create the Special Task Force for the Apparel Industry (the Task Force).[99] The Task Force considers as its responsibility the enforcement of state labor

92. *See* U.S. Dep't of Labor, *Garment Enforcement Summary*, *at* http://www.dol.gov/dol/esa/public/nosweat/garment16.htm (last visited Sept. 20, 2001).

93. *See* Telephone Interview with Jerry Hall, *supra* note 89.

94. *See id.*

95. *See id.*

96. *See id.* The DOL also sues under a theory of disgorgement. *See id.*

97. *See Conditions in New York City's Garment Industry Unchanged*, U.S. NEWSWIRE, Oct. 15, 1999, *available at* 1999 WL 22280483 (reporting the arrest of two contractors for wage and hour law violations and giving false information to investigators).

98. *See* U.S. Dep't of Labor, *Chinatown Garment Operators Sentenced for Making False Statements to Federal Investigators*, *at* http://www.dol.gov/dol/esa/public/media/press/whd/ny186.htm (last visited Sept. 20, 2001).

99. *See* N.Y. LAB. LAW § 342 (McKinney Supp. 2001).

law, especially registration requirements and wage and hour laws, for the apparel industry.[100] The Task Force, noting the large number of contractors in New York who fail to register properly, investigates contractors and manufacturers that it believes have failed to register, or who have registered improperly, and issues fines to contractors and manufacturers for labor law violations.[101]

2. Article 12-A Definitions and Scope

New York Labor Law Article 12-A explicitly defines retailers, manufacturers, and contractors. A "retailer" is a company that "sells or offers to sell"[102] to a consumer. By contrast, a "manufacturer" either (1) "contracts with a contractor," or (2) cuts, sews, or "otherwise produces"[103] garments. A "contractor" is a company that contracts with a manufacturer. The Task Force can inspect contractor and manufacturer shops and their records.[104] Retailers are not mentioned in the scope of inspections or with respect to fine assessments.[105]

3. Manufacturer and Contractor Registration

Any contractor or manufacturer must register with the Task Force, disclosing information about the company and owners.[106] If the company completes the registration form and pays a fee, the Task Force issues the

100. *See* Telephone Interview with Thomas Glubiack, *supra* note 2.

101. *See id.*

102. N.Y. LAB. LAW § 340(i).

103. *Id.* § 340(d).

104. *See id.* § 344(1).

105. The Apparel Industry Task Force interprets registration requirements as including retailers that also fit in the definition of manufacturer. *See* Telephone Interview with Thomas Glubiack, *supra* note 2.

106. N.Y. LAB. LAW § 341 requires any manufacturer or contractor to disclose

> whether it is a sole proprietorship, partnership or corporation, its name, address and number of production employees, the name, home address and social security number of each owner or partner . . . [, or, if a corporation,] how long it has been in business, its tax identification number, whether it is a manufacturer or contractor, whether it is in contractual relations with a labor organization . . . any officer or any of the ten largest shareholders thereof has, within the last three years, been found by any court or administrative body to have violated this chapter, and, if so, the nature and date of such violation and, if the registrant is a contractor, whether the contractor subcontracts the cutting or sewing of apparel or sections or components thereof.

Id. The Apparel Industry Task Force maintains a database of approximately 4500 registered contractors and manufacturers. *See Workplace Protections in Sweatshops: Hearing Before the N.Y. State Assemb. Subcomm. on Sweatshops, Standing Comm. on Labor* 11 (N.Y.1998) (statement of Richard Polsinello, Dir., Div. of Labor Standards, N.Y. Dep't of Labor) (transcript on file with author).

company a renewable registration.[107] A contractor or manufacturer who fails to register or renew within the time limits,[108] or who contracts with an unregistered company, may face both a civil penalty[109] and a criminal sanction for intentional failure to register.[110] Retailers are excluded from registration requirements.

4. Inspections of Manufacturers and Contractors

The Task Force inspects manufacturers and contractors to enforce registration and labor law compliance.[111] An inspection entails investigating employer records and interviewing employees to determine wage and hour and registration violations.[112] If the inspector discovers wage and hour violations, the Task Force may issue a civil fine, negotiate a settlement for the employees, or revoke the entity's registration.[113] The Task Force can refer wage and hour violators to the attorney general for criminal prosecution.[114]

5. Hot Goods Seizure to Recover Back Wages

Contractors, manufacturers, and retailers who "knew or should have known" that the garment production violated wage and hour laws,[115] are subject to the New York hot goods law, which, like the FLSA hot goods provision, subjects the garments to government seizure.[116] However, a retailer

107. *See* N.Y. LAB. LAW § 341(1). The initial fee is $150, and $75 annually thereafter. *See id.*

108. *See id.* § 345(1)–(2).

109. *See id.* § 345(4)(a) ("[O]f up to one thousand five hundred dollars for the initial violation . . . and up to three thousand dollars for the second or subsequent violations."). Thomas Glubiack reports that the penalty for failure to reregister ranges from an order to register to a $1000 fine. *See* Telephone Interview with Thomas Glubiack, *supra* note 2.

110. *See* N.Y. LAB. LAW § 345(7). Intentional failure is a class B misdemeanor. The Apparel Industry Task Force does not pursue criminal penalties for failure to register. *See* Telephone Interview with Thomas Glubiack, *supra* note 2.

111. *See* N.Y. LAB. LAW § 343(1)–(3) (stating that the Task Force shall "inspect manufacturers and contractors . . . for compliance with the registration requirements . . . the labor law [and] . . . the orders of, and assessments of civil penalties by, the commissioner pursuant to this article").

112. *See* Telephone Interview with Thomas Glubiack, *supra* note 2.

113. *See id.* Instead of revoking registrations, the Task Force denies registration renewals, because the burden in a registration revocation is on the Task Force to prove noncompliance, while the burden for denied renewal is on the company. *See id.*

114. *See id.* The maximum criminal penalty for violating the state labor law is nine months. *See id.* However, Glubiack observes that although the Task Force at any time has sixty cases referred for prosecution, most cases are either never prosecuted or are dismissed. *See id.*

115. N.Y. LAB. LAW § 345(10)(a).

116. *See id.* § 345(10)(a)–(c); *see also, e.g.*, *'Hot Goods' Law Is Enforced to Stop Sale of Clothing Made in Violation of Labor Law*, N.Y. L.J., July 22, 1999, at 25.

is only liable under New York hot goods law if: (1) the labor commissioner gives the retailer notice of the violations, and (2) the manufacturer and/or contractor failed to provide written assurances that the garments were produced without violations.[117] Upon petition of the attorney general, if the wage and hour violation occurred in the previous 180 days, the New York Supreme Court can "restrain the shipping, delivery, sale or purchase by any manufacturer, contractor or retailer of apparel."[118]

C. California's Assembly Bill 633

1. Legislative Intent and Background of AB633.

The Counsel's Digest to Assembly Bill 633 (AB633)[119] articulates the law's intent to change how California regulates the garment industry. AB633 establishes joint liability for garment manufacturers to "ensure that employees are paid for all hours worked,"[120] and, provides for successorship liability for contractors who "close down their sewing shops to avoid paying their employee's wages and subsequently reopen"[121] under a different name, address, and registration. Finally, the law intends to create a "private right of action by which an aggrieved employee may enforce a claim for unpaid wages,"[122] which is investigated and decided by the California Labor Commission.[123]

The historical context of AB633 is as important as the official intent. In 1990, recognizing the low union density and subminimum wage pay among garment employees in California, a coalition of garment unions and immigrants' and workers' rights organizations began lobbying the state legislature for joint liability laws in the garment industry.[124] Four years later, in El Monte, California, the DOL found seventy-one Thai workers held as slaves for up to six years to produce clothing sold by national manufacturers and retailers.[125] The media coverage and

117. *See* N.Y. LAB. LAW § 345(10)(b).
118. *Id.* § 345(10)(c).
119. Assemb. 633, 1999 Leg., Reg. Sess. (Cal. 1999).
120. CAL. LAB. CODE § 2673.1(a) (West Supp. 2001).
121. *Id.* § 2684(a).
122. *Id.*
123. *See id.*
124. *See* Quan, *supra* note 12, at 11.
125. Eighty Thai and twenty-two Latino El Monte garment workers joined in a federal lawsuit against the contractor, manufacturers, and retailers. The workers' lawsuit included national retailers such as Mervyn's and B.U.M. International, Inc. *See* Bureerong v. Uvawas, 922 F. Supp. 1450, 1450 (C.D. Cal. 1996). For a description of the litigation strategies used to recover the

lawsuit[126] that arose from the scandal pressured California legislators to enact legislation to deter the violence of poverty inflicted upon garment employees by the garment industry. Accordingly, the California Assembly enacted AB633 with substantial input from antisweatshop advocates and legal agencies throughout California.[127] While two previous governors vetoed similar bills in the past decade,[128] Governor Gray Davis signed AB633 into law in September 1999, signaling a shift in the political waters for the garment industry in California.

2. AB633 Definitions and Scope: Persons Who Engage in Garment Manufacturing

AB633 modifies the California State Labor Code by creating a new right for garment employees to assert Labor Commission wage claims against all "persons"[129] engaged in "garment manufacturing"[130] who contract with the employee's contractor. A contractor is a person who employs people in any aspect of garment manufacturing.[131]

3. Registration of Garment Manufacturers and Contractors

All garment manufacturers and contractors must register with the state. The application requires the applicant to provide business information[132]

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workers' owed back wages, see Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405 (1998).

126. *See Bureerong*, 922 F. Supp. at 1450.

127. For example, AB633 amended CAL. LAB. CODE § 2684(b) to reflect Lora Jo Foo's recommended language for successorship liability. *Compare* Foo, *supra* note 8, at 2199–200, *with* CAL. LAB. CODE § 2684(b)(1)–(4).

128. *See* Foo, *supra* note 8, at 2195.

129. CAL. LAB. CODE § 2671(a). AB633 defines a "person" as "any individual, partnership, corporation, limited liability company, or association, and includes, but is not limited to, employers, manufacturers, jobbers, wholesalers, contractors, subcontractors, and any other person or entity engaged in the business of garment manufacturing." *Id.*

130. *Id.* § 2671(b). The act of "garment manufacturing" is "sewing, cutting, making, processing, repairing, finishing, assembling, or otherwise preparing any garment . . . to be worn by any individual . . . for sale or resale by any persons or any persons contracting to have those operations performed." *Id.*

131. *See id.* § 2671(d). A contractor is "any person who, with the assistance of . . . others, is primarily engaged in sewing, cutting, making, processing, repairing, finishing, assembling, or otherwise preparing any garment . . . designed or intended to be worn by any individual . . . ." *Id.*

132. *See id.* § 2675. Information that must be provided includes: statement of character; names and addresses of all partners, associates, and profit sharers; current workers' compensation insurance policy; an oral or written exam of "pertinent laws and administrative regulations"; and a signed statement that the company will comply with regulations and inform employees of laws regarding workplace safety and health. *Id.*

and to pay a fee.[133] Part of the registration fee is an appropriation to pay for garment employee back wages.[134] A registrant who has been cited for wage violations in the past three years must deposit a bond "for the benefit of any employee" owed back wages.[135] The Labor Commission can revoke registrations or deny annual registration renewals,[136] and the Division of Labor Standards Enforcement (DLSE) may confiscate the garments of any unregistered party,[137] or confiscate the property and equipment of any unregistered party whose garments have been confiscated twice in the past five years.[138] A registered manufacturer who contracts with a contractor who is unregistered or who failed to post a bond with the commissioner is jointly liable with the unregistered contractor for wage claims asserted by any of their employees.[139]

4. Joint and Several Liability for Garment Manufacturers, Successorship Liability for Contractors

AB633 creates a new legal category in California labor law, a "guarantor."[140] Although the term "guarantor" is not separately defined in the text of the statute, AB633 considers entities that contract with a contractor to be guarantors, and holds guarantors jointly liable along with contractors for garment employees' owed back wages. If the contractor worked with more than one garment manufacturer, liability as guarantors is proportional to the amount of the guarantor's work that the employee performed while earning less than the minimum wage.[141] The Labor Commission hearing is the only forum in which a garment employee has a valid cause of action against the manufacturer as a guarantor of the employee's back wages.[142]

AB633 extends the contractors' liability to successor contractors of prior entities that closed down with debt owed to their former employees. AB633 defines four categories of contractors liable for the back wages of the prior contractor: if the new contractor (1) uses the same facility or employees to

133. *See* Assemb. 633, 1999 Leg., Reg. Sess. (Cal. 1999).
134. *See* CAL. LAB. CODE § 2675. The law empowers the Labor Commissioner to "disburse the funds to persons damaged by failure of a garment manufacturer, jobber, contractor, or subcontractor to pay wages and benefits." *Id.* § 2675.5(a).
135. *Id.* § 2675(a)(3).
136. *See id.* § 2673.1(m).
137. *See id.* § 2680(a).
138. *See id.* § 2680(b).
139. *See id.* § 2677(a).
140. *Id.* § 2673.1(a).
141. *See id.* § 2673.1(b).
142. *See id.* § 2673(c).

produce the same product;[143] (2) owns, manages, or controls the operation of the prior employer;[144] (3) has a manager who directly or indirectly controlled the employee for the prior contractor;[145] or (4) is an immediate family member with the prior contractor or owner.[146] Manufacturers and retailers are not included in successor liability provisions.[147]

5. Procedure for Filing a Claim with the Labor Commission

After receiving the claim, the Labor Commission sends notification to parties of an impending investigation, and issues a subpoena to the contractor for all employee records.[148] Next, the Labor Commission must send a notice to all parties of a "meet-and-confer conference,"[149] to be held within sixty days of the claim. Prior to the conference, the Labor Commission must conduct an investigation and make a finding and assessment of the amount of wages owed, and each guarantor's proportionate share of liability.[150] In the investigation and assessment, the garment employee's statement of wages owed is presumed valid, unless the contractor provides "specific, compelling, and reliable written evidence" [151] such as accurate and contemporaneous records refuting the claim. Any falsification of the contractor record creates the presumption that all the contractor's records are false.[152]

At the meet-and-confer, the investigator presents the finding and assessment, and the Labor Commission deputy attempts to broker a settlement.[153] If the parties reach no resolution at the meet-and-confer, the Labor Commission sets the matter for hearing.[154] The investigation for the meet-and-confer "shall not be admissible or be given any weight" in the hearing.[155]

The hearing begins within thirty days of the meet-and-confer, and finishes within fifteen days thereafter.[156] The hearing may be bifurcated, first

143. *See id.* § 2684(b)(1).
144. *See id.* § 2684(b)(2).
145. *See id.* § 2684(b)(3).
146. *See id.* § 2684(b)(4).
147. *See id.* § 2684(b) ("This section does not impose liability upon a successor for the guarantee of unpaid minimum wages and overtime compensation set forth in subdivision (a) or (b) of Section 2673.1.").
148. *See id.* § 2673.1(d)(1).
149. *Id.* § 2673.1(d)(2).
150. *See id.* § 2673.1(d)(3).
151. *Id.*
152. *See id.*
153. *See id.*
154. *See id.*
155. *Id.*
156. *See id.* § 2673.1(d)(4).

to address the liability of the contractor and guarantors, and then to determine proportionate liability based on the proportion of the employees' work performed for each guarantor.[157] The procedure is otherwise the same as the regular Labor Commission hearing.[158] The hearing is informal, so rules of evidence do not apply.[159] Within fifteen days of the hearing's completion, the Labor Commission must issue a decision.[160] In addition to back pay, AB633 requires guarantor proportionate liability on the guarantor for liquidated damages if the guarantor acted in bad faith, such as by failing to pay the contractor.[161] Any party can appeal the Labor Commission's decision, but the appealing company (guarantor or contractor) must post a bond,[162] and parties that appeal and lose can be liable for the opposing side's attorney's fees.[163] If the employee requests, the Labor Commission represents the employee in the judicial review.[164]

III. COMPARISON OF THE FEDERAL AND STATE APPROACHES

A. Comparing Intent

The federal DOL's "No Sweat" campaign relies on random inspections to uphold wage and hour laws and to return back wages to garment employees, and does not require contractor and manufacturer registration. In contrast, the New York Task Force, which does not receive employee complaints, targets contractors based primarily on registration information.[165] While the DOL relies on garment employee complaints and on

157. *See id.*

158. *See id.* ("[T]he hearing shall be held in accordance with the procedure set forth in subdivisions (b) to (h), inclusive, of Section 98.").

159. *See id.* The only objections that can be made in a hearing are based on relevancy and private information. *See id.*

160. *See id.* § 2673.1(d)(5).

161. *See id.* § 2673.1(e). Bad faith includes

> failure to pay or unreasonably delaying payment to its contractor, unreasonably reducing payment to its contractor where it is established that the guarantor knew or reasonably should have known that the price set for the work was insufficient to cover the minimum wage and overtime pay owed by the contractor, asserting frivolous defenses, or unreasonably delaying or impeding the . . . investigation.

Id.

162. *See id.* § 2673.1(g).

163. *See id.* § 2673.1(h). Contractors and guarantors who appeal are liable for attorney's fees if they lose on appeal; employees are liable for attorney's fees only if the court determines that the employee appealed in bad faith. *See id.*

164. *See id.* § 2673.1.

165. *See* Telephone Interview with Thomas Glubiack, *supra* note 2. The investigation results reflect the Task Force's concentration on registration compliance: 50 percent of investigations find registration violations, while only one-third find wage and hour violations. *See id.*

independent investigations to identify back wage violations, the Task Force uses registration data to identify manufacturers and contractors who are likely to be violating registration requirements.

The DOL's concentration on wage and hour violations and the Task Force's concentration on registration enforcement suggest divergent goals in the two agencies. State registration laws typically intend to force underground industries to report their activities to the state.[166] By requiring registration, the Task Force can monitor entities that may otherwise violate labor laws, fail to pay taxes, or maintain dangerous workplaces. However, the Task Force lacks a system for identifying wage and hour law violators. The Task Force's inspections may not deter nonpayment of the minimum wage, because there is no causal connection between nonpayment of minimum wages and suspected failure to register, or to register properly. Contractors violating wage and hour laws can avoid a Task Force investigation by registering, because the Task Force only targets unregistered contractors. Unregistered contractors that pay less than the minimum wage have no greater a risk of triggering a Task Force inspection than other unregistered contractors. Thus, the Task Force's concentration on enforcing registration requirements may subordinate wage and hour law enforcement.

On the other hand, the DOL's approach may destabilize the industry by driving contractors and manufacturers further underground. If the DOL were to assess enough fines, a contractor may find that the costs of the DOL fines exceeds the benefits of being an "above ground" contractor. To avoid this increased cost, a contractor may hide its business, knowing that even if caught, it can still simply close and reopen under a new name.

In contrast, AB633 joins formerly separate offices in the California Department of Industrial Relations: the DLSE, which administers contractor and manufacturer registration, and the Labor Commission, which adjudicates wage claims in administrative hearings.[167] Inspections now occur in response to wage claims asserted by garment employees through the Labor Commission. California's strong nexus between registration requirements and inspections suggests a potential synergy between minimum wage enforcement and combating the underground economy. Inspections facilitate registration by creating penalties in wage claims for unregistered companies. Failing to register or contracting with an unregistered contractor makes a manufacturer strictly liable for its proportionate share of a wage claim. Registration facilitates inspections, because employ-

166. *See* Foo, *supra* note 8, at 2179.

167. *See* Anne Stevenson, Dep't of Labor Standards Enforcement Legal Dep't, Remarks at the Meeting Between the Labor Commissioner and the Garment Worker Coalition (Oct. 31, 2000) (on file with author).

ees and DLSE inspectors can use registration to track down manufacturers who work with contractors. Registration also facilitates inspections as an enforcement mechanism, by creating registration penalties for companies that fail to pay back wages. Finally, both registration and inspections are driven by the garment employees. Inspections are conducted in response to garment employee wage claims, instead of targeted by registration information. In AB633, garment employees play a role both in enforcing wage and hour laws and in forcing their employers "above ground."

B. Scope of the Laws

The New York law fails to adequately distinguish between retailers and manufacturers. *The Chasm* fits the New York definition of a manufacturer that "contracts with a contractor." However, because *The Chasm* also "sells or offers to sell" to consumers, it fits within the definition of a retailer.[168] If the Task Force considers *The Chasm* to be a manufacturer, it must register as one. But if a retailer cannot simultaneously be a manufacturer, the Task Force may consider *The Chasm* to be a retailer, and thus exempt from a manufacturer's wage liability. Such an interpretation would allow companies to circumvent New York's liability provisions by selling directly to consumers while simultaneously contracting with contractors.[169]

Similarly, in California, *The Chasm* may or may not be a "person." Although *The Chasm* is a corporation, which AB633 lists as a "person," it is also a retailer, which is not listed, even though other garment manufacturing entities, such as "manufacturers," "jobbers," and "wholesalers," are explicitly included in the definition of "person."[170] If *The Chasm* is a "person," it designs clothing, which is "garment manufacturing," and is thus a guarantor. However, if retailers are excluded from the definition of a "person," *The Chasm* can not be a guarantor. Therefore, both New York and California fail to craft a definition that would clearly hold *The Chasm* liable as a manufacturer.

Crafting an explicit definition of a "manufacturer" gives companies an incentive to restructure their production process to avoid liability. A retailer such as *The Chasm* would successfully avoid liability in both states as a manufacturer or guarantor in those instances in which it manufactures

168. *See supra* Part II.B.2.

169. The Apparel Industry Task Force interprets this provision as requiring all retailers that manufacture garments to register as manufacturers. *See* Telephone Interview with Thomas Glubiack, *supra* note 2.

170. Unlike manufacturers, jobbers, wholesalers, and contractors, retailers are not among the enumerated list of types of entities that are "persons" under AB633. CAL. LAB. CODE § 2671(a) (West Supp. 2001).

apparel with a jobber, like *Sherry*, instead of directly through contractors. At the same time, hiring *Sherry* would not reduce its indirect control over the employees, because it would still design the clothing and determine the price of the contract, the work-schedule, and the apparel quantity. Thus, retailers will be able to escape liability while maintaining indirect control over employees under both state approaches, through hiring a jobber.

Second, the New York law may fail to explicitly include in its purview manufacturers that sell directly to consumers. Under the New York law, a company such as *CD* fits the definition of a "retailer" that "sells or offers to sell" to consumers. However, *CD* also fits the definition of a "manufacturer," because it "contracts with a contractor," and "produces" apparel. One could argue in New York that *CD* is both a retailer and manufacturer. Although the Task Force currently requires manufacturers that fit both definitions to register as manufacturers, *CD* (like *The Chasm*) could circumvent the definition by contracting with a jobber. In contrast, in California, *CD* would be considered a "person" that "engages in garment manufacturing," and a guarantor of its contractors' employees' wages. Thus, *CD* would be jointly liable as a guarantor in California.

New York creates different legal regimes for manufacturers and retailers, while California's approach of treating all entities that manufacture garments equally (notwithstanding California's confusing definition of "person") better reflects the ambiguity inherent in the garment industry. New York's vague definitions of manufacturers and retailers give companies the incentive to operate within the legal definitions of a "retailer" to escape manufacturer liability. California allows less room for manufacturers to escape liability by resembling retailers, because both will be considered to be "guarantors" if they engage in "garment manufacturing."[171] New York's retailer exception undermines potential joint liability provisions: Even if New York adopted AB633's guarantor language for "manufacturers," retailers and manufacturers could simply restructure to resemble the statutory definition of a retailer. Under the New York law, garment retailers and manufacturers that control garment employees can avoid liability through restructuring, thus undermining the deterrent effect of the laws. Comparing both states' labor laws suggests that definitions that focus less on the specific functions of an entity and more on the general relationship of the entity to the garment employee are better-equipped to capture all entities that produce apparel.

The New York definition of manufacturers may also exclude middlemen, such as jobbers like *Sherry*, that take orders from manufacturers and

171. *Id.* § 2671(b).

hire contractors, but do not actually assemble the apparel. Under New York law, *Sherry* is a manufacturer if it contracts with a contractor. If *Sherry* "contracts" with a contractor when it places an order for garments, then *Sherry* satisfies the New York definition of a manufacturer. However, if New York interprets "contract" more narrowly to mean designing clothing for the contractor to produce, then *Sherry* may not be a manufacturer, because Sherry does not design or produce clothing. Further, the New York law would certainly exclude the manufacturers that hire *Sherry*, because those manufacturers do not contract directly with the contractor.

It is not clear that California would include *Sherry* as a guarantor either. As a "jobber," *Sherry* is a "person." However, *Sherry* does not directly assemble the apparel, so *Sherry* may not engage in "garment manufacturing." Placing the orders and procuring the materials may be "preparing," but AB633 may require direct preparation in the actual apparel manufacturing to be considered a "guarantor." Further, even if procuring materials satisfies the preparation requirement, *Sherry* could loan its contractors the funds to procure the materials themselves. *Sherry* would thereby be involved in no part of the apparel preparation, and may not be considered a guarantor. Therefore, both state definitions may exclude *Sherry* from the plain language of the laws, or would allow *Sherry* to escape liability through minor restructuring. In contrast, the manufacturers who hire *Sherry* would be considered guarantors in California, because they design apparel, and so are engaged in garment manufacturing. Although California's law is better equipped than is New York's to capture entities that manufacture garments, both laws suffer from vagueness that entities such as *The Chasm*, *CD*, and *Sherry* can manipulate to avoid liability.

Seizing apparel under hot goods provisions is the primary mechanism for New York's Task Force and the DOL to reclaim owed back wages for garment employees. In New York, manufacturers and contractors share the same standard of liability under the hot goods law. For liability to attach, the hot goods provision requires that a contractor or manufacturer such as *Sherry* or *CD* "knew or should have known" that the companies produced the garments in violation of state wage and hour law. Assuming this is a recklessness standard, goods could be seized from *Sherry* or *CD* if records reveal that the manufacturer formed contracts with the contractor, and that the contractor paid the employee a piece rate for less than what the minimum wage and overtime laws would permit.[172] Because the industry is

172. The Task Force calls this the "basis of value" test: If the manufacturer should have known that the contract was for less than the minimum wage, then the basis of value shows that the manufacturer violated the law. *See* Telephone Interview with Thomas Glubiack, *supra* note 2.

highly regulated, manufacturers such as *CD* could be expected to know that a contract at a certain price for a certain quantity of garments would be impossible to perform without breaking wage and hour laws. *Sherry*, with a standardized piece rate system for contractors, should know what contractors are paying its employees. However, because *Sherry* does not keep written records of its transactions with contractors, investigators would have difficulty proving what *Sherry* did or did not know about employee wages. Thus, the Task Force may encounter an evidentiary problem in meeting the recklessness standard.

By contrast, the FLSA's hot goods provision has no mens rea requirement.[173] However, under the FLSA, all entities, and under New York law, all retailers,[174] can only be enjoined from shipping hot goods if the entity or retailer acquired the apparel without assurances from the contractors that they obeyed the law, or if they have received notice of violations from the DOL or the Task Force. The first condition is unlikely to be met, because entities such as *The Chasm* require a *pro forma* assurance from contractors that they obey state and federal law. To meet the second condition, the DOL or the Task Force would have to investigate the contractor, identify *The Chasm* as the retailer that ordered the apparel, and notify *The Chasm* of the violation before *The Chasm* sells the apparel.[175] If the retailer used a jobber, like *Sherry*, the agencies would have to trace the apparel through two separate contracts to the end retailer.

In addition, under New York law, even after notifying *The Chasm*, the Task Force would have to determine the proportionate liability of all the retailers before it could seize the apparel from *The Chasm*. Apparel is often produced and shipped under strict deadlines, and once the apparel is sold to consumers, the hot goods law provides no remedy. Thus, retailers may be excluded or rendered judgment-proof by the New York hot goods provisions, especially if retailers use jobbers in their production process. Even under the FLSA, accurately tracing the apparel from the contractor to the retailer seems onerous.

Both hot goods laws could be more effective if garment employees reported owed back wages directly to agency investigators, who could give notice to the contractors to enjoin the shipment of apparel before it leaves

173. *See* 29 U.S.C. § 215(a)(1) (1994); Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 34 (1987) ("That Congress identified only two narrow categories of 'innocent' persons who were not subject to the 'hot goods' provision suggests that all other persons, innocent or not, are subject to § 15(a)(1).").

174. Except common carriers. *See* 29 U.S.C. § 215(a)(1).

175. The Task Force has stated that if there is one manufacturer, and the employee makes a complaint, then the Task Force can seize the goods on the same day. *See* Telephone Interview with Thomas Glubiack, *supra* note 2.

the workplace. However, neither agency educates the garment employees that prompt reporting could facilitate a hot goods seizure to recover their owed back wages. Thus, both agencies undermine their approach by failing to encourage garment employees to facilitate the hot goods enforcement. Although California does not explicitly incorporate employee education in its approach, it mitigates this lack of outreach by incorporating the wage claim into the Labor Commission hearing, a forum traditionally used by employees to assert wage claims.

In California, the standard of liability is the same for any "person" engaged in "garment manufacturing."[176] *The Chasm*, *CD*, and *Sherry*, if found to be manufacturers, would all be considered "guarantors" of the garment employees' wages. California's introduction of joint and several liability among guarantors may give an incentive for garment employees to assert wage claims through the Labor Commission rather than under the FLSA. Under the *Lopez* economic realities test, the proportion and duration of a contractor-manufacturer relationship are factors in determining whether the manufacturer is liable as an employer, while under AB633 proportion and duration is irrelevant in determining liability, because all manufacturers are potential guarantors. Under FLSA, *Sherry* may be shielded from joint liability because it contracts with many contractors. By contrast, California will hold *Sherry* to its proportionate share of liability, even if that proportion is small in each individual case.

In addition to back wages, garment contractors and guarantors may be liable for liquidated damages. However, guarantors are only liable for their proportionate share of liquidated damages if they show bad faith. If the Labor Commission requires the employee to show the guarantor's bad faith, it is unlikely that the employee will be informed enough about AB633 to assert this right.

Finally, AB633 holds the employer or guarantor who appeals the hearing decision liable for the employee's attorney's fees if the employee prevails, while the employee is liable for attorney's fees only if the court finds employee bad faith. This higher standard for the employee may suggest that the law gives employees an incentive to appeal. However, California does not articulate the standards for employee bad faith. If courts only award attorney's fees against the employee for egregious bad faith, such as paying witnesses to provide false testimony, then workers should generally appeal an adverse hearing decision. On the other hand, if courts award attorney's fees for delaying hearings or for vagueness in the claim for owed wages, employees may have a powerful incentive against appealing, because

176. CAL. LAB. CODE § 2673.1(a).

they would be liable for both the contractor's and guarantors' legal costs.[177] By contrast, if the employee asserts a pro se claim and has no legal costs to reimburse, the contractor and guarantor(s) may not stand to lose anything on the attorney's fees requirement.

C. Enforcement Mechanisms

1. Monitoring

Unlike New York and California, the federal approach is the only one that pressures manufacturers to monitor their contractors' shops. The DOL considers monitoring an essential link in ensuring compliance, and cites a 1997 survey showing that manufacturer monitoring resulted in 20 percent higher wage compliance, as compared to unmonitored contractors.[178] However, more recent empirical evidence indicates that monitoring is not an effective mechanism to reduce wage and hour violations. For instance, a DOL 1999 survey of garment contractors in New York City showed that 40 percent more monitored contractors paid below the minimum wage since 1997.[179] A DOL 2000 survey in Los Angeles showed increasing wage violations since 1998, despite increased pressure on manufacturers to monitor contractors.[180]

Although the DOL continues to tout monitoring as an effective strategy,[181] manufacturer monitoring seems to be a conciliatory approach that does not mesh with the stark reality.[182] In one example, the Disney corporation created Trinity Knitworks, a garment factory in Los Angeles, and hired private inspectors to monitor workplace conditions. However, when Trinity

177. Further, an employee who lost at the hearing stage would not be represented by the Labor Commission on appeal, and so is effectively barred an appeal unless a private attorney represented her.

178. *See* Alexis M. Herman, Remarks at the Marymount University Academic Search for Sweatshop Solutions (May 30, 1997), *available at* http://www.dol/asp/public/programs/history/herman/speeches/sp970603.htm.

179. *See* U.S. Dep't of Labor, *Conditions in New York City's Garment Industry Unchanged, but Tougher Enforcement Leads to Arrests* (Oct. 15, 1999), *at* http://www.dol.gov/dol/opa/public/media/press/opa/opa99300.htm.

180. *See id.* Random investigations by DLSE of garment contractors in Los Angeles revealed that only 33 percent of garment manufacturers paid their employees minimum wage and overtime, the lowest level since DLSE began recording compliance in 1996. *See* CAL. DEP'T OF LABOR STANDARDS ENFORCEMENT, APPAREL INDUSTRY SOUTHERN CALIFORNIA SURVEY (2000).

181. *See* U.S. Dep't of Labor, *supra* note 179.

182. One commentator describes self-monitoring as "nothing more than the fox guarding the chicken coop." Foo, *supra* note 8, at 2195. *But see* BONACICH & APPELBAUM, *supra* note 2, at 237 (concluding that self-monitoring "may be an important part of a comprehensive campaign against sweatshops, especially if monitors are not confined to the company and its own agents").

Knitworks closed, it left over $200,000 in unpaid wages owed to its 180 garment employees, and the inspectors "failed to notice that workers were not being paid."[183] In one case that recently settled, not only did the monitoring fail to result in contractor compliance, but the garment employees were allegedly fired after reporting wage violations to the monitor.[184] Citing both the DOL surveys and manufacturer abuse of monitoring policies, monitoring has been independently criticized for failing to reduce wage and hour violations.[185] On the other hand, monitoring may be effective as a DOL claim for prospective relief against a manufacturer whose contractor violated wage and hour laws. Upon granting relief, the judge could find the manufacturer in contempt if it failed to effectively monitor the contractor in the future.[186]

2. Investigations

The U.S. DOL, New York Task Force, and California DLSE all independently investigate garment production workplaces. However, independent investigations have failed to recover a substantial portion of garment employees' owed back wages. A recent government survey reported that DOL and DLSE investigations only recovered $1.3 million of the $73 million in back wages owed to garment employees in California in 1999.[187] And despite 1200 Task Force investigations in 1999,[188] wage and hour compliance in New York remains the same as that of two years before.[189] Even if an investigation can successfully recover owed back wages in an individual case, the volume of wage and hour violations in the garment industry undermines the investigators' ability to change how the industry operates. As long as investigations cost the industry less than paying the minimum wage, investigations alone are unlikely to improve wage and hour law compliance.

In contrast, in California, the garment employee claims drive the Labor Commission inspections. Under AB633, investigation levels match wage claim levels, because each wage claim necessitates a DLSE investigation and assessment. Thus, AB633 better integrates agency investigations

183. Patrick J. McDonnell, *Despite U.S. Funded Loan, Firm Closes Door with $200,000 Owed Workers*, L.A. TIMES, Dec. 1, 1998, at A1.

184. *See* Nancy Cleeland, *Garment Makers' Compliance with Labor Law Slips in L.A.*, L.A. TIMES, Sept. 21, 2000, at C1.

185. *See id.*

186. *See* Telephone Interview with Jerry Hall, *supra* note 89.

187. *See* BONACICH & APPELBAUM, *supra* note 2, at 236.

188. *See* Telephone Interview with Thomas Glubiack, *supra* note 2.

189. *See* U.S. Dep't of Labor, *supra* note 179.

with the direct recovery of back wages for employees. However, one could argue that the scope of Task Force and the DOL inspections is more realistic. If tens of thousands of garment workers assert wage claims in California under AB633, Labor Commission deputies would be hard pressed to process these claims, because each claim would require an independent investigation with a finding and assessment of owed back wages and proportional liability. One could argue that AB633 erred in requiring independent investigations, and that the Labor Commission instead should simplify the hearing process for the pending claims.

Yet, requiring garment employees to take over the discovery process will derail the hearing process as a forum for pro se claims. To properly represent herself, a garment employee would be required to independently calculate the total owed wages over a three-year period. This calculation is particularly onerous for garment workers, who may not have access to equipment to make the calculations, much less accounting skills to accurately calculate back wages over different minimum wage levels and to make separate calculations for normal wages and overtime. An investigator must make an assessment of owed back wages independently, which includes a weekly calculation of owed back wages. Although the investigator's finding is inadmissible at a hearing,[190] garment employees can use the investigator's weekly calculations as a template for the final calculation submitted before the hearing. Next, a garment employee would have to apply to the state to obtain the contractor's and guarantors' registration application, and read the application herself to determine if the company is registered and, if so, the names and addresses of the company owners. Lastly, the worker would have to identify potential guarantors herself. With an agency investigation, the garment employee can rely upon the investigator's assessment to ascertain registration and owner information. Therefore, the investigation is crucial to make the hearing viable for pro se claimants.

3. Registration

Both California's and New York's labor laws require manufacturers and contractors to register with the state. However, although New York's law charges the Task Force to inspect contractors and manufacturers for registration compliance, the law does not require wage and hour compliance as a condition for certification.

190. *See* CAL. LAB. CODE § 2673.1(d)(3) (West Supp. 2001).

Arguably, both New York and California registration laws could link registration requirements with wage and hour enforcement through registration revocation. However, registration revocations are a limited enforcement mechanism because in both states, if the entity appeals the revocation, the agency has the burden to show that it properly revoked the registration. The Task Force and the DLSE may have an incentive to instead deny registration renewals, because the burden of proof is on the company to prove that the agency wrongfully denied the renewal application.

Although denying a renewal could be easier because the contractor or manufacturer is less likely to appeal, denying a renewal is also less likely to deter wage and hour violations, especially for a contractor. The DOL estimates that the average contractor operates for two years before closing.[191] Given the instability of contractors, who can close and register under a new name with relative ease, paying the minimum wage may be more costly than closing and re-registering. Contractors who know that their renewal applications are likely to be denied may simply close their shop and open under a new name, thus escaping a disruption in their production. By contrast, revoking a registration is likely to impose a substantial cost on the contractor, because it would be in breach of all outstanding contracts that it could not fulfill. In addition, manufacturers would be more likely to monitor a contractor's shop if they knew that violations could result in a disruption in their production process. Therefore, denying a renewal application is no substitute for registration revocation of wage and hour violators.

Retailers may be excluded from both the New York and California registration provisions. However, New York retailers, unlike those in California, cannot be fined or criminally sanctioned for contracting with an unregistered manufacturer or contractor. Assuming that *The Chasm* is engaged in garment manufacturing, AB633 would consider *The Chasm* a guarantor, and jointly liable with an unregistered contractor for garment employee owed back wages.

In New York, in order to sanction a manufacturer, such as *CD*, for contracting with an unregistered contractor, the law requires that the Apparel Task Force prove that *CD* knew that its contractor was unregistered. Similarly, to apply the criminal sanction of a Class B misdemeanor to a company that fails to register, the Task Force would need to prove that the company "intentionally failed" to register. The knowledge and intent requirements are difficult to prove, unless the contractor and/or manufacturer have been previously cited.

191. *See* Telephone Interview with Jerry Hall, *supra* note 89.

Unlike in New York, in California there is a nexus between registration and the wage claim hearing. If the contractor is unregistered, the manufacturer is automatically jointly liable for back wages. After the investigator assesses whether the contractor or guarantor is registered, the garment employee has an incentive to use the registration information to further her own claim.[192] By contrast, in New York there is no liability provision for wage claims against unregistered companies, and a garment employee does not have formal access to the Task Force registration files, unless the employee files a New York Freedom of Information Law (FOIL)[193] request. Further, because contractors do not have to list the retailers they work for in New York, it is not clear how the employee would be able to discover that the contractor works for *The Chasm*.

4. Adjudication

A garment employee cannot assert a wage claim privately through the DOL or the New York Task Force. The lack of participation by the aggrieved garment employee in the process is one factor in balancing the concerns of efficiency, fairness, and efficacy. Litigating on behalf of workers is certainly more efficient than a hearing, and the DOL represents all workers and litigates without employee participation. Further, DOL litigation may be more fair than a hearing for employees, because the DOL calculates the owed back wages and employees are not subjected to cross-examinations. However, the effectiveness of DOL litigation depends on how adequately the employees are represented through the process.

Besides the lack of litigation caused by a lack of DOL investigations, litigation may be ineffective if the DOL settles for a fraction of the total amount owed to employees. For example, of the more than five million dollars in back wages owed to workers involved in the El Monte case, the DOL offered a settlement of merely $247,000 to the workers—less than 5

192. Even with a state assessment of the contractor's or guarantor's registration status, the garment worker still faces the barrier of needing to know the statutory effect of failure to register with the state in order to assert her rights. This barrier could be overcome if the hearing officer automatically assesses registration penalties in pro se cases.

193. N.Y. PUB. OFF. LAW §§ 84–85 (McKinney 1988). The New York Freedom of Information Law (FOIL) provides access to all records from a public agency, unless an exception permits an agency to deny access. Section 87(2) enumerates exceptions to FOIL, such as confidential information or information that would interfere with contract negotiations or divulge trade secrets. *See id.* § 87(2). New York's Registration requirement probably does not rise to the level of confidential information. However, even if the law permits access to these records, the Task Force may deny the request, and the employee would have to appeal the decision. *See id.* § 89(4)(a). If the appeal were denied, the employee's only remedy would lie in challenging the denial in civil court. *See* N.Y. C.P.L.R. 7801 (McKinney 1994).

percent of the claimed back wages.[194] The DOL asserted the claim against the contractor and a single manufacturer,[195] even though then U.S. Labor Secretary Robert B. Reich concluded that "[i]t is clear from our investigation that this merchandise found its way to the racks and shelves of some of this nation's most prominent retailers."[196] That the DOL's success criteria is the aggregate sum of settlements nationwide indicates that the percentage of total owed back wages received through settlement is not a primary concern for DOL.[197]

On the other hand, unlike California, where only the employees who assert the claims receive the ultimate award, the DOL litigates on behalf of all the employees in the workplace. If the DOL were able to increase its investigations to affect a significant number of workplaces and effectively represent employees in litigation, litigation through the DOL may be a superior approach for garment employees who will not assert their own wage claim. However, lacking these two conditions, a pro se approach will benefit employees who otherwise have no remedy from the DOL, or a remedy incommensurate to the employee's claim. Even if DOL litigation were more effective, AB633 could improve labor law enforcement by allocating agency resources to inspect the most likely wage and hour law violators.

5. Interagency Cooperation

Garment contractors recruit primarily from immigrant communities. Therefore, DOL inspections are problematic when considered in conjunction with the Immigration and Naturalization Service's (INS) enforcement of immigration law in the workplace.[198] The 1986 Immigration and Reform Act (IRCA)[199] criminalized the relationship between employers and

194. In 1999, the 104 garment employees settled for more than four million dollars with contractors and manufacturers. *See* Kristi Ellis, *El Monte Sweatshop Defendant Pays $1.2 M.*, WOMEN'S WEAR DAILY, July 30, 1999, at 23.

195. *See* U.S. Dep't of Labor, *Labor Department Recovers $247,000 in Back Pay for South El Monte Garment Workers*, *at* http://www.dol.gov/dol/esa/public/media/press/whd/sf091399.htm (last visited Sept. 20, 2001).

196. Patrick J. McDonnell & Paul Feldman, *New Approaches to Sweatshop Problem Urged*, L.A. TIMES, Aug. 16, 1995, at A1 (quoting Robert B. Reich).

197. *See* U.S. Dep't of Labor, *Garment Enforcement Report* (July 1999–Sept. 1999), *at* http://www.dol.gov/dol/esa/public/nosweat/garment16.htm (last visited Sept. 20, 2001).

198. INS policies undermine the efficacy of other federal agencies as well. In 1999, a Holiday Inn fired nine of its employees and reported them to INS during a union organizing drive. Despite findings by the NLRB and the Equal Employment Opportunity Commission (EEOC) that the hotel violated the NLRA and Title VII, all nine housekeepers were deported because they lacked work authorization. *See* Michael D. Patrick, *EEOC Seeks Complaints from Unauthorized Workers*, N.Y. L.J., Jan. 24, 2000, at 3.

199. Immigration Reform and Control Act (IRCA) of 1986, 8 U.S.C. § 1324 (1994).

undocumented employees. Although the legislature explicitly intended IRCA to sanction employers, and not employees,[200] immigration laws are a barrier to wage and hour enforcement.[201] Wages for garment workers fell precipitously after the enactment of IRCA,[202] and the General Accounting Office reports widespread employee reluctance to report labor law violations for fear of deportation.[203] Court interpretation of the exclusionary rule's applicability to INS deportation proceedings validates employee concerns of employer retaliation. In *Montero v. INS*,[204] the Second Circuit recently held that evidence of undocumented status is admissible in an immigration hearing even if obtained because the employer reported the employee to INS in violation of employee retaliation laws.[205]

Recent federal administrative decisions indicate only a subtle shift away from DOL and INS cooperation since the passage of IRCA. In 1992, the DOL and the INS signed a Memorandum of Understanding (MOU), agreeing that the DOL must turn over to the INS the names of undocumented workers who call them over wage and hour violations.[206] But the DOL and the INS signed a new MOU in 1998, agreeing that DOL investigators will not ask employees about their immigration status or forward immigration information to the INS in *complaint-driven* investigations (investigations resulting from complaints by employees at a particular work-

200. Courts generally find that IRCA's purpose is to limit the economic incentive of illegal immigration by punishing employers who hire undocumented workers. *See, e.g.*, NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 58 (2d Cir. 1997) ("IRCA demonstrates a Congressional intent to punish employers of illegal aliens, not to grant them any additional reward for their illegal actions."). *But see* Del Rey Tortilleria Inc. v. NLRB, 976 F.2d 1115, 1119 (7th Cir. 1992) (reasoning that an undocumented employee "has not been harmed in a legal sense by the deprivation of employment to which he had no entitlement").

201. *See* Goldstein et al., *supra* note 17, at 996 (stating that employer sanctions create "negative incentives for workers to enforce their rights or even speak up about underpayment of wages and other unlawful working conditions").

202. UCLA researcher Goetz Wolff found that after the INS implemented employer sanctions, hourly wages in Los Angeles fell 21 percent for garment employees, from $6.37 in 1988 to $5.62 in 1993. *See* David Bacon, *Labor/Immigration-U.S.: Bringing Back Sweatshop Conditions*, INTER PRESS SERV., Oct. 14, 1998.

203. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 4, at 34. For example, "[i]n Los Angeles the INS initiated a raid in garment sweatshops, called Operation Buttonhold, in response to information from DOL inspectors. In one raid on P.K. Fashions, garment worker Miguel Angel Garcia Serrano was so frightened he jumped out of an eight-story window." Bacon, *supra* note 202. IRCA has also resulted in work place discrimination against legal residents for their national origin. *See* U.S. GEN. ACCT. OFFICE, PUB. NO. GAO/GGD-99-33, ILLEGAL ALIENS—SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 5 (1999).

204. 124 F.3d 381 (2d Cir. 1997).

205. *See id.* at 386 (reasoning that reporting an employee to the INS for supporting a union organizing campaign is not an egregious violation of the Fourth Amendment).

206. *See* U.S. DEP'T OF LABOR & IMMIGRATION & NATURALIZATION SERV., MEMORANDUM OF UNDERSTANDING, DLR NO. 113 (6/11/92) D-1 (1992); *see* Bacon, *supra* note 202.

site).[207] However, in *directed* cases (those resulting from DOL targeting of noncompliant industries), the DOL still must continue to refer all suspected undocumented employees to the INS.[208] Nearly 80 percent of DOL investigations are directed rather than complaint-driven,[209] so the 1998 MOU does not substantially improve the DOL's ability to protect garment employees' rights under the FLSA without implicating the employees' immigration status.

The policy guiding complaint-driven inspections seem clear. INS action against employees who complain of wage violations may deter future employee complaints. Yet, the DOL has not articulated the converse argument as to why reporting undocumented employees to the INS in directed investigations will not deter employees from complaining. If a garment employee associates a random DOL inspection with an INS raid, there is little reason for her to think that a complaint-driven inspection will not also result in a raid. Clearly, any association between the DOL and the INS undermines the DOL's efforts to enforce wage laws. That the DOL and the INS are housed in the same building in New York City suggests the DOL's insensitivity to this issue.[210]

6. AB633 Improves on New York and Federal Law, but Lacks Clarity on Joint Liability and Process

Lacking a shift of federal DOL policy toward aggressive inspections and prosecutions, as well as insulation from the INS, the DOL has not demonstrated the capacity or the will to enforce wage and hour law on behalf of garment employees. AB633 improves on both the federal approach and New York's Labor Law 12-A by strengthening joint liability language, utilizing company registration as evidence for employee wage claims, and reconfiguring the hearing process to encourage employees to act as watchdogs for their employers.

However, all approaches fail to address two important questions. First, what is the most appropriate general test to determine whether a company is a joint employer? The DOL prefers to litigate under the FLSA's hot

207. *See* U.S. DEP'T OF LABOR & IMMIGRATION & NATURALIZATION SERV., MEMORANDUM OF UNDERSTANDING, DLR NO. 227 (11/25/98) D-1 (1998).

208. The DOL intended the new agreement to "ensure that exploited workers are not discouraged from filing complaints because they may fear that [the DOL's] investigation will be the cause of an INS enforcement action at the worksite." Memorandum of Understanding, *supra* note 207.

209. *See* Telephone Interview with Jerry Hall, *supra* note 89.

210. The INS and DOL district offices in New York City are both located in 26 Federal Plaza in Manhattan.

goods provision rather than under joint employer theories. The New York Task Force only considers contractors to be employers. California sidesteps this question by declaring garment manufacturers to be wage "guarantors" only within the limited scope of a Labor Commission hearing.

Second, what is the most appropriate forum for garment employees to assert wage claims? The DOL's and New York's top-down approaches are dissatisfying because garment employees lack standing to assert wage claims through federal and New York hot goods provisions; under AB633 garment employees have a claim against the employer, but AB633 folds the claims into the standard Labor Commission wage claim hearing process. These two questions are the focus of the next section.

IV. RECOMMENDATIONS FOR A MODEL STATE LAW

A. States Should Amend the Labor Law Definition of "Employer" to Include Garment Manufacturers and Retailers that Integrate Contractors into Their Production

State approaches that exclude certain retailers from liability as joint employers are defensible on policy grounds. A general retailer that does not have the ability to produce garments on its own but purchases apparel through a manufacturer may not know what the contractors' employees earn. Holding such a general retailer liable for garment employee wages may not deter wage and hour law violations, if the general retailer lacks the ability to ensure that garment employees are paid the minimum wage. Therefore, the states and the FLSA appropriately exclude entities that lack knowledge or the capacity to change the terms and conditions of garment workers' employment.

However, the federal judiciary's multifactor economic realities test creates exceptions that manufacturers and retailers can manipulate to avoid liability while maintaining indirect economic control over the contractor and over garment employees. For example, *Lopez* interprets both ownership and supervision factors in considering whether the manufacturer purchased the materials and conducted oversight. If the manufacturer requires the contractor to purchase the materials and oversee the apparel quality itself (like *The Chasm*), the manufacturer may not satisfy these factors. Further, if the contractor contracted with multiple manufacturers for short periods of time, then a court could find that the manufacturer fails to satisfy each of the proportion, duration, and business association factors. Thus, a company would not meet five of the seven factors if it signed "full package

contracts" with the contractors, and contracted with multiple and changing contractors.

Any joint employer test that falls short of capturing all entities that produce garments will not result in increased compliance with wage and hour laws.[211] Therefore, states with a substantial garment industrial sector[212] should craft a version of the economic realities test that asks "whether the employees in question are economically dependent upon the putative employer."[213] Such a test would hold manufacturers and retailers with indirect control liable for wage and hour violations, and presume a joint employer relationship unless the employer can show the contractor's lack of integration and interchangeability in the entity's production process.[214] This presumption will operate to hold liable any company that contracts with contractors merely to avoid liability. On the other hand, creating a presumption has an advantage over a strict liability regime in that it preserves the category of independent contractors for companies that are truly independent of the contractee's operations.

This Comment recommends the insertion of the following language in the labor laws of states with significant garment manufacturing, in order to better address wage and hour violations:

> This presumption affects the burden of proof.[215] Persons and entities that contract with a second person or entity to produce apparel are

211. According to one commentator, "without the imposition of liability on manufacturers by judicial interpretation of labor law, manufacturers will not be effectively deterred from contracting with sweatshops and the demand for sweatshop labor will prolong substandard working conditions." Leo L. Lam, Comment, *Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops*, 141 U. PA. L. REV. 623, 655 (1992).

212. DOL investigation concentration suggests that California, Florida, Illinois, New York, and Texas have the highest concentrations of garment companies. *See* U.S. Dep't of Labor, *supra* note 4.

213. Lopez v. Silverman, 14 F. Supp. 2d 405, 413–14 (S.D.N.Y. 1998). State economic regulation has long been upheld as a legitimate exercise of a state's general police powers. The U.S. Supreme Court has held that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." Metro. Life Ins. Co v. Massachusetts, 471 U.S. 724, 756 (1985) (citation omitted); *see also* Fair Labor Standards Act, 29 U.S.C. § 218(a) (1994) (stating that the FLSA does not preempt state minimum wages that are above the FLSA floor); Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n, 520 N.E.2d 528, 531 (N.Y. 1988) (State economic regulation "must be sustained if it has any reasonable relation to the State's legitimate interests."); Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1004 (Cal. 1999) (upholding economic regulation as serving a legitimate state interest).

214. "Joint liability legislation is necessary because the tightly integrated nature of the garment manufacturing business means that retailers and manufacturers are *de facto* responsible for the factories they hire, since they effectively determine the conditions of employment." L.A. JEWISH COMM'N ON SWEATSHOPS, *supra* note 16, at 29.

215. This language intends to create a Morgan-McCormick presumption affecting the burden of persuasion. Such a presumption will not disappear upon proof of lack of integration and interchangeability, but will rather shift the burden of proof to the entity to prove that the

> presumed to suffer or permit to work all employees of the second entity who are involved in apparel production. In order to rebut this presumption, the person or entity must show that the second person or entity provided a service that the former could not integrate into its production process because its scale and scope were insufficient to integrate them, and that the second person or entity possessed a bargaining position sufficient to negotiate the terms and conditions of the contract with the first person or entity.[216]

B. Administrative Hearings Should Admit Administrative Investigations into Evidence

One commentator argues that unless garment employees are able to assert wage claims as private plaintiffs, "governments will lose the battle against the underground economy."[217] Yet, the creation of a private right of action is insufficient to deter wage and hour law violations because garment employees lack access to the legal system to assert this right, especially after the defunding of, and restrictions on, free legal services.[218] Therefore, a state approach that incorporates garment employees in the enforcement process must reduce the barriers to garment employees asserting pro se claims.[219] The hearing process must guarantee that the garment employees'

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contractor is independent. Although this presumption is not available in federal law, it exists in many states, including California. *See* CAL. EVID. CODE § 606 cmt. (West 1995).

216. For a federal economic realities test that would measure integration and ownership, see Goldstein et al., *supra* note 17, at 1142.

217. Foo, *supra* note 8, at 2181; *see also* Barbara E. Koh, Note, *Alterations Needed: A Study of the Disjunction Between the Legal Scheme and Chinatown Garment Workers*, 36 STAN. L. REV. 825, 856 (1984) (predicting that "[o]nce [garment employees] . . . see the benefits [of a private wage claim], they will act as their own watchdogs . . . .").

218. Lack of access to the legal system is a general problem for low-income plaintiffs. *See* Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2241 (1999) ("The American Bar Association Commission on Nonlawyer Practice found in 1995 that as many as 70% to 80% or more of low-income persons are unable to obtain legal assistance even when they need and want it." (citation omitted)).

219. Obviously, any law is only as effective as the enforcer's implementation. In California, the Labor Commissioner has been criticized by commentators for failing to enforce wage and hour law compliance, and for being too removed from communities that suffer from wage violations. One study of the first fifteen months of the DLSE's implementation of AB633 found that the agency processed less than one claim per day, only 29 percent of which identified a guarantor, and that of $320,569 in DLSE judgments against contractors and guarantors, DLSE collected merely $17,274 from contractors, and failed to collect anything from guarantors. *See* Gary Blasi et al., *Implementation of AB633: A Preliminary Assessment* 2–8 (July 26, 2001), *at* http://www.law.ucla.edu/AB633PreliminaryReportDraft72601.htm. This report attributed these findings to a lack of outreach to garment worker communities, language, and logistical barriers in filing claims with DLSE, agency failure to identify potential guarantors, and insufficient resources devoted to collecting judgments. *See id.* at 8–9. One commentator, comparing the Labor Commission's dismal enforcement record with the California Rent Board's "open" hearing process and

rights can be asserted and the remedy enforced fairly and within a reasonable period of time.

Hearings as they currently exist disadvantage the garment employee, who has neither the resources to hire a lawyer nor the time to prepare her case. Contractors and manufacturers, on the other hand, can hire an attorney and manipulate the process to avoid liability and to hide assets. Opposing attorneys can interrogate employees unfamiliar with the hearing procedures and discredit them in front of the hearing officer. The pro se claimant may find herself answering questions about irrelevant matters, such as her immigration or marital status, or whether she receives public assistance. A manufacturer or a retailer is more likely to prepare with an attorney, and therefore to provide coherent testimony. An employee who does not have the time to calculate a weekly wage chart will find herself accosted by opposing counsel in cross-examination, and will be interrogated about every specific week for which she claims back wages. If the garment employee has no records and no witnesses, the hearing officer will decide based on which party seems more credible. An employee confronting these barriers may decide that the potential benefit of back wages are outweighed by the low chances of success and the cost of a lengthy and potentially traumatic hearing process.

The Labor Commission could remove these barriers by making the investigator's finding and assessment admissible in the hearing. Making the assessment admissible would convert the investigation into discovery necessary for the hearing officer to make an informed judgment. Further, allowing the assessments would streamline wage claims. Investigators could perform the wage calculation within the time frame of the statute, whereas if the employee is responsible for the calculations herself, the process may take much longer. Thus, admitting agency investigations at the hearing would reduce psychological and time barriers for garment workers who may be otherwise willing to assert pro se claims.

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relative success in San Francisco, argues that the Labor Commission should decentralize hearings and educate employees on the process. *See* Koh, *supra* note 217, at 855–56.

V. POTENTIAL CRITICISMS OF AND RESPONSES TO JOINT EMPLOYER LIABILITY AND A PRO SE CLAIM PROCESS

A. Joint Liability Is Not Closely Tailored to Recover Garment Employee Back Wages

One could argue that an economic realities test that defines "employer" to include manufacturers with indirect control collapses the distinction between an employer and an independent contractor, thereby changing the entire legal system.[220] A state law that expands "employer" to consider manufacturers and retailers as presumptive employers of garment employees would reduce demand for legitimate uses of independent contractors, both in garment and other industries. Such a test punishes manufacturers and retailers who may be ignorant of their contractors' wage and hour law violations.[221]

For the garment industry, an economic realities test that considers integration and interchangeability would include retailers and contractors involved in garment production, while excluding general retailers who merely purchase the apparel. Companies such as *The Chasm*, *CD*, and *Sherry* decide on the contract amount and price, and instruct the contractor about how to prepare and sew the apparel. The contractors have little bargaining power to change the contract terms, and add no skills or capital equipment that *The Chasm*, *CD*, and *Sherry* could not provide themselves. Thus, they would be considered joint employers of the contractors' employees. On the other hand, general retailers that purchase apparel from *CD* would not be joint employers, because they lack the capacity to design and produce garments. Further, if *The Chasm* hired a contractor to perform a unique hand-stitch apart from the garment production, and the contractor could effectively bargain for the terms of the contract, then *The Chasm* could defeat the presumption by showing a lack of integration or interchangeability. Therefore, this language would uphold the legitimate use of

220. Leo Lam writes:

> An independent contractor is one who contracts to do something for the contractee but who is not controlled by the contractee or subject to the contractee's control with respect to the manner in which the performance of the contract is undertaken. . . . "Independent contractors" . . . do not fall within the FLSA definition of "employee," and the status of the garment sweatshop owner as an independent contractor can free the manufacturer from liability for labor law violations occurring in the sweatshop.

Lam, *supra* note 211, at 645–46 (citation omitted).

221. *See id.* at 645 ("[U]nder a free-market theory, an ignorant buyer should not be held accountable for the seller's wrongdoings.").

an independent contractor to provide a unique service or resources that the company lacks, while holding liable companies that contract out merely to escape liability for the underpayment of employees.

Indeed, this test applies equally well to other industries that employ contingent labor. In agriculture, an integration/interchangeability test would consider all growers who hire unskilled labor to pick crops as part of their production process to be employers. In contrast, grocers who buy produce from growers would not be liable, because they are not involved in the production process. In meatpacking, all slaughterhouse owners would be liable as employers because they integrate deboners into the meatpacking process, and the deboners have little ability to bargain for the contract terms. However, the entites that purchase meat from the slaughterhouse would not be liable, because they are not involved in meat production.

On the other hand, for industries that are less dependent on contingent labor, this test seems overly broad. An independent contractor's employee in the construction industry, for example, may be integrated in the construction of a building, and the laborer's skills and equipment may be within the general contractors' scope of operations. However, one could argue that the independent contractor system is necessary in the construction industry, where general contractors need to find contractors quickly to fill orders, and have no knowledge of their contractors' employment practices. Similarly, a public hospital system may contract with private clinics to provide outpatient care to an underserved community. Although the clinics are integrated into the public health system and provide services that the state could itself provide, if the state is considered an employer, it will be forced to develop a layer of human relations for the clinic employees that would increase the cost of the clinic contracts. The state may find that this additional burden would make providing these medical services unfeasible.

Therefore, states may wish to add conditions for applying this test to industries beyond the garment industry. The above analysis suggests that states should consider (1) whether the industry is dependent on the contracting system, and (2) the history of wage and hour law compliance in the particular industry. In this analysis, the agriculture, meatpacking, and garment industries all have a history of hiring contingent laborers, and of utilizing the contracting system to avoid legal responsibility for owed back wages. If all companies in these industries involved in production were considered joint employers, the industries would need to account for minimum wages in their contracts, or risk wage claims (and resulting penalties) from employees. On the other hand, construction and health services, though relying on contract labor, are not well-known for

restructuring employment practices to avoid liability under wage and hour laws. In these industries, liability may not provide a deterrent effect for paying the minimum wage, because the companies do not exert enough control over the contractors to force them to comply with wage and hour laws. Further, liability may have unanticipated adverse consequences, such as a decrease in medical services. Thus, courts should consider applying an integration/interchangeability test to industries that are dependent on contingent labor and have a history of restructuring its production process to avoid liability.

B. Admitting Investigations Will Remove Due Process Protections for Contractors and Guarantors

One could argue that investigation inadmissibility preserves important due process protections for the contractors and guarantors. The hearing places the initial burden on the employee to show that she worked at the contractor's workplace and performed work for the guarantor(s). The burden then switches to the employer to refute the claim. If the investigation were admissible, one could argue that the assessment alone would satisfy the employee's burden. The hearing would then begin with the burden on the contractor and guarantors. Thus, a critic may argue that admitting investigations at the hearing level denies due process protections for the contractor and guarantors.

However, admitting investigation evidence will not unduly prejudice any party. If the employer does offer credible employee records to the investigator, the investigator will make an assessment based on those records, thus benefiting the contractor in the hearing. On the other hand, if the employer has no employee records, the assessment should not affect the hearing, because the hearing officer is instructed to find for the garment employee unless the employer produces credible employee records. The hearing officer, lacking any evidence from the employer, would find for the employee regardless of the assessment, unless the employee's testimony is inconsistent or not credible. Second, admitting investigations is already a widely accepted practice by state and federal courts, which admit agency investigations under the public records hearsay exception.[222] In the context of labor and employment law, federal DOL and NLRB investigations have long been held admissible evidence in courts.[223] Moreover, any due process

222. *See* FED. R. CIV. P. 56(c); FED. R. EVID. 803(8)(c).

223. *See, e.g.*, Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc., 653 F.2d 143, 145 (5th Cir. 1981); United States v. Sch. Dist. of Ferndale, 577 F.2d 1339, 1354–55 (6th Cir. 1978).

concerns created by introducing investigations at the hearing can be resolved within the hearing process. Upon introducing the investigation into evidence at the hearing, the opponent party should have the opportunity to cross-examine the investigator, and any witnesses referred to in the investigation. This will remove the concern that a party is denied the right of confrontation.

Finally, even if admitting the investigation prejudices contractors and guarantors, efficiency and fairness to the garment employee are dominant concerns in creating a state hearing process. According to federal and state investigations, hundreds of thousands of garment employees across the nation are denied their legal right to a minimum wage.[224] Congress and state legislatures have responded to this crisis by passing laws intended to regulate the minimum wage by providing a forum to garment employees. However, for states to realistically deter minimum wage violations in the garment industry, states must provide garment workers a fair and efficient forum to collect their owed back wages. Contractors and guarantors will have the incentive to delay the decision and appeal until the garment worker finds herself without the time or resources to continue the adjudication. States should respond by creating a system that is not open to manipulation. Thus, the value of removing pro se barriers and of streamlining the hearing process outweighs any prejudice that the contractor would suffer from an admissible, independent assessment.

C. Aggressively Enforcing Wage and Hour Laws Will Harm Garment Employees

Changing laws to increase legal liability among retailers and manufacturers could produce unpredictable results. Aggressively enforcing wage and hour laws could drive contractors underground, speed up production, or force contractors to take the increased wages out of other important areas, such as workplace safety. Increasing wages may increase the process of globalization.[225] Manufacturers and retailers may contract internationally to decrease production costs, thereby eliminating domestic jobs. Strengthening enforcement may harm employees who will pay for the increased wages in other costs, or lose their jobs entirely.[226] One could argue

224. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 4, at 2.

225. "If we succeed in raising labor standards, which is an inevitable concomitant of eliminating sweatshops, the industry will, it is widely believed, then leave Los Angeles, because labor costs will be too high to sustain a local apparel industry. In curing the disease, we may kill the patient." BONACICH & APPELBAUM, *supra* note 2, at 221.

226. *See* Koh, *supra* note 217, at 857 ("It should be recognized, however, that full enforcement of the labor laws in Chinatown may have harsh practical and economic effects . . . . Should

that the current, weaker enforcement gives unskilled employees the opportunity to support their families.

While globalization has decreased the aggregate number of garment production jobs in the United States, the rate of decline in garment production is leveling off,[227] and the industry is growing in Los Angeles.[228] Empirically, it is not clear whether lower labor costs abroad outweigh import quotas and shipping costs,[229] government subsidies available to domestic manufacturers and contractors,[230] and the prevalence of low-income communities in the United States.[231] Second, even assuming a higher domestic production cost, the benefit of domestic production may outweigh the cost for manufacturers and retailers who desire quality oversight, sudden changes in clothing design, and quick shipping to stores.[232]

Even if effectively enforcing wage and hour law reduces garment employment, Congress, in enacting the FLSA, articulated an intent to value basic human rights over poverty wage jobs. Subsequent minimum wage increases have shown a continued congressional commitment to link the minimum wage to a minimum living standard. There is no principled argument why the garment industry should be exempted from the same standards that apply to all other industries. If apparel cannot be produced in this country without undermining labor laws, then upholding basic employee rights outweighs the value of poverty employment.

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it be large, then the legislature might want to create an exception to the labor code to preserve the existing Chinatown garment industry.").

227. The rate of employment job loss in the garment industry from 1986 to 1996 is projected to decline over 30 percent from 1996 to 2006. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 429 (119th ed. 1999).

228. "The number of apparel manufacturing jobs in L.A. rose by 19 percent between 1993 and 1998, from 92,500 to 110,000." Bowles, *supra* note 7, at 14.

229. One commentator notes that "[r]ecently, apparel manufacturing firms have shifted their operations from foreign countries to the United States in efforts to avoid stiff import quotas and shipping costs." Lam, *supra* note 211, at 631.

230. For example, domestic contractors and manufacturers may benefit from tax breaks for locating in economic redevelopment zones, and federal and local subsidies in local construction, utility and capital improvements.

231. Garment production follows low-income neighborhoods to find the domestic labor pool most willing to accept the lowest wages. For example, in New York, the garment industry has shifted from Chinatown, Manhattan, to other low-income neighborhoods, such as "Sunset Park, East Williamsburg, Ridgewood and Long Island City . . . ." Bowles, *supra* note 7, at 12.

232. According to Jonathan Bowles, of the Center for an Urban Future

> "There's nothing like controlling the quality of goods that are being made across the street," says Konheim [CEO of Nicole Miller] . . . . "When it's across the street, the lapse time is just a few minutes. The quality gets immediately better. What it means to your business is that you're not making mistakes and you don't have to give away any garments."

Id. at 11.

D. Alternative Solution: State Run, Strict Liability Insurance Program

One could argue that California's Labor Commission hearings will not impact wage and hour violations, because retailers and manufacturers will simply restructure their production and manipulate the hearing process to avoid liability. Instead, states may create an insurance program, modeled after unemployment insurance, that compensates employees for owed back wages. An employee would present her evidence to a Wage and Hour Board that would approve or deny her claim based on a burden of production (for example, employee testimony, documents proving that she worked at the factory, manufacturer labels, pay stubs). The board would have an investigator conduct an independent investigation and assessment, and examine the employer's evidence to refute the claim. The board would approve or deny the claim based on whether, looking at all available evidence, the employee received less than the minimum wage.[233] All manufacturers and retailers would contribute their proportion of sale volume in the garment industry to the insurance pool, adjusted for the individual violations of contractors with whom the individual manufacturers and retailers contract. Although the insurance rates may be high because of the high incidence of violations, these payments would simply reflect what the industry would pay for minimum wage. Further, manufacturers and retailers could benefit from an insurance system under which they would not be required to pay wage penalties, but would simply incorporate the minimum wage into the retail price of clothing.

Although an insurance system would preserve the due process of the parties' offer of proof and eliminate some barriers for garment employees, any legislative approach to unemployment is problematic as an analogy for collecting owed back wages, because it is generally recognized that there are legitimate reasons to lay off employees, while minimum wage violations are immoral and connotative of slavery. This moral difference is also reflected in employment and labor law: It is conditionally legal to fire an employee,[234]

233. AB633 fashioned a similar mechanism, called the Garment Fund, that would attach a seventy-five-dollar fee to state contract registrations, to disburse to garment workers with wage claims who are unable to recover from either their employer or a guarantor. *See* CAL. LAB. CODE § 2675.5(a) (West Supp. 2001).

234. Obviously, an employer cannot fire employees for certain discriminatory reasons, and may only fire unionized employees for just cause. Further, in some states, promissory estoppel may create a contract remedy for an employee fired after years of reliance upon the employment for her livelihood. *See, e.g.*, Fletcher v. Wesley Med. Ctr., 585 F. Supp. 1260 (D. Kan. 1984); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311 (1981); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980).

yet it is conditionally illegal to pay under the minimum wage.[235] Establishing an insurance system may send a signal to the garment industry that nonpayment of the minimum wage is a normal, acceptable practice.

Further, an insurance system lacks the due process protections for the employers that a hearing process upholds. Insurance would hold companies strictly liable for owed back wages, and require insurance payments regardless of the company's actual wage violations. By contrast, an administrative hearing creates due process protections, such as the employer's right to settle at the meet-and-confer, to make arguments at the hearing, and appeal the hearing decision. Because violating wage and hour law is illegal, but laying off employees is not, society may feel more urgency to establish due process protections for an employer to defend a back wage claim than an unemployment claim. Thus, assuming the equal efficacy of insurance and administrative hearings, an administrative hearing that injects moral force behind a garment employee's valid wage claim, and which preserves the employers' due process rights is superior to a strict liability insurance regime.

However, if administrative hearings do not effectively address violations of wage and hour laws in the garment industry, then an insurance-based strict liability regime may be required. Like unemployment insurance, which was established to address widespread poverty created by temporary unemployment, back wage insurance may be necessary to resolve widespread poverty created by minimum wage violations.

CONCLUSION

The federal government and states have thus far been unable to preserve workplace rights for garment employees. The garment manufacturers, retailers, and contractors that violate wage and hour laws prevent hundreds of thousands of garment employees from earning the bare minimum required for survival for themselves and their families.

This Comment argues that states in which garment production occurs should follow California's lead and craft labor laws that hold manufacturers and retailers liable for contractor wage and hour violations. States should design an administrative hearing process that fairly and efficiently adjudicates garment employees' wage claims. This Comment recommends changing the state labor codes to make manufacturers and retailers jointly liable for wage violations by contractors that are interchangeably integrated

235. There are exemptions to the minimum wage for certain jobs (for example, certain agricultural workers, domestic workers, and student workers). *See* 29 U.S.C. § 213 (1994).

into an entity's production process, and to provide for state investigations of wage claims that would be admissible in state hearings. These changes would strengthen existing manufacturer and retailer joint liability laws, and facilitate a viable pro se hearing for garment employees. These recommendations are necessary to avoid further manufacturer and retailer restructuring to avoid legal liability, and to remove the entrenched barriers that currently prevent garment employees from asserting wage claims.