MULTIPLE-EMPLOYER ANALYSIS: SURVEYING AND SIMPLIFYING A NEEDLESSLY COMPLEX EMPLOYMENT-LAW INQUIRY

ABSTRACT

Can multiple business entities qualify as a plaintiff's employer for purposes of employment litigation? The well-established answer is yes, but actually making this determination is less straightforward. Various tests exist, and which one a court ultimately chooses may depend on several different factors. Courts and litigants often confuse or conflate the various tests or fail to apply the correct analysis. Circuit courts even persist in using tests that no longer comport with Supreme Court precedent. What ultimately should be a simple inquiry has unfortunately become a convoluted jurisprudence.

This article explores how courts determine whether multiple entities can be considered a plaintiff's employer—a determination this article refers to as "multiple-employer analysis." While other works have focused on specific multiple-employer tests in a particular statutory context, this article broadly maps the contours of a unique issue within employment law and makes recommendations on how this overly complicated analysis can be simplified.

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I. Introduction

Generally, in employment litigation, in order to hold an employer liable for an employee's harm, a plaintiff must first show the defendant was in fact their "employer" under the relevant statute.[1] Most of the time this is a non-issue; an employment relationship may be so evident that the defendant will not even dispute that it employed the plaintiff. Still, in many other cases, determining employment is not only more complex, but the central issue of the litigation. The classic example is an employment dispute over whether a worker was a defendant's employee or just an independent contractor.[2]

Determinations regarding whether an employment relationship exists generally only involve one defendant, because as a practical matter, an employee generally only has one employer. Interestingly, however, for purposes of employment law, it is well-established that a plaintiff may have *multiple* employers.[3] Consider, for example, a plaintiff employed by a subsidiary of a parent corporation. In a lawsuit under the Fair Labor Standards Act, the plaintiff may argue that *both* the subsidiary and the parent corporation qualify as employers.[4] Or consider an employee of a franchisee company. In a Title VII discrimination lawsuit, the plaintiff may argue the franchisor influenced or controlled the employment or HR practices of the franchisee

[1] *See*, *e.g.*, 42 U.S.C. § 2000e-2 (prohibiting "employer[s]" from discriminating in various employment practices); 29 U.S.C. § 158(a) (defining unfair labor practices for "employer[s]" under the National Labor Relations Act); 29 U.S.C. § 203(d) (defining "employer" for purposes of the Fair Labor Standards Act).
[2] The oft-cited example today is whether many gig economy workers are employees or just independent contractors. *See, e.g.*, Nicholas Iovino, *Uber and Lyft Win Temporary Reprieve on Making California Drivers Employees*, COURTHOUSE NEWS SERV. (Aug. 20, 2020), https://www.courthousenews.com/uber-and-lyft-win-temporary-reprieve-on-making-california-drivers-employees/.
[3] *See, e.g.*, U.S. EEOC v. Global Horizons, Inc., 915 F.3d 631, 637 (9th Cir. 2019) ("It is now well-settled that an individual can have more than one employer for Title VII purposes.").
[4] *See, e.g.*, In re Enter. Rent-A-Car Wage & Hour Empl. Pracs. Litig., 683 F.3d 462 (3d Cir. 2012) (analyzing whether a parent company can be considered the employer of its subsidiaries' employees for purposes of the FLSA).

such that the franchisor, not just the franchisee, should also be considered an employer for purposes of Title VII.[5] Similar issues may exist with staffing agencies as well.[6]

There are a couple reasons a plaintiff would choose to argue that multiple entities qualify as their employer, and both can have a significant effect on litigation. The first reason is fairly obvious. If the plaintiff prevails, the additional defendant may be liable to the plaintiff for damages, and with multiple entities liable, a plaintiff may more easily enforce a judgment.[7] The second reason is that by claiming multiple defendants qualify as a plaintiff's employer, a plaintiff may more easily show that the defendants are both subject to the relevant employment statute.[8] For example, under Title VII and the Americans with Disabilities Act, a covered entity is an employer with 15 or more employees.[9] If multiple entities qualify as the plaintiff's employer, courts allow the plaintiff to aggregate the number of employees from each employer to show the 15-employee threshold is met.[10]

This analysis of determining whether multiple entities qualify as a plaintiff's employer currently does not have a name to which it is universally referred; rather, courts refer to the various tests or doctrines they use to perform this analysis (e.g. joint employment, single

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[5] *See, e.g.*, Myers v. Garfield & Johnson Enters., 679 F. Supp. 2d 598, 611 (E.D. Pa. 2010) (finding franchisor and franchisee may both qualify as plaintiff's employer under).

[6] *See, e.g.*, 29 CFR § 825.106(b)(1) ("[J]oint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer."); *see also* Steven Greenhouse, *Spitzer in Effort to Get Wages for Valets*, NY TIMES (Oct. 8, 2004), https://www.nytimes.com/2004/10/08/nyregion/spitzer-in-effort-to-get-wages-for-valets.html (exemplifying a "joint employer" situation in context of staffing agency).

[7] *See, e.g.*, Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005) ("[A]n employee, who is technically employed on the books of one entity, which is deemed to be part of a larger "single-employer" entity, may impose liability for certain violations of employment law not only on the nominal employer but also on another entity comprising part of the single integrated employer.").

[8] *See, e.g.*, 42 U.S.C. § 2000e(b) (requiring an employer to having fifteen or more employees to be subject to Title VII); 42 U.S.C. § 12111(5) (defining an employer as having fifteen or more employees for purposes of the ADA).

[9] *See* 42 U.S.C. § 2000e(b) (Title VII); 42 U.S.C. § 12111(5) (Americans with Disabilities Act).

[10] Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1206 (2006) ("[A]n individual plaintiff seeking to overcome a small firm defense might argue in favor of combining the workforce of the nominal employer with the workforces of affiliated corporations to reach a total in excess of the threshold for coverage."); *Arculeo*, 425 F.3d at 197–98 (discussing aggregation of employees of multiple entities to satisfy the numerosity requirement of Title VII).

employer doctrine).[11] But because each test, regardless of its unique features, seeks to answer the same basic inquiry in employment litigation—whether multiple legal entities can be considered a plaintiff's employer—they can each generally be referred to as type of multiple-employer analysis.

Unfortunately, multiple-employer analysis has become needlessly complicated. For starters, several differing tests exist to perform the analysis, and courts and litigants often confuse or conflate the various tests which creates unpredictable and inconsistent case law. To make matters worse, the federal circuit courts even vary in which tests they use and when they use them. Some circuits have even adopted tests that seem to conflict with Supreme Court precedent. Broadly speaking, what should be a legally straightforward concept has developed into a convoluted and jurisdictionally diverse area of law where courts and litigants often have to wade through several factors just to determine the appropriate legal standard. Courts and regulators should work to simplify multiple-employer analysis by both reducing the number of tests they use and by conforming to Supreme Court precedent.

II. Prominent Multiple-Employer Tests

To reiterate, the purpose of multiple-employer analysis is to determine whether an additional defendant-entity qualifies as a plaintiff's employer. As mentioned, however, this analysis has become needlessly complicated partly due to the fact that different tests and legal doctrines exist by which courts can approach multiple-employer situations. While courts have endorsed a myriad of different approaches, the three most prominent tests used are the common-law agency, single employer, and joint employer tests. This section surveys these tests.

a. Common-Law Agency

[11] *See, e.g.*, Gilliland v. Cont. Land Staff, LLC, No. 1:17-cv-191, 2019 WL 5068651, at *8 (D.N.D. Oct. 9, 2019) (referring to "joint employer" and "single employer" as cases under Title VII where "an employee can have more than one employer in what arguably are two distinct situations").

The first approach worth discussing is the common-law agency test, not because it is widely used as a standalone test, but because common-law agency principles remain the default method by which courts construe employment. In fact, the Supreme Court has on several occasions instructed that courts use common-law principles as the default method for determining employment under federal statutes.[12]

Most recently, in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), the Court had to decide who qualifies as an "employee" for purposes of the Americans with Disabilities Act.[13] The ADA defines an employee as an "individual employed by an employer[;]"[14] a definition the Court found to be circular and unhelpful.[15] Accordingly, the Court reasoned that because "'Congress ha[d] used the term "employee" without defining it . . . Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'"[16] The Court then found that because, at common-law, a servant was one whose work was controlled by their master, the "principal guidepost" for an employment relationship was "the extent of control that one [entity] may exercise over the details of the work of the other[.]"[17]

The Court's reasoning in *Clackamas* essentially endorsed what is known as the control test—the common-law method for determining whether an employment relationship exists by examining the degree of control the principal or employer has over the work of the agent or

[12] *See, e.g.,* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444–45 (2003) (defining who qualifies as an "employee" under the ADA); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (defining who qualifies as an "employee" under the ERISA).
[13] *Clackamas Gastroenterology*, 538 U.S. at 444–45.
[14] 42 U.S.C. § 12111.
[15] *Clackamas Gastroenterology*, 538 U.S. at 444.
[16] *Id.* at 445 (quoting *Darden*, 503 U.S. at 322–23).
[17] *Id.* at 448.

employee.[18] The control test, as articulated in *Clackamas*, is appropriate when a statute fails to adequately define its use of the term "employee." In this way, the control test acts as the default approach whenever it is legally necessary to determine who qualifies as an employee.[19]

Although *Clackamas* did not deal with an issue of multiple employers, its use of common-law agency principles to define employment has informed how lower courts conduct multiple-employer analysis under a theory of agency liability. Consistent with the control test and the "principal guidepost" in *Clackamas*, courts examine the degree of control the additional defendant-entity has over the employee's conduct.[20] For example, in *Myers v. Garfield & Johnson Enterprises*, 679 F. Supp. 2d 598 (E.D. Pa. 2010), an employee filed a Title VII sexual harassment claim not only against her employer, a franchisee, but also against the employer's franchisor on the basis that an agency relationship existed between the companies.[21] When the franchisor argued it never actually employed the plaintiff and moved to dismiss the claim against it, the court denied the motion reasoning that under an agency theory of liability, a third party may be liable for the actions of its employee if the third party had a "right to control the employee's conduct[.]"[22] The court concluded that the plaintiff's complaint survived dismissal because it contained "sufficient allegations of [the franchisor's] control" over the franchisee.[23]

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[18] *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 ("[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work[.]").
[19] It is important to note that the control test applies beyond multiple-employer situations to employment determination generally; in fact, this includes cases such as whether Uber drivers are employees or independent contractors. *See, e.g.*, O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015).
[20] *See* Walker v. Pac. Pride Servs., 341 F. App'x 350, 351 (9th Cir. 2009) ("The general rule is that, if a franchise agreement gives the franchisor the right of complete or substantial control over the franchisee, an agency relationship exists."); *see also* Berkey v. Third A. R. Co., 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.) ("*Dominion* may be so complete . . . that by the general rules of agency the parent will be a principal and the subsidiary an agent." (emphasis added)); RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006) ("an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work[.]").
[21] Myers v. Garfield & Johnson Enters., 679 F. Supp. 2d 598, 611 (E.D. Pa. 2010).
[22] *Id.* at 612.
[23] *Id.*

While control is the universal standard used by all courts under a common-law agency theory of liability, the approach does not specify the requisite *degree* of control that constitutes an agency relationship. The necessary level of control one entity must have over another to satisfy the test varies among courts as a result.[24] This is perhaps one reason why the standalone common-law agency test is rarely used in comparison with other methods of multiple-employer analysis. The two most popular approaches, single and joint employment, arguably provide better guidance to courts by prescribing factors to weigh in their analyses. But despite the declining popularity of the agency approach as a standalone test, common-law agency principles remain highly relevant; for example, many circuit courts use common-law agency principles when determining joint employment.[25]

b. Single Employer or Integrated Enterprise

The second major form of multiple-employer analysis is the single employer or integrated enterprise test.[26] Courts use the single employer test when businesses are "nominally distinct entities" such that they can be deemed to constitute a "single employer" or one integrated enterprise.[27] Common examples of nominally distinct entities are "parent and wholly-owned subsidiary corporations, or separate corporations under common ownership and management."[28]

The single employer doctrine originated in the 1950s as a tool the National Labor Relations Board used to determine whether it could assert jurisdiction over a labor dispute that

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[24] Geoffrey A. Mort, *Finding Franchisors Liable in Discrimination Cases: Many Theories, but Few Successes*, 30 ABA J. LAB. & EMP. L. 73, 75 (2014) ("Courts vary in their perceptions of when the degree of control exercised over a franchisee is sufficiently substantial for it to be considered an agent.").
[25] U.S. EEOC v. Global Horizons, Inc., 915 F.3d 631, 638 (9th Cir. 2019) (adopting the control test to determine joint employment).
[26] *Compare* Bristol v. Bd. of Cnty. Comm'rs, 312 F.3d 1213, 1218 (10th Cir. 2002) (referring to "single-employer test"), *with* Rhodes v. Sutter Health, 949 F. Supp. 2d 997, 1005 (E.D. Cal. 2013) (using the term "integrated enterprise test").
[27] Clinton's Ditch Coop. Co. v. NLRB, 778 F.2d 132, 137 (2d Cir. 1985).
[28] Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005) (citing Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240–41 (2d Cir. 1995)).

implicated the NLRA.[29] At that time, the Board only chose to assert jurisdiction over cases that "ha[d] a substantial impact upon interstate commerce" presumably to avoid violating the Commerce Clause of the U.S. Constitution.[30] In determining whether a case met the threshold, the Board combined cases where "separate business entities . . . are so closely related as to be considered a single employer."[31] The Board used four principal factors in deciding whether separate businesses were considered sufficiently integrated: (1) the interrelation of the operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.[32]

Courts began to adopt the Board's approach in the 1960s after a pair of notable Supreme Court cases involving the NLRB. In the first case, *NLRB v. Deena Artware, Inc.*, 361 U.S. 398 (1960), the NLRB had filed charges against respondents, a group of related companies, alleging one respondent had been intentionally decapitalized and its assets transferred to the other respondents in an attempt to avoid paying an employee-back pay order that the Board had imposed.[33] The Board petitioned the Court to be able to prove "an alternative theory of liability" whereby the respondents would be jointly liable for acting "as a single enterprise" with the "purpose of frustrating the back pay order[.]"[34] The Court ultimately agreed with the Board by recognizing that oftentimes "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise."[35] In such situations, the Court noted

[29] *See* 21 NLRB ANN. REP. 14–15 (1956), https://www.nlrb.gov/sites/default/files/attachments/pages/node-131/nlrb1956.pdf; *see also* 29 U.S.C.A. § 150 *et seq.* (West) (prohibiting employers from retaliating against employees engaging in labor organizations).
[30] *See* 21 NLRB ANN. REP. at 7; *see also* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (stating that activity that has a "substantial economic effect on interstate commerce" may be regulated by Congress).
[31] 21 NLRB ANN. REP. at 14.
[32] *See id.*
[33] *See* NLRB v. Deena Artware, Inc., 361 U.S. 398, 399–401 (1960).
[34] *Id.* at 401–02.
[35] *Id.* at 402.

that "the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities."[36] As such, the Court ruled in favor of the Board and thus indirectly endorsed its single employer theory of liability.[37]

A few years later, the Court reaffirmed its support for the single employer test in *Radio & Television Broadcast Technicians Local Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965). The issue before the Court was whether the respondent's gross receipts could be aggregated with its related companies for purposes of determining whether the NLRB could assert jurisdiction over the case.[38] In its reasoning, the Court approved of the Board's method of considering "several nominally separate business entities to be a single employer where they comprise an integrated enterprise[.]"[39] The Court then found that under the Board's "controlling criteria," the "factors are present" that indicate the respondent and its related companies are a single employer and that therefore their gross receipts could be aggregated.[40]

While both *Deena Artware* and *Radio & Television Broadcasting* both show how the single employer test was first used in the context of the NLRA, courts and practitioners also use it in employment litigation today.[41] For example, in *Torres-Negron v. Merck & Co.*, 488 F.3d 34 (1st Cir. 2007), the First Circuit dealt with a single employer issue in the context of Title VII.[42] The plaintiff in that case brought, *inter alia*, a race and sex discrimination claim against three different defendant-entities—a parent corporation and its two subsidiaries.[43] But because the

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[36] *Id.* at 403.
[37] *See id.* at 404.
[38] *See* Radio & Television Broad. Technicians Loc. Union v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 255 (1965) (per curiam).
[39] *See id.* at 256.
[40] *See id.* at 256–57.
[41] *See, e.g.*, Torres-Negron v. Merck & Co., 488 F.3d 34, 41 (1st Cir. 2007) (using single-employer test in context of Title VII); Swallows v. Barnes & Noble Book Stores, 128 F.3d 990, 993–94 (6th Cir. 1997) (using single-employer test in context of ADA and ADEA).
[42] *Torres-Negron*, 488 F.3d at 36.
[43] *Id.*

plaintiff had only technically been employed by one of the subsidiaries, the other two defendants moved for summary judgment claiming they did not qualify as the plaintiff's employer.[44] In ruling on the motion, the court explained that "[u]nder the 'single employer' doctrine, two nominally separate companies may be so interrelated that they constitute a single employer subject to liability under Title VII."[45] The court then considered the exact same four factors used by the NLRB in *Deena Artware* and found that sufficient evidence existed to suggest that all the defendants had interrelated operations, centralized control over labor relations, and were commonly owned.[46] As such, the court reasoned the defendants could plausibly be considered a single employer, and therefore the court denied the defendants' motion for summary judgment.[47] *Torres-Negron* is just one example of how the single employer test can be used to conduct multiple-employer analysis.

c. Joint Employment

The final and likely most common form of multiple-employer analysis is the joint employment test. Unlike the single employer doctrine which assumes that separate business entities are "not what they appear to be,"[48] the concept of joint employment assumes that entities *are* what they appear to be: "independent legal entities that have merely historically chosen to handle jointly important aspects of their employer-employee relationship."[49] In fact, the distinctive characteristic of a joint employment analysis is that there is no requirement that the

[44] *Id.* at 36–37.
[45] *Id.* at 40–41.
[46] *Id.* at 42 ("The factors considered in determining whether two or more entities are a single employer . . . are: (1) common management; (2) interrelation between operations; (3) centralized control over labor relations; and (4) common ownership.").
[47] *Id.* at 53.
[48] *Deena Artware, Inc.*, 361 U.S. at 403.
[49] NLRB v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117, 1122 (3d Cir. 1982) (internal quotations and citations omitted).

entities be related.[50] Rather, the entities need only to have shared control or influence of a plaintiff's work such that each entity can fairly be considered an employer.[51] How courts actually make this determination, however, depends on (1) which version of joint employment analysis they use and (2) the factors they consider. Each is discussed below.

i. Three (More) Tests

There are three different versions of joint employment: the control test, the economic realities test, and the hybrid test.[52] While each of these tests was originally developed to distinguish employees from independent contractors,[53] their function is essentially the same when used in a joint employer context—to determine whether an employment relationship existed between a plaintiff and an additional defendant-entity.

1. The Control Test

The control test, as already explained *supra*, derives from common-law agency principles and construes employment based on the degree of control one entity exercises over another. It is the default method for determining whether an employer-employee relationship exists, and many courts have adopted the control test because it is firmly based in the common law and Supreme Court precedent. For example, in *U.S. EEOC v. Global Horizons, Inc.*, 915 F.3d 631 (9th Cir. 2019), the Ninth Circuit recently adopted the control test for joint employer analysis in Title VII

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[50] *Id.* ("In 'joint employer' situations no finding of a lack of arm's length transaction or unity of control or ownership is required, as in "single employer" cases.").

[51] Butler v. Drive Auto. Indus. of Am., 793 F.3d 404, 408 (4th Cir. 2015) ("'[C]ourts look to whether both entities exercise significant control over the same employees.'") (quoting Bristol v. Bd. of Cnty. Comm'rs, 312 F.3d 1213, 1218 (10th Cir. 2002) (en banc)); U.S. EEOC v. Global Horizons, Inc., 915 F.3d 631, 637 (9th Cir. 2019) ("The law recognizes that two entities may simultaneously share control over the terms and conditions of employment, such that both should be liable . . .").

[52] *See Butler*, 793 F.3d at 410 (explaining three different kinds of joint employment tests).

[53] 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 4.02 (2021), https://plus.lexis.com/document/documentslider/?pdmfid=1530671&crid=a974c4af-863f-4aae-afb6-41254a6c37ed&config=&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A52DB-9K70-R03N-V4G7-00000-00&pdcomponentid=230142&pdtocnodeidentifier=N104A9&pdistocdocslideraccess=true&ecomp=bgktk&prid=1ef0850d-67ca-43ba-a555-fff246d6eef9.

cases.[54] The court cited *Clackamas Gastroenterology* as support for its adoption noting that "courts should use common-law agency principles to analyze the existence of an employer-employee relationship."[55]

2. The Economic Realities Test

The second version of joint employer analysis is the economic realities test. This test focuses on the "'degree of economic dependence of alleged employees on the business with which they are connected . . .'"[56] In order to determine if a worker is economically dependent, courts must consider all circumstances of the parties' working relationship.[57] And while the business entity's control over the alleged employee is a relevant factor, unlike the control test, it is not dispositive.[58]

The Supreme Court first conceived of the economic realities test in 1947 as an alternative approach to the control test.[59] The Court reasoned that a broader definition of "employee" was necessary in the context of social legislation.[60] The test was seen as a more liberal method of defining employment and was intended to increase worker access to social legislation like the Social Security Act or the Fair Labor Standards Act.[61] Decades later, however, the Supreme Court greatly restricted the application of the economic realities test with its ruling in *Nationwide*

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[54] *Global Horizons, Inc.*, 915 F.3d at 637.
[55] *Id.*
[56] *Butler*, 793 F.3d at 411–12 (quoting EEOC v. Zippo Mfg. Co., 713 F.2d 32, 37 (3d Cir. 1983)).
[57] *See* Bartels v. Birmingham, 332 U.S. 126, 130 (1947) ("It is the total situation that controls."); *Butler*, 793 F.3d at 412 ("The ultimate determination of joint employment [under the economic realities test] must be based upon the circumstances of the whole activity."); Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) ("[T]he determination of the [employer-employee] relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity.")
[58] *See, e.g.*, Howard v. Malcolm, 852 F.2d 101, 105 (4th Cir. 1988) (quoting Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327 (5th Cir. 1985)) ("It is not essential that the farmer have control over all aspects of the work of the laborers or the contractor.")
[59] *See Bartels*, 332 U.S. at 130; *see also Rutherford Food Corp.*, 331 U.S. at 727–30.
[60] *Bartels*, 332 U.S. at 130 ("Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.").
[61] *Zippo Mfg. Co.*, 713 F.2d at 36 (explaining the genesis and purpose of the economic realities test).

Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992).[62] The issue in *Darden* was the interpretation of the term "employee" under ERISA.[63] The appellate court had rejected using the control test to construe the term "employee" instead favoring an approach that interpreted the term in light of the remedial purpose of the federal statute.[64] In a unanimous opinion, the Supreme Court began by endorsing the common-law control test in situations where Congress used a term regarding employment without adequately defining it.[65] The Court then explicitly rejected the appellate court's approach of going beyond the common law to define "employee" in the absence of statutory guidance otherwise.[66] Importantly, however, the Court excepted the FLSA from this rule noting that the FLSA's definition of "employ" was more expansive than ERISA's and therefore warranted a departure from common-law principles.[67] By excepting the FLSA from the control test, the Court impliedly condoned the use of the economic realities test to determine who qualifies as an "employee" under the FLSA.

As a result of *Darden*, the economic realities test is typically only used in cases dealing with the FLSA or statutes that define employment similarly.[68] But like the ADA (at issue in *Clackamas Gastroenterology*) or ERISA (at issue in *Darden*), most employment laws do not

[62] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).
[63] *Darden*, 503 U.S. at 319.
[64] *See id.* at 324 (discussing how the appellate court erred by suggesting that "the content of the term 'employee' in the context of a particular federal statute is to be construed in the light of the mischief to be corrected and the end to be attained.").
[65] *See id.* at 322–23 ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms[.]"). As discussed *supra*, this reasoning served as the basis for the Court's reasoning in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003).
[66] *See Darden*, 503 U.S. at 324–25.
[67] *See id.* at 326 (noting the FLSA defines the verb "employ" expansively to mean "suffer or permit to work.")
[68] *See, e.g.*, Butler v. Drive Auto. Indus. of Am., 793 F.3d 404, 412 (4th Cir. 2015) ("This Circuit has applied the economic realities test in the context of the Migrant and Seasonal Agricultural Worker Protection Act and the Fair Labor Standards Act.").

elaborately define the term "employee."[69] As such, the common-law control test will typically govern unless the statute indicates otherwise.[70]

3. The Hybrid Test

The third iteration of joint employer analysis is a hybrid test which combines elements of both the economic realities and control tests.[71] "Under the hybrid test, the term 'employee' is construed in light of general common-law concepts, taking into account the economic realities of the situation."[72] This involves considering a list of factors with control being the most important factor even though it is still not dispositive.[73]

Similar to the economic realities test, courts began adopting the hybrid test as a more liberal alternative for determining employment than the control test.[74] In fact, prior to *Darden*, "nearly every appellate court ha[d] applied a test described as a hybrid of the common-law test and the economic realities test."[75] Since *Darden*, many courts still continue to use the hybrid test.[76] This may be because the hybrid test still considers control the most important factor of an employer-employee relationship, and therefore many courts consider it to be consistent with the

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[69] *See* 29 U.S.C. § 1002(6) (defining "employee" for purposes of ERISA as "any individual employed by an employer."); 42 U.S.C. § 12111(4) (defining "employee" under the ADA as "an individual employed by an employer."); *see also* 42 U.S.C. § 2000e(f) (defining "employee" under Title VII as "an individual employed by an employer[.]").

[70] LARSON, *supra* note 53 ([T]he Court ruled that when a statute does not helpfully define "employee," Congress will be deemed to have intended the common-law agency relationship of master and servant, and the appropriate way to differentiate employees from independent contractors is by applying the common-law agency test.").

[71] *See Butler*, 793 F.3d at 412 (discussing hybrid test).

[72] Wilde v. Cnty. of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994) (citing Cobb v. Sun Papers, Inc., 673 F.2d 337, 340–41 (11th Cir. 1982).

[73] *See, e.g.*, Garrett v. Phillips Mills, Inc. 721 F.2d 979, 982 (4th Cir. 1983) ("Under this test, control is still the most important factor to be considered, but it is not dispositive.").

[74] LARSON, *supra* note 53 ("Prior to *Darden*, most courts of appeals began adopting a more liberal, modified common law test . . . which considered both the degree of control and the economic realities of the disputed relationship.").

[75] *Wilde*, 15 F.3d at 105 (citation omitted).

[76] *See, e.g.*, *Butler*, 793 F.3d at 412 (adopting the hybrid test for joint employment analysis in the context of Title VII).

reasoning of *Darden*.[77] Conversely, other circuits courts have rejected the hybrid test as inapposite with *Darden* and *Clackamas Gastroenterology* because of its incorporation of elements of the economic realities test.[78] Notwithstanding their differences, it is questionable the two approaches actually produce materially different outcomes.[79] Regardless, a circuit split currently exists between courts that prefer the common-law control test and those that use the hybrid test.[80]

ii. A Factor-Heavy Analysis

In addition to which test is used, the other characteristic of joint employer analysis worth briefly mentioning are the factors that accompany each test. Joint employer analysis is a factor-based determination with many joint employer tests commonly providing more than ten factors to consider.[81] But despite the seeming laundry list of factors that accompany the analysis, most joint employer tests still instruct that the factors are "non-exhaustive" and that, in addition to the factors provided, "all circumstances surrounding the work relationship" are relevant to determining whether an employment relationship exists.[82] Such instructions essentially create a totality-of-the-circumstances approach and may reflect the reality that joint employment is an inherently "fact-intensive" exercise.[83] This factor-heavy approach may be why, as previously

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[77] *See Wilde*, 15 F.3d at 105 (finding that the hybrid test is sufficiently similar to the control test and therefore consistent with *Darden*).
[78] *See, e.g.*, U.S. EEOC v. Global Horizons, Inc., 915 F.3d 631 (9th Cir. 2019) ("Supreme Court precedent dictates that the common-law test governs when a statute does not meaningfully define terms like 'employer' and 'employee.'").
[79] *See Global Horizons, Inc.*, 915 F.3d at 639 ("We acknowledge that there may be little functional difference among the common-law agency test, the economic-reality test, and a third test that blends elements of the first two (the so-called "hybrid" test)"); *Wilde*, 15 F.3d at 106 (8th Cir. 1994) ("We see no significant difference between the hybrid test and the common-law test articulated by the Supreme Court in *Darden*.").
[80] *Compare Global Horizons, Inc.*, 915 F.3d at 638 (adopting control test in joint employer context), *with Butler*, 793 F.3d at 412 (adopting the hybrid test for joint employment analysis).
[81] *See Global Horizons, Inc.*, 915 F.3d at 638; Scott v. Sarasota Doctors Hosp., Inc., 688 F. App'x 878, 887 (11th Cir. 2017).
[82] *Global Horizons, Inc.*, 915 F.3d at 638; *Scott*, 688 F. App'x at 887.
[83] *Global Horizons, Inc.*, 915 F.3d at 639; *see also Butler*, 793 F.3d at 410 (stating that all three joint employer tests are "highly fact-specific").

mentioned, joint employer tests "usually produce the same outcome" regardless of which version is used.[84] At any rate, it is questionable whether the factors actually guide the analysis or just give the factfinder *carte blanche* to reach a conclusion irrespective of the legal standard.

III. Selecting the Correct Test

At this point, it should be apparent that there is more than one way to perform multiple-employer analysis. As a result, courts and litigants often struggle to identify and apply the right test to their case. Selecting the correct test often requires considering the relationship of the defendant-entities, the substantive law of the plaintiff's claim, and the jurisdiction of the court. This section examines each of these factors in turn.

a. Relationship of the Defendant-Entities

The first relevant factor to selecting the correct test is the relationship between the defendant-entities. Remember, in multiple-employer situations, one entity usually already qualifies as the plaintiff's employer; it is the status of the second entity that is in controversy, and the relationship between the entities may influence which test is most appropriate. For example, as already mentioned, the two most prominent kinds of multiple-employer analysis are the single and joint employer tests. While the joint employment test "focuses on the relationship between an employee and its two potential employers, the single employer test focuses on the relationship between the potential employers themselves."[85] Recall that this is because the single employer test only applies when the defendant-entities are "nominally separate."[86] Therefore, it is the *relatedness* of the entities that informs whether the single employer test can be used. If the entities are unrelated, the single employer doctrine is not applicable, and a joint employer test is

[84] *Global Horizons, Inc.*, 915 F.3d at 639.
[85] Knitter v. Corvias Mil. Living, LLC, 758 F.3d 1214, 1227 (10th Cir. 2014).
[86] *E.g.*, Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005) (citing Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240–41 (2d Cir. 1995)).

more appropriate. In that sense, identifying that the entities are unrelated is crucial to selecting the correct test.

But how can the relatedness of two entities be determined without doing a complete single employer analysis? After all, the very purpose of the test is to make this exact determination. To avoid doing a complete analysis, one shortcut may be to consider only the second and fourth factors of the test: whether the entities share common ownership and whether they share common management.[87] First, this is because the information regarding ownership and management can generally be obtained from easily discoverable evidence such as tax forms, state filings, organizational documents, and even a company's website.[88] Second, determining early on that two entities lack common management or ownership saves time by likely indicating that the two entities are independent and distinct rather than one integrated enterprise.[89]

In the event the defendant-entities are actually found to be nominally separate, it is unclear whether only the single employer test should be used or whether a plaintiff could plead and argue both the single and joint employer tests provided the facts support each approach. Many courts seem to describe the joint employer test as only applying in cases where the defendant-entities are truly separate and independent.[90] This approach naturally divides cases

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[87] *See* Radio & Television Broad. Technicians Loc. Union v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) ("The controlling criteria . . . are interrelation of operations, common management, centralized control of labor relations and common ownership.").

[88] *See, e.g.*, *U.S. Corporation Income Tax Return*, IRS (2021), https://www.irs.gov/pub/irs-pdf/f1120.pdf (exemplifying that Schedule K on page 4 of a corporate tax return requires disclosure of ownership in other entities); *Business Search*, IDAHO SEC'Y OF STATE, https://sosbiz.idaho.gov/search/business (last visited Jan. 6, 2022) (illustrating ability to conduct public search of business's annual state filings with the secretary of state).

[89] This author has found no cases where a court found an integrated enterprise despite the entities lacking common ownership or management. All prominent appellate court opinions where a single employer situation existed were in the context of entities with common ownership or management. *See, e.g.*, *Radio & Television Broad. Technicians Loc. Union*, 380 U.S. at 255 (finding defendant-entities "owned and operated" by common individual); Torres-Negron v. Merck & Co., 488 F.3d 34, 43 (1st Cir. 2007) (finding defendant-entities share common ownership).

[90] *See, e.g.*, Gilliland v. Cont. Land Staff, LLC, No. 1:17-cv-191, 2019 WL 5068651, at *8 (D. N.D. Oct. 9, 2019) (noting that the single employer test is for "related entities" while the joint employer test is for "separate and unrelated entities").

into either joint employer or single employer cases based on the relationship of the defendant-entities.[91]

However, it could also be argued that the two tests are not necessarily mutually exclusive. After all, while the single employer doctrine may require the defendant-entities to be related, it is possible that the joint employer test does not actually require the entities to be unrelated but only "assumes that they are[.]"[92] Under this view, both tests could reasonably be applied in a single case if the defendants-entities were both nominally separate *and* had chosen to "share or co-determine those matters governing the essential terms and conditions of employment."[93]

In all likelihood, the joint and single employer tests were probably intended to be mutually exclusive; appellate courts seem to stress the relationship of the defendant-entities as the defining characteristic of each test.[94] Still, trial courts commonly apply both tests in a single case.[95] This may be because, as is commonly observed, the two tests are frequently confused and conflated.[96] But regardless of which approach is correct, in a case where the defendant-entities are only nominally separate, plaintiffs may be wise to plead both the single and joint employer tests given they only need to convince the court of one.

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[91] *See* Grant v. Her Imps. NY, LLC, No. 15-CV-5100, 2018 U.S. Dist. LEXIS 27134, at *31 (E.D.N.Y. Feb. 16, 2018) (citation omitted) ("The theories are mutually exclusive.").
[92] Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005).
[93] NLRB v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1123 (3d Cir. 1982) (defining joint employment).
[94] *See* Knitter v. Corvias Mil. Living, LLC, 758 F.3d 1214, 1227 (10th Cir. 2014) ("Unlike the joint employer test, which focuses on the relationship between an employee and its two potential employers, the single employer test focuses on the relationship between the potential employers themselves."); Bristol v. Bd. of County Comm'rs, 312 F.3d 1213, 1218 (10th Cir. 2002) (Although these two tests are sometimes confused, they differ in that the single-employer test asks whether two nominally separate entities should in fact be treated as an integrated enterprise, while the joint-employer test assumes that the alleged employers are separate entities."); Clinton's Ditch Cooperative Co. v. NLRB, 778 F.2d 132, 137–38 (2d. 1985) (discussing difference of joint and single employer approaches based on whether they are actually separate entities).
[95] *See, e.g.*, Kinnebrew v. W. Wholesale Supply, Inc., No. 18-00523, 2021 WL 2581414 (D. Idaho June 6, 2021); EEOC v. 704 HTL Operating, LLC, No. 1:11–CV–845, 2013 WL 5273219 (D.N.M. Aug. 16, 2013) (denying defendant's motion for summary judgment as to plaintiff's claim that the defendants are both joint and single employers).
[96] *Bristol*, 312 F.3d at 1218 (10th Cir. 2002) ("Although these two tests are sometimes confused . . ."); Virgo v. Riviera Beach Assocs., 30 F.3d 1350, 1359 n.6 (11th Cir. 1994) (citation omitted) ("A 'joint employer' relationship is different from, though sometimes confused with, a 'single employer' situation.").

b. Substantive Law

While employment statutes are largely silent in regard to multiple-employer analysis, the substantive law of a plaintiff's claim may still inform which test should be used in two important ways. The first is by how an employment statute defines the term "employee." Recall the Supreme Court's guidance in *Darden* and *Clackamas Gastroenterology*. For statutes similar to ERISA and the ADA whose definition of "employee" essentially "explains nothing[,]" the common-law control test should be used in determining who qualifies as an employee under the statute.[97] But when a statute provides a more expansive definition of employment like the FLSA, "traditional common law principles[,]" and hence the control test, do not apply.[98]

As already explained, this determination directly affects which joint employer test is applicable. When an employment statute has an unhelpful or circular definition of "employee," the control test or hybrid test should be used for joint employer analysis because both tests are based completely or partially on common-law agency principles.[99] For example, Title VII defines "employee" as "an individual employed by an employer[.]"[100] Several circuit courts have found this definition to be unhelpful, and citing *Darden* and *Clackamas Gastroenterology*, have adopted either the control test or hybrid test to use in joint employer situations.[101]

In joint employer situations where the substantive law at issue has a more expansive definition of "employee" like the FLSA, some form of the economic realities test will generally apply. As already mentioned, the Supreme Court originally used the economic realities test to

[97]Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).
[98] *Id.* at 326.
[99] *See* Wilde v. Cnty. of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994) (finding that the hybrid test is sufficiently similar to the control test and therefore consistent with *Darden*).
[100] 42 U.S.C. § 2000e(f).
[101] U.S. EEOC v. Global Horizons, Inc., 915 F.3d 631, 639 (9th Cir. 2019) (adopting the control test for joint employer analysis under Title VII); Butler v. Drive Auto. Indus. of Am., 793 F.3d 404 (4th Cir. 2015) (adopting the hybrid test for joint employer analysis under Title VII).

define employment in the context of social legislation like the FLSA;[102] circuit courts then naturally began to apply it in joint employer cases.[103] Over time, however, federal regulations have replaced case law as the primary authority governing joint employment under the FLSA.[104]

Employment regulations represent the second possible way in which a lawsuit's substantive law can influence multiple-employer analysis. Interestingly, however, only employment laws that define the term "employ" similar to the FLSA have federal regulations that specify what constitutes joint employment.[105] As such, these joint employer regulations all use the economic realities test.[106] For example, under the Family and Medical Leave Act, "[t]he terms 'employ', 'employee', and 'State' have the same meanings given such terms in . . . the Fair Labor Standards Act[.]"[107] In explaining the significance of this definition, the corresponding FMLA regulations promulgated by the Department of Labor codified the Supreme Court's endorsement of the economic realities test for statutes like the FLSA by explaining that "the employment relationship under the FLSA is broader than the traditional common law concept of master and servant[,]"[108] and therefore the "determination of the [employment] relation cannot be based on isolated factors . . . but depends 'upon the circumstances of the whole activity'

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[102] *See Bartels*, 332 U.S. at 130; *Rutherford Food Corp.*, 331 U.S. at 727–30.
[103] *See, e.g.*, Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 756 (9th Cir. 1979) (finding that the test for determining joint employment under the FLSA "must focus on the economic realities of the total circumstances"); Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194 (5th Cir. 1983).
[104] Prior to October 5, 2021, DOL regulations outlining joint employment under the FLSA were located at 29 C.F.R. § 791.2. *See* 29 C.F.R. § 791.2 (2019). The regulation defined joint employment for purposes of the FLSA similarly to the FMLA regulation. Compare *id.*, *with* 29 C.F.R. § 825.105(a) (2022). However, in 2020, the DOL amended section 791.2 to add "vertical joint employment," whereby joint employment would be determined by the control test—not the economic realities test. *See* Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40939, 40941 (July 30, 2021). This amendment was challenged in court and ultimately found to be unlawful; the DOL rescinded section 791 as a result. *Id.* at 40942–43. There is still currently no active joint employer regulation under the FLSA. *See* 29 C.F.R. § 791.2 (2022).
[105] *See* 29 C.F.R. § 825.105(a) (2022) (discussing how employment under the FMLA is the same as the FLSA); 29 C.F.R. § 500.20(h)(5) (defining joint employment under the Migrant and Seasonal Agricultural Worker Protection Act).
[106] *See* 29 C.F.R. § 825.105(a) (2022); 29 C.F.R. § 500.20(h)(5).
[107] 29 U.S.C § 2611(3); *see also* 29 U.S.C. § 203(g) (defining "employ" under the FLSA as "to suffer or permit to work").
[108] 29 C.F.R. § 825.105(a) (2022); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

including the underlying 'economic reality.'"[109] The regulations then go on to state that "[w]here two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA."[110] While this definition may appear to make control the touchstone of joint employment, the regulations again reiterate that whether "a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality."[111] This indicates that the regulatory joint employer analysis used by the FMLA is a type of economic realities test.

c. Jurisdiction

The last factor to consider in selecting the appropriate kind of multiple-employer analysis is the jurisdiction of the court. While the single employer test is generally uniformly applied across federal courts, the circuit courts vary in which test they use in default joint employer cases.[112] Several circuits have adopted the control test;[113] others use the hybrid test;[114] some courts surprisingly use the economic realities test;[115] and several circuits have either not decided the issue or declined to endorse a test.[116] What is odd about this jurisdictional variation, however, is that the Supreme Court seems to have already provided guidance on which test to use. *Darden* and *Clackamas Gastroenterology* make it abundantly clear that statutes that define employment

[109] 29 C.F.R. § 825.105(a) (2022); *see also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).
[110] 29 C.F.R. § 825.106(a) (2022).
[111] *Id.*
[112] *Compare* U.S. EEOC v. Global Horizons, Inc., 915 F.3d at 631, 638 (9th Cir. 2019) (adopting control test in joint employer context), *with* Butler v. Drive Auto. Indus. of Am., 793 F.3d 404 (4th Cir. 2015) (adopting the hybrid test for joint employment analysis). It is important to note, however, that this split only exists for employment statutes that fall under *Darden*, and not to statutes like the FLSA or the FMLA that do not; as discussed *ad nauseum*, Supreme Court precedent and federal regulation have foreclosed the question of which joint employer test is appropriate for statutes that have a broader definition of employment like the FLSA or FMLA. *See Rutherford Food Corp.*, 331 U.S. at 727–30; 29 C.F.R. § 825.106(a) (2022).
[113] *See* Knight v. State Univ. of N.Y. At Stony Brook, 880 F.3d 636, 642–43 (2d Cir. 2018); *Global Horizons, Inc.*, 915 F.3d at 638.
[114] *See, e.g.*, *Butler*, 793 F.3d at 414–15.
[115] *See* Frey v. Hotel Coleman, 903 F.3d 671, 676 (7th Cir. 2018) (using an "economic realities" test in order to determine joint employment); Scott v. Sarasota Doctors Hosp., Inc., 688 F. App'x 878, 886–87 (11th Cir. 2017).
[116] *See, e.g.*, Al-Saffy v. Vilsack, 827 F.3d 85, 96–97 (D.C. Cir. 2016) (recognizing "two largely overlapping articulations of the test for identifying joint-employer status" but not specifically endorsing one).

similar to ERISA and the ADA should use common-law agency principles to determine employment, with the principal guidepost being control. Moreover, *Darden* also seems to instruct that the economic realities test is only appropriate for statutes with a broader definition of employment like the FLSA.[117] Therefore, based on Court precedent, the control test should be the default test for joint employment while the economic realities should only be used with select statutes. Why then have several courts rejected the control test in favor of the economic realities test or the hybrid test?

At least with the hybrid test, its use is somewhat understandable. The Fourth Circuit justified its adoption of the hybrid test by explaining that even though the hybrid test "bridges the control test and the economic realities test," it is still consistent with *Darden* because "the common-law element of control remains the 'principal guidepost' in the analysis."[118] Therefore, despite incorporating aspects of the economic realities test, the hybrid test still reasonably comports with *Darden* because its predominant factor is control.

What is less understandable, however, is using the economic realities test, by itself, outside the context of statutes like the FLSA. Unlike the hybrid test, control is, at least theoretically, not the predominant factor of the economic realities test; it is merely one consideration. In this way, the economic realities test deviates from the common-law understanding of employment. But that deviation is intentional because the whole point of using the economic realities test is to define employment in a broader sense than the control test does; this was its original purpose.[119] Therefore, using the economic realities test as the default method

[117] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 325–26 (1992).
[118] *Butler*, 793 F.3d at 414.
[119] *See* Bartels v. Birmingham, 332 U.S. 126, 130 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 726–29 (1947) (agreeing with the circuit court that the correct " test for determining who was an employee under the [FLSA] was not the common law test of control," but the "underlying economic realities . . .").

for determining joint employment, when *Darden* and *Clackamas Gastroenterology* seem to instruct otherwise, appears to be inconsistent with Supreme Court precedent.

However, this is exactly what several circuit courts claim to do.[120] Take the Eleventh Circuit, for example.[121] In *Scott v. Sarasota Doctors Hospital, Inc.*, 688 F. App'x 878, 886–87 (11th Cir. 2017), a Title VII case, the court recently condoned the use of pattern jury instructions that explained that joint employment is determined by considering "the economic realities of the entire relationship between the parties . . ."[122] Ironically, however, as support for its use of the economic realities test, the instructions cite several cases that deal with the FLSA and Migrant and Seasonal Agricultural Worker Protection Act,[123] which is odd considering these statutes define employment differently than Title VII.

Although several circuit courts purport to use some form of an economic realities test in joint employer cases, these tests may actually function more like a hybrid test in that they emphasize control as the predominant factor in joint employment. As such, they may only be economic reality tests in name only. For example, the first factor provided as guidance in the Eleventh Circuit's pattern jury instructions is "the nature and degree of control over the employee," and although "no single factor is determinative," the instructions add that "the extent of the right to control the means and manner of the worker's performance is the most important

[120] *See Frey*, 903 F.3d at 676 (using an "economic realities" test in order to determine joint employment in the Seventh Circuit); *Scott*, 688 F. App'x at 886–87.
[121] *See Scott*, 688 F. App'x at 886–87.
[122] *Id.* at 886; *see Eleventh Circuit Pattern Jury Instructions (Civil Cases)*, JUD. COUNCIL OF THE U.S. ELEVENTH JUD. CIR. (Feb. 27, 2020), https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227
[123] *See Eleventh Circuit Pattern Jury Instructions (Civil Cases)*, *supra* note 122; *see also* Aimable v. Long and Scott Farms, 20 F.3d 434 (11th Cir. 1994); Antenor v. D & S Farms, 88 F.3d 925 (11th Cir. 1996); Charles v. Burton, 169 F.3d 1322 (11th Cir. 1999).

factor."[124] This emphasis on control is more characteristic of a hybrid test than a true economic realities test.

In addition to the Eleventh Circuit, the Seventh Circuit has also putatively adopted an economic realities test. In *Frey v. Hotel Coleman*, 903 F.3d 671, 676 (7th Cir. 2018), the court also addressed a joint employment case in the context of Title VII.[125] The court instructed that "when evaluating the existence . . . of a joint employment relationship . . . . a court in this circuit must employ an 'economic realities' test . . ."[126] Oddly enough, however, the court claims their purported economic realities test is based on "general principles of agency law" and "is the essential equivalent of the Supreme Court's *Darden* test."[127] Moreover, of the factors provided by this so-called economic realities test, "the employer's right to control is the most important."[128] So although the Seventh Circuit believes it is articulating some kind of economic realities test, in truth, it is also closer to a hybrid test or even a control test.

These so-called economic realities tests illustrate two important considerations for litigants looking to select the correct multiple-employer analysis. First, selecting the correct test depends significantly on the relevant circuit court's precedent—especially in regard to joint employment. Second, what a circuit court claims to use as their joint employer test may actually function as an entirely different analysis. Therefore, it is important to apply the circuit court's exact test and not presume to know how the test functions simply based on its name.

IV. Simplifying Multiple-Employer Analysis

At this point, it is hopefully apparent that the current analysis used to answer a relatively simple question—whether multiple entities qualify as a plaintiff's employer—can be

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[124] *Eleventh Circuit Pattern Jury Instructions (Civil Cases)*, *supra* note 122.
[125] *Frey*, 903 F.3d at 676.
[126] *Id.* (citing Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377, 378–79 (7th Cir. 1991)).
[127] *Id.*
[128] *Id.* (internal quotations and citation omitted).

complicated and confusing. While some courts have made this observation explicitly, it is also apparent from the case law: courts and litigants conflate single and joint employment,[129] apply multiple tests in a single case,[130] and even use joint employer tests that appear to contradict Supreme Court precedent.[131] All of this supports the notion that multiple-employer analysis has become convoluted, and needlessly so.

Much of the complexity is simply the result of there being several different multiple-employer tests. In order to simplify the analysis, courts and regulators should reduce the number of tests available. Specifically, two changes should be considered. First, courts should consolidate their joint and single employer tests into one modified joint employer test that applies in all multiple-employer situations. Second, consistent with *Darden*, every circuit court should adopt the control test as its default method for determining joint employment. This section will discuss these proposals as well as the rationale of reducing the number of tests.

a. Reduce the Number of Tests

The benefit of reducing the number of multiple-employer tests is somewhat plain. Having fewer tests means less work and more predictability for everyone involved. Currently, as already explained, courts and litigants have to wade through several different factors just to select the correct test.[132] This would at least be tolerable if each test actually merited its distinction, but they simply do not. For starters, consider the three joint employer tests; because of the factor-heavy, totality-of-the-circumstances approach that most courts utilize, choosing one test over

[129] *See* Bristol v. Bd. of Cnty. Comm'rs, 312 F.3d 1213, 1218 (10th Cir. 2002); Virgo v. Riviera Beach Assocs., 30 F.3d 1350, 1359 n.6 (11th Cir. 1994).
[130] *See, e.g.*, Kinnebrew v. W. Wholesale Supply, Inc., No. 18-00523, 2021 WL 2581414 (D. Idaho June 6, 2021); EEOC v. 704 HTL Operating, LLC, No. 1:11–CV–845, 2013 WL 5273219 (D. N.M. Aug. 16, 2013).
[131] *Compare* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992), *with Frey*, 903 F.3d at 676.
[132] *See* discussion *supra* Section III.

another likely has no effect on a court's overall employment determination.[133] As such, there is little downside to reducing the number of joint employer tests since they often do not produce materially different results.

Furthermore, the single employer test also appears to be surplusage considering that joint employment is potentially broad enough to address multiple-employer situations notwithstanding the relationship of the defendant-entities. Remember that joint employment primarily focuses on the relationship between the plaintiff and the additional defendant-entity and doesn't necessarily require that the defendants be related.[134] Conversely, the single employer doctrine does require that the defendant-entities are related. In that sense, the single employer doctrine is a much narrower test that does not necessarily even consider the plaintiff at all.[135] This begs the question then of whether the single employer doctrine actually warrants its own test or whether all multiple-employer decisions could be handled using joint employment. For the sake simplicity, employment law should abandon using the single employer doctrine for multiple-employer analysis.

b. Modify Joint Employment and Abandon the Single Employer Test

The first change courts and regulators should make is to only use joint employment to address multiple-employer situations. This change necessary entails abandoning both the single employer and common-law agency tests. Abandoning the common-law agency test will have little to no effect considering it is already rarely used as a standalone test. However, the single

[133] *See, e.g.*, Grenawalt v. AT&T Mobility LLC, 642 F. App'x 36, 37 (2d Cir. 2016) (quotation omitted) (stating that "determining joint employment is fact-intensive"); U.S. EEOC v. Global Horizons, Inc., 915 F.3d 631, 639(9th Cir. 2019) ("All three are fact-intensive tests that will usually produce the same outcome in a joint-employment analysis.").
[134] *See* discussion *supra* Section II.C.
[135] *See* discussion *supra* Section II.B.

employer doctrine is still used somewhat regularly, and although it is too narrow of an analysis to warrant being a standalone test, its underlying rationale is still valuable and worth considering.

As already explained, the single employer test looks beyond the legal fiction of separate business entities and presumes that substantially related businesses are really a single actor. As *Deena Artware* and *Radio & Television Broadcasting* both illustrate, the single employer doctrine prevents multiple-entity defendants from using their business structures to disadvantage their employees and escape liability for misconduct. [136] This pragmatic and real-world view of employment should remain a consideration when conducting multiple-employer analysis.

One possible solution is to modify joint employment to incorporate aspects of the single employer test. This could be done simply by adding the four factors from the single employer test to the factors of joint employment. If the factors suggest the entities are nominally separate, then the defendant-entity should be presumed to satisfy the relevant legal standard whether that be the control test or economic realities test. This new modified joint employer test would apply in all multiple-employer situations and remove the need for courts and litigants to distinguish between single and joint employment thereby simplifying multiple-employer analysis.

c. Make the Control Test the Default Joint Employer Test

The second simplification that circuit courts should adopt in their multiple-employer analysis if they have not already, is to use the control test as the default method for determining joint employment. When a statute fails to adequately define employment, *Darden* and *Clackamas Gastroenterology* clearly instruct that the control test should be used.[137] When the statute instead has a broader definition of employment like the FLSA or FMLA, *Darden* and

[136] *See* NLRB v. Deena Artware, Inc., 361 U.S. 398, 399–401 (1960); Radio & Television Broad. Technicians Loc. Union v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 255 (1965).
[137] *See Darden*, 503 U.S. at 322–23 (1992); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 445, 448 (2003).

earlier Court precedent instruct that the economic realities test is appropriate.[138] Despite this relatively clear guidance, several circuit courts have adopted either an economic realities test[139] or a hybrid test[140] as their default method for determining joint employment; this is not only inapposite with Court precedent, but it also complicates joint employer analysis with unnecessary and erroneous jurisdictional variation. By uniformly adopting the control test to determine joint employment, the federal circuit courts can resolve this pointless circuit split.

Additionally, as a result of this change, courts should also stop using the hybrid test altogether. The hybrid test is supposed to blend the control and economic realities tests by treating control over the putative employee as the most important factor but not dispositive by itself.[141] The problem is, because the hybrid test does not treat control as being dispositive, the test is arguably not consistent with *Darden* or *Clackamas Gastroenterology*.[142] Moreover, half the hybrid test is premised on the economic realities test; this should be reason enough to prove it is inconsistent with *Darden* or *Clackamas Gastroenterology*. As such, abandoning the hybrid test would be both legally appropriate and a welcome simplification to multiple-employer analysis.

[138] *Darden*, 503 U.S. at 326; Bartels v. Birmingham, 332 U.S. 126, 130 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 727–30 (1947).
[139] *E.g.*, Scott v. Sarasota Doctors Hosp., Inc., 688 F. App'x 878, 886–87 (11th Cir. 2017).
[140] *See, e.g.*, Butler v. Drive Auto. Indus. of Am., 793 F.3d 404, 414 (4th Cir. 2015).
[141] *Id.* at 413 ("[C]ontrol is still the most important factor to be considered, but it is not dispositive.") (internal quotation marks and citations omitted).
[142] *Contra Butler*, 793 F.3d at 413–14 (explaining how the Fourth Circuit's hybrid test allegedly comports with *Darden*).