DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 500

RIN 1215–AA93

Migrant and Seasonal Agricultural Worker Protection Act

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document amends the regulations concerning the definition of ''employ'' under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) to include a definition of ''independent contractor'' and to clarify the definition of ''joint employment'' under MSPA, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty and to better guide the Department's enforcement activities.

DATES: This final rule is effective April 11, 1997.

FOR FURTHER INFORMATION CONTACT: Michael Hancock, Office of Enforcement Policy, Farm Labor Team, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 219–7605. This is not a toll-free number. Copies of this Final Rule in alternative formats may be obtained by calling (202) 219–7605, (202) 219–4634 (TDD). The alternative formats available are large print, electronic file on computer disk and audio-tape.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act of 1995

This Final Rule contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

II. Background

The MSPA statutory definition of ''employ'', 29 U.S.C. 1802(5), from which the concept of ''joint employment'' is drawn, is the FLSA statutory definition of ''employ,'' 29 U.S.C. 203(g), incorporated by reference. The MSPA definition of ''joint employment,'' 29 CFR 500.20(h)(4), is amended by this Final Rule to clarify and provide more accurate and complete information to the regulated community, thereby making the MSPA regulations more ''user-friendly.'' The regulation, as amended, comports more fully with (1) the Fair Labor Standards Act (FLSA) regulations at 29 CFR 791; (2) seminal court decisions regarding the employment relationship; and (3) the MSPA legislative history. In keeping with the President's Executive Order directive (No. 12866, ''Regulatory Planning and Review,'' September 30, 1993 [58 FR 51735 (October 4, 1993)]) to Federal agencies to identify rules that could be clarified to provide more complete and understandable guidance to the regulated community, the Department is amending the MSPA ''joint employment'' regulation. The Department published a Notice of Proposed Rulemaking in the Federal Register on March 29, 1996 (61 FR 14035–14039). The public comment period on the proposed regulatory changes closed on June 12, 1996.

III. Comments to the Proposed Regulatory Revision

A. Comments to the Proposed Rule

Comments to the Notice of Proposed Rulemaking (NPRM) were received from organizations, public officials and individuals representing the views of members of Congress, farmworker advocacy groups, farmworker labor unions, agricultural associations, agricultural employers, farmworker legal services programs, religious organizations serving farmworkers, lawyers representing farmworkers, and individuals. These 41 comments were submitted on behalf of over 91 organizations and individuals, 63 generally supportive of the NPRM and 28 generally opposed. The Department also received comments from the United States Department of Agriculture (USDA) after the public comment period and during the course of review of the final regulation pursuant to Executive Order 12866.

The commenters were broadly representative of two points of view: those who support the NPRM, and those who oppose the proposal and contend it should be withdrawn. The supporters of the NPRM assert that the change in the regulation is necessary to correct the confusion which has developed under the current regulation, and that the proposal accurately reflects the law governing the determination of independent contractor and joint employment status. Those opposed to the NPRM contend that it effectively creates a ''strict liability'' [1] rule which will automatically result in the determination that an agricultural employer who uses a farm labor contractor is a joint employer of the workers in the contractor's crew. Consequently, these commenters suggest that the NPRM be withdrawn and the current regulation be left undisturbed.

The comments from the Members of Congress, farmworker unions, service organizations, and legal services programs primarily focused on two subjects: the broad scope of ''employ'' in MSPA (particularly as it pertains to the statutory term ''suffer or permit to work'') which is the statutory basis of ''independent contractor'' and ''joint employment''; and suggested changes to the precise formulation of the analytical factors set forth in the NPRM. The comments from agricultural employers and associations also focused on two subjects: asserting that the Department was creating a strict liability joint employment standard which would always result in a finding of joint employment whenever an agricultural employer/association utilizes the services of a farm labor contractor; and questioning the Department's legal authority to adopt the proposed regulation.

B. Summary of Comments

1. Members of Congress

A joint comment was submitted by Rep. George Miller and Rep. Howard Berman supporting the Department's proposed rule.

2. Agricultural Employers and Associations

Comments were submitted by Agricultural Producers, American Farm Bureau Federation, California Grape and Tree Fruit League, Florida Fruit and Vegetable Association, Hood River Grower-Shipper Association, Maine Farm Bureau Association, Michigan Farm Bureau, Midwest Food Producers Association, National Cotton Ginners' Association, New England Apple Council, Nisei Farmers League, Pennsylvania Farm Bureau, United States Sugar Corporation, Venture County Agricultural Association, Virginia Farm Bureau Federation, Washington State Growers Clearing House Association, and the Washington State Farm Bureau. All of these comments struck common themes most fully expressed in the comments from the National Council of Agricultural Employers (NCAE). NCAE asserts that the NPRM proposes to create an unlawful strict liability joint employment standard for agricultural employers or associations who use the

[1] Strict liability as used by the commenters appears to mean ''per se'' liability. Per se liability in this context means that agricultural employers/associations are responsible for violations committed by the farm labor contractor if they merely retain or benefit from the services of the farm labor contractor.

services of farm labor contractors, and the Department has not stated a legally sufficient factual basis for the proposed regulatory change. The NCAE comments will be addressed below.

In addition to NCAE and other similar comments, three agricultural organizations submitted comments that addressed issues not fully explored in the NCAE comments. The American Pulpwood Association and the American Forest & Paper Association both suggest that reforestation contractors which the industry engages are independent contractors and would not be joint employers with the industry under the proposed rule. Further, these organizations suggest that the Department should clarify the analytical factor—set out in the NPRM at 500.200(h)(5)(iv)(H)—pertaining to the maintenance of payroll records and provision of field sanitation facilities. These issues are addressed below.

Florida Citrus Mutual (FCM) submitted comments in which it contends that the primary test for joint employment is control, i.e., who exercises direct control over the workers. Further, FCM contends that the House Education and Labor Committee Report relied upon by the Department in developing the NPRM is neither lawful nor appropriate guidance. Finally, FCM suggests that some of the listed analytical criteria are inappropriate for the joint employment determination. These issues too are addressed below.

3. Labor Organizations, Farmworker Advocates, Legal Services Organizations and Attorneys

Comments submitted by the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), California Rural Legal Assistance, California Rural Legal Assistance Foundation, Columbia Legal Services of Washington, Farmworker Justice Fund, Friends of Farmworkers of Pennsylvania, Garry Geffert, Migrant Farmworker Justice Project of Florida, Migrant Legal Action Program, National Council of La Raza, North Carolina Council of Churches, the United Farm Workers of America, and United Farm Workers-Texas Division, on behalf of themselves and many other organizations, generally supported the proposed regulations. These comments endorsed the general approach of the NPRM but suggested that additional changes should be considered to make the definitions of ''employ,'' ''independent contractor,'' and ''joint employment'' clearer and unambiguous.

C. Analysis of Comments

1. Congressional Comments

Representatives George Miller and Howard Berman support the NPRM, stating that it implements the legislative intent to create a broad standard of coverage under MSPA by incorporating the definition of ''employ'' from the Fair Labor Standards Act (FLSA). Further, their joint comment contends that the NPRM corrects the current regulation's incomplete and inaccurate guidance to the public and the courts concerning the scope of employer responsibility under MSPA. The commenters also assert that Congress intentionally adopted an expansive definition of ''employ'' when it incorporated the FLSA definition and eschewed the traditional common law ''right to control'' test.[2]

The Congressional commenters further state that in the enactment of MSPA, Congress recognized that the adoption of the broad FLSA definition of ''employ'' would result in the frequent imposition of liability on growers because the types of relationships Congress intended to cover through joint employment are common in agriculture. In floor debate on the bill, Rep. Miller (a cosponsor) had pointed out that the FLSA concept of joint employment ''presented the best means by which to insure that the purpose of this Act would be fulfilled''[3] and that incorporating FLSA joint employment into MSPA would fix ''* * * responsibility on those who ultimately benefit from [the workers'] labor—the agricultural employer.''[4]

For these and other reasons stated in their comment, the Congressional commenters support the proposed rule and urge its speedy adoption.

2. The American Pulpwood Association and American Forest and Paper Association

The American Pulpwood Association (AP Assoc.) and American Forest & Paper Association (AF&PA) contend the proposed regulation fails to afford primacy to the common law test of ''right to control'' in determining joint employment. According to AP Assoc. and AF&PA, the test for joint employment is properly viewed as a question of the contractual relationship between the farm labor contractor (FLC) and the agricultural employer/association. Further, the organizations assert that under this analysis the typical arrangement in the reforestation industry will fall outside the scope of joint employment.

The Department disagrees that the proper legal analysis should turn exclusively on contractual arrangements among an FLC and the agricultural employer/association. The proposed rule is carefully crafted to reflect the analytical framework within which a determination of independent contractor and joint employment is to occur. Because such an analysis is dependent on all the facts of a particular situation, it is impossible to conclude that the relationships described by these commenters as typical in the reforestation context—that is, where the reforestation contractor has all the indicia of common law right to control—could not result in a determination of joint employment.

The current regulation and the proposed amendment make clear that neither independent contractor nor joint employment determinations under MSPA are reached only by the ''traditional common law test of 'right to control''' as suggested by the AP Assoc. and the AF&PA. While ''right to control'' is one of several factors that must be considered in the analysis, the absence of such control on the part of a forestry company does not conclusively determine that a reforestation contractor is a bona fide independent contractor or that there is no joint employment relationship between the forestry operator and the workers in the reforestation crew. As stated in the proposed regulation, the determination ''depends upon all the facts in the particular case * * * [n]o one factor is critical to the analysis * * *''[5] Contractual designations or notions of common law control, while certainly relevant, are not controlling.

The AP Assoc. and the AF&PA also contend that it is inappropriate to include ''maintaining payroll records'' as a factor in the joint employer analysis at proposed regulation 500.20(h)(5)(iv)(H). The associations point out that an agricultural employer or association is obligated under MSPA to ''retain'' and ''keep'' payroll records created by a farm labor contractor, regardless of joint employer status. The associations suggest that the proposed rule would use this legal obligation as a factor in determining joint employment and thus creates an untenable choice for the agricultural employer or association: ''retain'' and ''keep'' these FLC payroll records (''maintain'' them) and thereby create indicia of employment that will come to

[2] H.R. Rep. No. 885, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S.C.C.A.N. 4547 (''House Comm. Rept.'').

[3] 128 Cong. Rec. 26,009 (1982) (statement of Rep. George Miller).

[4] Id, at 26,008.

[5] § 500.20(h)(5),(h)(5)(iv).

play in a joint employment analysis, or violate the law by not maintaining the FLC payroll records in order to avoid that result. The associations' concern in this regard is based on what the Department views as a reasonable but unintended interpretation of the word ''maintaining'' in the proposed rule. This word is used in the proposed rule in the active sense of ''preparing'' or ''making,'' rather than in the passive sense of merely ''retaining'' or ''keeping.'' However, the Department agrees that some clarification in the regulatory language would be helpful in order to convey that the proper consideration is not who ''retains'' the payroll records but rather who ''prepares or makes'' the payroll records. The obligation to ''make'' payroll records is clearly an employer function under MSPA, 29 CFR 500.80(a), and is appropriate to consider in the joint employer analysis. The Final Rule provides this clarification.

The AP Assoc. and the AF&PA suggest that a similar flaw exists in the proposed regulation at 500.20(h)(5)(iv)(H) regarding the provision of field sanitation facilities. The Department does not agree. While retaining copies of FLC-created payroll records is not indicative of employer status, the provision of field sanitation facilities is an obligation which rests with employers under the Occupational Safety and Health Act regulations.[6] When a putative employer voluntarily assumes responsibility for workplace obligations that the law imposes on employers, this voluntary assumption of such responsibility indicates the putative employer's assumption of employer status for other purposes and is relevant to whether or not the employees were economically dependent upon the putative employer for a workplace protection or benefit, such as field sanitation facilities. Therefore, the provision of field sanitation facilities is an appropriate fact to be considered in the joint employment analysis.

3. Florida Citrus Mutual

Florida Citrus Mutual (FCM) raises a number of issues (some of which will be addressed more fully in the analysis of the NCAE comments below) that question both the legality of the proposed regulation and the extent to which the NPRM factors reflect the proper considerations in determining joint employment.

The question of legality hinges largely on the FCM contention that the Department inappropriately relies on MSPA legislative history, specifically the 1982 House Committee Report, to guide its interpretation of ''employ'' and the definition of independent contractor and joint employment. The Department disagrees. When developing implementing regulations, the Department can and should be guided by the Congressional purpose as expressed in the statutory language and the legislative history. MSPA arose in the House Education and Labor Committee, Subcommittee on Labor Standards. That Committee's view of the purpose it was seeking to serve by incorporating the FLSA definition of ''employ'' into MSPA provides essential guidance to the Department in construing that term. The Department has an obligation to consider this Congressional guidance in implementing legislation through regulations. Therefore, the NPRM seeks to incorporate the Congressional intent as well as the construction given to the critical term by the courts over the last 50 years.

FCM's contention that the Committee Report does not reflect Congressional intent is unfounded. Committee reports are one of the most important sources of legislative history. As one court has explained, where ''Congress does enact a statute, the committee reports explaining it may have considerable significance in guiding interpretation'' and may serve as an indication of ''expressed purposes of the drafters of statutory language * * *''[7] In the case of MSPA, the Committee Report was particularly thorough and precise. It included the text of the bill, described its contents and purposes, and gave reasons for the Committee's recommendations including the recommendation on ''employ'' and joint employment which was adopted by Congress via enactment of the bill. The Committee's extensive treatment of the joint employment issue evidences the importance of the principle as a ''central foundation'' of the statute.

Further, this FCM argument regarding use of legislative history to develop regulations ignores the other bases for this proposed regulation. The Department did not rely solely on legislative history but also looked to its own enforcement experience under MSPA and the substantial amount of case law construing joint employment.

FCM also disagrees with the proposed rule's analytical framework for considering questions of independent contractor and joint employment status, both of which arise from the definition of ''employ''. FCM states that ''it is virtually impossible for unskilled manual laborers, offering nothing more than two willing hands, to be an independent contractor''; a view shared by the Department as to the likely status of such workers. However, while FCM acknowledges that unskilled farmworkers will be the employees of someone, FCM takes issue with the proposed analytical framework for identifying the workers' employer or joint employers in that the regulation would look to factors beyond the terms of any contractual agreement between the agricultural employer/association and the FLC. FCM's position is that to the extent any other factors are relevant and appropriate for consideration, only common law right to control should be considered.

FCM contends that relationships between an agricultural employer/association and FLC fall into two categories. In the first, the FLC is so controlled by the agricultural employer/association that ''* * * he is a foreman/employee of the farmer * * *'' rather than an independent contractor doing business with the farmer, and all the workers in the crew are direct employees of the agricultural employer/association. The Department agrees that an FLC could very well operate as an employee of the agricultural employer/association, and his/her crew members would also be direct employees of that employer. However, the Department disagrees with the basis for FCM's assertion. Court cases on this issue make it clear that it is not simply control but all the facts bearing on economic dependence that determine the status of the FLC.[8] The agricultural employer/association's control of the FLC is probative but not necessarily determinative of the FLC's employee/independent contractor status. Acknowledgment must be given to the extensive case law which evaluates economic dependence by looking beyond the control factor to consider other factors such as those set out in the proposed rule at 500.20(h)(4)(i)–(v).

The second category of relationship identified by FCM is one in which it is determined that the FLC is an independent contractor and not an employee of the agricultural employer/association; the FLC's crew members are his/her employees. FCM asserts that in such circumstances the two tests of joint employment on the part of the agricultural employer/association should be the contractual agreement

[6] 29 CFR 1928.110(b)(i)-(iii); (c).

[7] *American Hospital Ass'n* v. *NLRB*, 899 F.2d 651, 657 (7th Cir. 1990), *aff'd* 499 U.S. 606 (1991).

[8] *Beliz* v. *W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327 (5th Cir. 1985); *Castillo* v. *Givens*, 704 F.2d 181, 192 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983); *Fahs* v. *Tree Gold Co-op Growers of Florida, Inc.*, 166 F.2d 40, 43 (5th Cir. 1948).

between that party and the FLC, and the extent to which the agricultural employer/association retains the contractual right to control the workers. To the extent that it is appropriate to look beyond the terms of any contractual agreement, FCM asserts that control factors alone should govern the determination of joint employment by an agricultural employer/association and an independent contractor FLC.

The Department disagrees with the contention that common law control elements should be given undue weight in the joint employment analysis. As established by the courts and the current MSPA regulation, the test for joint employment under MSPA does not allow, much less require, that the determination be made exclusively or primarily by considering the description of control in any FLC contractual agreement or the actual exercise of control over the agricultural workers. Such unwarranted reliance on contractual labels and common law control was one of the primary reasons why Congress incorporated the FLSA definition of ''employ'' into MSPA.[9]

The legislative history and case law are clear that ''it is the economic reality, not contractual labels * * *'' that determines the employment relationships under the Act.[10] Further, Congress stated that ''* * * even if a farm labor contractor is found to be a bona fide independent contractor,* * * this status does not as a matter of law negate the possibility that an agricultural employer or association may be a joint employer of the harvest workers and jointly responsible for the contractor's employees.''[11] While a finding that there are sufficient indicia of control to satisfy the common law test of an employment relationship would most likely result in a similar determination under MSPA/FLSA, a finding of common law control is not a prerequisite to finding that a joint employment relationship exists.[12]

4. The National Council of Agricultural Employers

The National Council of Agricultural Employers (NCAE), a Washington, D.C. based association representing growers and agricultural organizations on agricultural labor and employment issues, submitted extensive comments on the proposed regulation. NCAE is strongly opposed to any change in the current regulatory definition of joint employment. NCAE asserts that the Department is inappropriately and unlawfully seeking to discourage the use of farm labor contractors by establishing a strict liability standard for agricultural employers/associations who use the services of FLCs; that the proposed rule is without a factual or legal foundation; that the proposed rule violates the Administrative Procedure Act because it is arbitrary and capricious; that the proposed rule is not user-friendly; and that the proposed rule ignores existing law. These issues are addressed below.

a. Strict Liability

NCAE contends that the proposed regulation effectively establishes a strict liability test for joint employment. The motive ascribed to the Department is that the Department is seeking to discourage agricultural employers/associations from using FLCs, thereby driving FLCs from the labor market, disrupting the agricultural labor supply, and empowering unions to substitute for FLCs in providing labor to employers. Further, the NCAE asserts that the alleged strict liability standard would allow the Department and farmworker legal services lawyers to reach into the deep pockets of agricultural employers/associations when violations occur, without the need to produce adequate evidence bearing on the joint employment determination. Finally, NCAE asserts that creation of the alleged strict liability through a regulatory change would be an illegitimate attempt to establish a legal standard which Congress and the courts have been unwilling to adopt. For the reasons stated below, the Department disagrees with the contention that the NPRM creates a strict liability standard.

The proposed definition of joint employment is a reiteration of well-established legal principles developed by the courts and explicitly endorsed by Congress when it enacted MSPA. Both the analytical framework set out in the proposed regulation (economic dependence) and the test used to examine economic dependence (the analytical factors) were derived from the cases found in the legislative history and other cases deciding joint employer issues both before and since MSPA's enactment. The Department has very specifically avoided creating ''strict liability'' through any regulatory test which would operate based on a presumption that a joint employment relationship exists. The current regulation as well as the proposed regulation expressly states that the presence or absence of one or more of the analytical factors is not dispositive. All the facts in each particular case must be considered using the factors identified in the regulation and any other relevant factors. The Department has not proposed any result-oriented ''strict liability'' or presumption test for determining either independent contractor or joint employment status. Instead, the Department has proposed a flexible test for joint employer which is consistent with the case law, the legislative history, and the current regulation which (as explained in the NPRM) is clarified and made more user-friendly by the proposed changes.

Some of the concerns expressed by NCAE may be attributable to the statement in the current and proposed regulations that joint employment relationships are ''common'' in agriculture. As Congress recognized when it enacted MSPA, the joint employment doctrine is ''the central foundation of this new statute; it is the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties.'' [13] Citing favorably the U.S. Supreme Court's characterization of ''employ'' under FLSA in *United States* v. *Rosenwasser*, 323 U.S. 360 (1945), the Committee stated that ''a broader or more comprehensive coverage of employees within the stated concept would be difficult to frame.'' [14] However, the recognition that the definition of ''employ'' (of which joint employment is one aspect) is very broad under MSPA does not lead to the presumption that joint employment is always present. The proposed rule does not create a strict liability standard that mandates the finding of joint employment in every instance in which an agricultural employer/association retains the services of a FLC. As the Department and the courts have recognized in the current definition of ''joint employment'' under MSPA, ''* * * joint employment relationships are common in agriculture. * * *'',[15] but that observation does not require or

[9] House Comm. Rept. at 4552–53.

[10] House Comm. Rept. at 4553; *Real* v. *Driscoll Strawberry Assoc. Inc.*, 603 F.2d 748, 755 (9th Cir. 1979), citing *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729 (1947); *Usery* v. *Pilgrim Equip. Co.*, 527 F.2d 1308, 1315 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976); *Hodgson* v. *Griffin and Brand of McAllen Inc.*, 471 F.2d 235, 237–238 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973).

[11] House Comm. Rept. at 4553; *Griffin and Brand* at 237.

[12] House Comm. Rept. at 4553; *Hodgson* v. *Okada*, 472 F.2d 965 (10th Cir. 1973); *Zavala* v. *Harvey Farms*, No. 94–225–M Civil (D.N.M., February 1, 1996) (Joint employer found even though court determined the FLC exercises the supervisory control).

[13] House Comm. Rept. at 4552.

[14] *Ibid.*

[15] 29 CFR 500.20(h)(4)(ii); *Aimable* v. *Long & Scott Farms*, 20 F.3d 434, 438 (11th Cir.), *cert. denied*, 115 S.Ct. 351 (1994).

inevitably lead to the creation of a strict liability standard or presumption.

The NCAE assertion that the proposed rule creates strict liability is misplaced for another reason. The structure and language of the proposed rule disavow any such presumption by expressly requiring an examination of all the facts of each case using a multifactor analytical framework to resolve the ultimate question of economic dependence, which NCAE concedes is the relevant inquiry. While the proposed rule sets out certain factors that are probative of the joint employment relationship, the proposed rule makes it abundantly clear that the ultimate test is ''* * * whether the worker is so economically dependent upon the agricultural employer/association as to be considered its employee. * * *'' NPRM at 500.20(h)(5)(iii). The factors are merely tools to be used to answer the ultimate question of economic dependence and are neither to be used as a checklist nor as an exhaustive list of relevant factors.[16]

Each potential joint employment situation must be examined on its peculiar or special facts. The legislative history is clear that there are a broad range of factual situations, and that each must be assessed based on its own distinct circumstances.[17] In the proposed rule, the Department more clearly, completely, and accurately sets out the appropriate method for analyzing these circumstances.

There is no presumption or automatic joint employment. There are circumstances which do not constitute joint employment. Some of the factors in the proposed rule are frequently present in the typical agricultural situation and, therefore, might lead to a determination of employment or joint employment status on the part of the agricultural employer/association. But such a determination must be made on all the facts in a particular case. Despite NCAE's assertion, the proposed rule does not compel a determination that joint employment exists whenever a farm labor contractor or other service provider is utilized.

For example, in some crops, a grower may sell his/her entire crop to a harvesting company, which becomes responsible for harvesting and transporting the crop to storage or market; or a grower may turn his/her entire harvesting operation over to a farm labor contractor, who makes all the meaningful decisions regarding the harvesting of the crops and provides his/her own materials and equipment needed in the harvest, such as with custom combiners who harvest grain crops or other custom harvesting operations common in many agricultural commodities.

Another example is where an agricultural employer/association secures the services of a FLC and sets out ultimate performance standards for the job, but then has no right to control or further involvement in the work or the employment, all of which are in the FLC's hands. The FLC and his/her employees are free to schedule work under any other contracts. The FLC provides all the equipment, tools and resources necessary to complete the job for which his/her services were retained and to manage all aspects of the workers' employment. The FLC has the financial and managerial ability to conduct his/her business without the involvement or assistance of the agricultural employer/association and undertakes all the responsibilities commonly performed by an employer. This and similar arrangements are not uncommon in agriculture. In such situations, an application of the economic dependence analysis is unlikely to result in a determination that the grower is an employer or joint employer under the MSPA.

In both of the above examples, it is quite common for the agreement between the agricultural employer/association and the farm labor contractor to explicitly state which party has responsibility for meeting certain obligations. The mere fact that the agricultural employer/association enters into an agreement making the farm labor contractor exclusively responsible for functions and activities that are commonly performed by employers—such as setting wage rates, paying wages, supervising, directing and controlling the workers, providing worker's compensation—does not indicate that the agricultural employer/association may be a joint employer. On the other hand, merely so providing in the contract is not controlling if the agricultural employer/association in fact retains the power to, or actually performs, such functions. As the legislative history and the case law make abundantly clear, it is the economic reality of the relationship, not contractual labels, that determine joint employment. In order to allay any confusion that may exist and to clarify the effect of this regulation, language has been added to the regulation to reiterate that this regulation does not create strict or per se liability and that no single factor or set of factors is determinative of joint employment. As has been stated repeatedly, joint employment can only be determined by an examination of all the facts in a particular case.

NCAE asserts that the effect of the proposed rule will be the elimination of the use of FLCs and consequent disruption in the agricultural labor market. This assertion fails to recognize that the issue of joint employment under MSPA does not govern whether agricultural employers/associations will have access to the services provided by FLCs. No FLC will be precluded by anything in the proposed regulation from pursuing his/her business. Even where the agricultural employer/association is determined to be the employer or a joint employer for purposes of MSPA, the employer/association may still use the FLC's services for all the tasks which FLCs may perform under MSPA—recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker. The sole effect of a joint employment determination is, where appropriate, to make an agricultural employer/association jointly responsible in the event the FLC does not perform the employer functions in a lawful manner.

The American Farm Bureau Federation—a broad-based organization similar to NCAE, which represents the business and economic interests of more than 4 million agricultural families—has addressed many of the same concerns raised by the NCAE comments but without predicting the same dire consequences for agricultural employers/associations who accept responsibility for FLCs' actions. In its *Farm Bureau Grower's Handbook: A Compliance Guideline To Federal Agricultural Labor Laws*, April, 1991, the Farm Bureau acknowledged that applying the economic dependence analysis to the typical agricultural circumstance will ''* * * probably be enough for him [the grower] to be a joint employer with the labor contractor. * * *'' In light of this potential outcome, the Farm Bureau suggested two alternative courses of action for its members:

> ''A grower has two choices. First, you may try to distance yourself from your farm labor contractor so that you will not be found to be a joint employer if a lawsuit is brought against him. Second, you may accept that the way in which you want your operation to work does not allow you to avoid being a joint employer, and decide to plan ahead to avoid legal liability. As for the first choice, you should be aware that the trend of court decisions, especially where workers covered by [MSPA] are concerned, is to find that the

[16] *See Antenor* v. *D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996).

[17] House Comm. Rept. at 4553.

growers are *joint* employers. Generally speaking, this option is available only where the workers are skilled and where the grower takes a hands-off approach to supervising the work and the employees. * * * On the other hand, planning ahead to take responsibility for complying with FLSA and [MSPA] does not need to be an unreasonable burden. Several of the steps that are required may be taken by either the grower or the contractor. * * * A plan to take all necessary steps to comply with FLSA and [MSPA] is a better defense against a lawsuit than trying to avoid joint employment.''

Id. at 49–50.

The Farm Bureau acknowledges that joint employment in the typical agricultural context is common but not inevitable. As will be addressed in greater detail below, the Farm Bureau also lists factors used in the joint employment analysis that closely track those set out in the proposed rule and which NCAE suggests are inappropriate.

b. Application of the Analytical Factors in the Proposed Rule

NCAE suggests that under the proposed rule a finding of ''any control or authority on the part of the grower'' will result in a finding of economic dependence and joint employment. NCAE construes the proposed rule as requiring that joint employment be found where *any* of the delineated factors are present. However, NCAE misconstrues (or perhaps overlooks) the express language of the proposed rule which states that the factors ''are analytical tools to be used in determining the ultimate question of economic dependence. The factors are not to be applied as a checklist. * * * No one factor is critical to the analysis * * * Rather, how the factors are weighed depends upon all the facts and circumstances.'' NPRM at 500.20(h)(5)(iv).

NCAE asserts that the analytical factors identified in the proposed rule are distorted or inappropriate for various reasons. This contention appears to overlook the fact that each of the proposed rule's analytical factors is drawn from the case law regarding ''employ'' and joint employment, as discussed below.

The American Farm Bureau Federation's published guidance for its members (1991 *Handbook*) expressly recognizes a list of analytical factors bearing on the joint employment determination. While the Farm Bureau's factors do not identically track the factors set out in the proposed rule, they are notably similar and their recognition by the Farm Bureau is at odds with NCAE's assertions about the propriety and relevance of factors such as the skills of workers, relative investment, and permanency and exclusivity of the work. The Farm Bureau's *Handbook* lists the relevant factors for determining as joint employment as follows:

- Who owns the property where the work is done?
- How much skill is needed to do the job?
- Who has investment in land, equipment and facilities?
- How permanent and exclusive is the job?
- Who has the right to control the work?
- Who supervises the work?
- Who sets the rates of pay or methods of payment and employment policies?
- Who has the right to hire, fire, discipline, and otherwise affect the workers' employment?
- Who prepares the payroll and pays the workers?

The NCAE's comments also address individual factors set forth in the proposed rule, as follows:

i. Control/Supervision

Among the factors set forth in the proposed rule, this factor tests the putative employer's power (directly or indirectly, exercised or unexercised) to control or supervise the workers or the work performed. NCAE suggests that the only relevant consideration under the control factor should be the extent to which the grower actually exercises control and then only if the exercise of control is substantial. The Department disagrees with such a narrow view of control in the determination of joint employment.

Courts addressing this matter have held that it is not the actual exercise of direct control of the work but rather the power or ability to do so that is relevant to the joint employment inquiry.[18] Further, the courts have recognized that the exercise of control can be accomplished directly or indirectly through others, such as by conveying instructions through a FLC to the workers.[19]

As one court observed when considering the control factor, ''* * * the *right* to control, not necessarily the actual exercise of that control is important. The absence of the need to control should not be confused with the absence of the right to control.''[20] Where the agricultural employer/association retains any right to control the workers or the work, this would constitute control indicative of an employment relationship. For instance, where the agricultural employer/association retains the right to direct details of the work, this fact is indicative of control and therefore relevant to the joint employment analysis.

Even the *Aimable* decision cited by NCAE in support of its comments to the proposed rule does not necessarily support NCAE's position. Having observed that in this case the FLC ''* * * exercised absolute, unfettered and sole control over [the workers] and their employment,'' the *Aimable* court simply never addressed any circumstance in which the putative joint employer retained the right to control but did not exercise it. *Aimable* at 440.

The Department does believe that the words ''exercised or unexercised'' in the proposed regulation language are redundant, inasmuch as the ''power'' to control, direct, or supervise necessarily implies the concept of unexercised control. Therefore, to avoid confusion or misunderstanding and to bring greater clarity to the regulation, the words ''exercised or unexercised'' are not included in the Final Rule.

The courts have determined that the requisite control of the work may be exercised directly or indirectly through others.[21] Indirect control or supervision may be accomplished through instructions delivered to the FLC to be communicated to the workers. As one court said, ''The fact that the defendant often effected this supervision by speaking to the crew leaders, who in turn spoke to the farmworkers, rather than speaking directly to the plaintiffs, does not negate the obviously extensive degree of on-the-job supervision that existed. Reality can not be so easily masked by transparent attempts to cover over the truth with a deceptive label.''[22]

It should be noted that indirect control sufficient to indicate the existence of an employment relationship between a grower and a FLC's crewmembers would not be established solely by contractual terms through which the grower's ultimate standards or requirements for the FLC's performance are defined (e.g., the

[18] *Beliz* at 1329–30; *Haywood* v. *Barnes,* 109 F.R.D. 568, 589 (E.D.N.C. 1986). *Contra Aimable,* at 440–441.

[19] *Aimable* at 441; *Griffin and Brand* at 238; *Monville* v. *Williams,* 107 Lab. Cas. (CCH) P34,978, at 45,252–253 (D. Md. 1987).

[20] *Haywood* at 589; cited in *Barrientos* v. *Taylor,* 917 F. Supp. 375, 383 (E.D.N.C. 1996).

[21] *Griffin & Brand* at 237; *Barrientos* at 382; *Monville* at 44,253; *Leach* v. *Johnston,* 812 F. Supp. 1198, 1207 (M.D. Fla. 1992); *Antunez* v. *G & C Farms, Inc.,* 126 Lab. Cas. (CCH) P33,015, at p. 46,174 (D.N.M. 1993).

[22] *Haywood* at 589 citing *Griffin & Brand* at 238. *See also Aimable* at 441 (''It is well-settled that supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor.''); *Beliz* at 1328; *Castillo* at 189 n.17, 191–92.

grower's specification of the size or ripeness of the produce to be harvested, or of the date for the FLC's completion of a job). Such stated performance standards or objectives—which are common in contracts for services in the agricultural industry and in other contexts—would not, in themselves, constitute indirect control of the work by the person for whose benefit the services are to be performed (e.g., the grower). However, the greater a grower's involvement in the assurance and verification that the FLC is meeting or will meet the contract's ultimate performance requirements, the greater the likelihood that the grower would demonstrate sufficient indirect control to indicate an employment relationship with the FLC's crewmembers. Where the grower not only specifies in the contract the size or ripeness of the produce to be harvested, but also appears in the field to check on the details of the work and communicates to the FLC any deficiencies observed, the circumstances must be closely examined to determine if the grower is demonstrating sufficient indirect control of the workers to indicate there may be an employment relationship with them. The agricultural employer/association may certainly take action during or after the conclusion of the work to confirm satisfaction of the contract's ultimate performance standards (including appearing in the field and communicating with the FLC about general observations concerning performance of the contract standards, such as ripeness or size of the produce harvested) without this action alone being considered an indicium of joint employment. The critical question to be considered is not whether the agricultural employer/association was in the field or communicated with the FLC, but rather what that presence in the field and those communications indicate about the nature and degree of the agricultural employer/association's control over the work or the employment. To avoid any possible confusion in this regard, Factor (A) has been amended to provide that a reasonable degree of contract performance oversight and coordination with third parties such as packing houses and processors is permissible.

ii. Power to Hire, Fire, Modify Employment Conditions or Determine Pay Rates or Methods of Payment

As with the control factor, NCAE argues that it should be only the actual exercise, not the power to effect, these activities that should be considered. NCAE recognizes that these important employer functions are significant in the determination of joint employment. A putative employer's direct or indirect exercise of the power to hire, fire or modify employment conditions, set pay rates or method of payment is obviously relevant to employer status, as courts have stated.[23] For example, a putative employer may expressly agree on a rate of pay for the workers in his/her contract with an FLC[24] or may effectively determine the workers' compensation rates through the amount of the payments to the FLC.[25]

Equally relevant is the putative employer's power or authority to exercise these functions should it be in his/her best interest to do so. Courts have recognized that agricultural employers retain the ability to exercise significant control over the employment but may never find the need to exercise that power.[26] The retention of power is revealing of the economic dependence of the workers on the putative employer just as is the actual exercise of power.

The current regulation, which NCAE urges the Department to retain, includes the same factor bearing on employment that NCAE asserts is objectionable.[27] This factor is merely preserved in the amended rule.

iii. Provision of Housing, Transportation, Tools and Equipment, or Other Materials Required for the Job

NCAE asserts that this factor should not be considered in a joint employment analysis. Many courts have recognized the appropriateness of identifying the person or entity which provides the housing, transportation, tools, equipment, machinery and other resources related to the employment.[28] The Department—along with the courts—considers this factor to be relevant.

It is the Department's view that this factor is sufficiently similar to the consideration of employer-provided services or benefits in factor (H) of the NPRM that the factors should be consolidated in the Final Rule. A fuller discussion of the relevance of these facts is found in part vii below, which deals with new combined factor (G) of the Final Rule.

iv. Degree of Permanency of the Relationship

NCAE contends that this factor should not be considered because it was rejected by the court in *Aimable*. However, the Department recognizes that, despite *Aimable*, the great weight of the case law supports consideration of the degree of permanency and exclusivity in the relationship between the workers and the putative employer in the context of the agricultural operation in question.[29] The duration of that operation necessarily affects the duration or permanency of the relationship. Where an FLC and the workers are engaged for the duration of the operation and are obligated to work only for or be available to the agricultural employer/association at his/her discretion during that period, that information bears directly on the question of the workers' economic dependence. Other courts have found this factor relevant and the Department believes that duration of the relationship should be one of the factors considered in determining joint employment.

v. Unskilled Work

NCAE suggests that this factor is designed to predetermine a finding of joint employment, apparently based on the assumption that nearly all agricultural work involves repetitive, rote tasks requiring little skill or training even though NCAE also acknowledges that many agricultural jobs require considerable skill and experience. The Department recognizes that the worker's skill—like each of the other factors identified in the case law and this regulation—is only one of several factors which are to be considered in making the ultimate determination as to the worker's economic dependence. In almost all cases, the courts have considered the worker's degree of skill to be a relevant and probative factor in the determination of such dependence.[30] In common experience in the agricultural industry and other contexts, there is a reasonable correlation between the worker's degree of skill and the marketability and value of his/her services. In the free market

[23] *Beliz at 1328; Castillo* at 192; *Griffin & Brand* at 237–38; *Antunez* at p 46,173; *Haywood* at 587.

[24] *Beliz* at 1328; *Griffin & Brand* at 238; *Alviso-Medrano* v. *Harloff*, 868 F. Supp. 1367, 1373 (M.D. Fla. 1994); *Haywood* at 590–91; *Monville* at 45,253.

[25] *Beliz* at 1328; *Castillo* at 192; *Alviso-Medrano* at 1373; *Monville* at 45,253; *Maldonado* at 487.

[26] *See, e.g., Beliz* at 1322, 1328; *Maldonado* at 487.

[27] *See* 29 CFR 500.20(h)(4)(ii)(C) The Power to determine the pay rates or the methods of payment of the workers; (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers.

[28] *Rutherford* at 731; *Antenor* at 937–938 & n.15; *Beliz* at 1328; *Castillo* at 192; *Barrientos* at 383; *Haywood* at 587, 588–89; *Monville* at 45,253. *But see Aimable* at 443.

[29] *Ricketts* v. *Vann*, 32 F.3d F1, F4 (rth Cir. 1994); *Lauritzen, Secretary of Labor* v. *Beliz* at 1328; *Fahs* at 44; *Haywood* at 589; *Donovan* v. *Gillmor*, 535 F. Supp. 154, 162–63 (N.D. Ohio), *appeal dismissed*, 708 F.2d 723 (6th Cir. 1982).

[30] *Ricketts* at 74; *Beliz* at 1328; *Castillo* at 190; *Real* at 755; *Antunez* at 46,174; *Fahs* at 44. *But cf. Aimable* at 444.

place, an unskilled task which may easily be learned and performed by almost any worker is a task for which many workers (both trained and untrained) can realistically compete, and is also a task for which the competing workers would not be able to demand or expect high wages. The lower the worker's skill level, the lower the value and marketability of his/her services, and the greater the likelihood of his/her economic dependence on the person utilizing those services. Conversely, the higher the worker's skill level, the greater the value and marketability of his/her services in the market place and, consequently, the lesser the likelihood that he/she would be economically dependent on any particular person who utilizes his/her services.

The Department concludes that, in light of the great weight of the case law, the factor of the worker's degree of skill is an appropriate factor for consideration in the determination of economic dependence; the regulation therefore identifies this factor as one of several to be considered. [31]

vi. Activities of the Workers Integral to Overall Business Operation and Work Performed on Premises Owned or Controlled by Putative Employer

NCAE asserts that these two factors are included in the proposed rule to assure that the agricultural employer/association always will be found to be a joint employer. NCAE cites no authority for rejecting these as relevant factors for determining joint employment. In fact, no case has rejected these factors and they are invariably included among the factors considered by courts. [32]

This MSPA regulation is an embodiment and distillation of the case law, which consistently demonstrates that many factors—including the worker's performance of a function integral to the putative employer's operation, and the location of the work on the putative employer's premises—are relevant and probative factors in the determination of the ultimate question of the worker's economic dependence. [33] The exclusion of one or more of these factors would not only be an unjustifiable distortion of the courts' decisions, but would also result in an incomplete analysis of the economic realities upon which the ultimate issue of an employment relationship is based.

In the agricultural industry, as in other parts of the free market place, there is a logical and appropriate correlation between the ''centrality'' of a function in a business operation and the certainty of the business' performance of that function through the use of whatever resources or methods are necessary, including the use of labor. In other words, where a function is a central or core part of the business (*i.e.*, important enough to be ''integral'' to the business; often performed on the business' premises), common experience shows that that business would be virtually certain to assure that the function is performed, and would obtain the services of whatever workers are needed for that function. The workers so engaged can reasonably anticipate that the work will be available for so long as the function in question must be performed. The Eleventh Circuit, recognizing the importance of the putative employer's providing the place where the work is performed, stated in *Antenor*: ''[t]his element is probative of joint-employment status for the obvious reason that without the land, the workers might not have work, and because the business that owns or controls the worksite will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors.'' 88 F.3d at 936–937. The court applied a similar rationale in holding that ''a worker who performs a routine task that is a normal and integral phase of the grower's production is likely to be dependent on the grower's overall production process.'' The workers' reliance upon a particular business as a source or place of work (and, consequently, a source of income in the form of wages for services) can appropriately be considered in the determination of an employment relationship.

Conversely, where the work is not performed on the putative employer's premises or is not integral to the putative employer's business operation, these facts would indicate that the existence of a joint employment relationship is somewhat less likely.

After carefully reviewing the case law and considering the NCAE comment, the Department has concluded that the analysis of the workers' economic dependency on the putative employer necessarily includes the consideration of these two factors bearing on the ''centrality'' of the function in the putative employer's operation. However, the Department reiterates that neither of these factors (or any other factor) is controlling in the analysis.

vii. Putative Employer Provides Services, Materials or Functions Commonly Performed by an Employer

As stated in the discussion under part iii above, factor (C) of the NPRM has been combined with factor (H) of the NPRM to create a new factor (G) in the Final Rule because the substance of the two NPRM factors is similar. Both NPRM factors focused on services, tools, equipment, and materials which are commonly provided or performed by employers. Factor (C) dealt with transportation and housing, which are common indices of employment for transient workers or those who have no other means of transportation to work. Factor (H) dealt with services and benefits such as providing workers' compensation insurance and handling payroll, which are commonly performed by employers.

In addition to the issues raised by the American Pulpwood Association and others, discussed above, NCAE suggests that consideration of this factor is inappropriate in that a putative employer may take such actions or provide materials or services because he/she handle them better or more economically than can the FLC. The Department recognizes that an agricultural employer/association may be more skilled, efficient, or better capitalized than the FLC and that this may be a reason for performance of various ''employer'' functions. However, the Department does not consider efficiency, motive, or capitalization to be a reason to negate the relevance of this factor in assessing joint employment. The courts have considered these facts to be relevant and probative in the joint employment analysis.

Where a putative employer provides materials or services, or undertakes functions normally performed by an employer (such as providing workers' compensation, paying FICA taxes, transporting or housing workers, providing the tools and equipment necessary to the work), such behavior indicates that it is in his/her interest to perform such functions that are commonly performed by employers rather than rely on the FLC. [34] Further, workers who use the services, materials or functions are in a very tangible way economically dependent on the entity

[31] *Ricketts* at 74; *Beliz* at 1328; *Castillo* at 190; *Real* at 755; *Antunez* at 46,174; *Fahs* at 44. *But cf. Aimable* at 444.

[32] *Rutherford Food* at 726, 729–730; *Aimable* at 444; *Griffin & Brand* at 237–238; *Beliz* at 1328; *Castillo* at 192; *Fahs* at 42–43.

[33] *Rutherford Food* at 726, 729–730; *Aimable* at 444; *Griffin & Brand* at 237–238; *Beliz* at 1328; *Castillo* at 192; *Fahs* at 42–43.

[34] *Antenor* at 937; *Griffin & Brand* at 237; *Fahs* at 42; *Beliz* at 1328.

performing these functions.[35] Thus, the performance of these ''employer'' functions by a putative employer is both an objective manifestation of employer status and strong evidence of the workers' economic dependence upon him/her.

The Final Rule contains some modifications made in response to these commenter's concerns. The word ''normally'' in the NPRM has been changed to ''commonly'' as a more accurate and precise word in this context. Further, the NPRM has been amended to consider the amount of the investment in tools and equipment when considering these items in the joint employment analysis.

The Department recognizes that ownership of housing is not determinative. To the extent that an agricultural employer/association relinquishes all control of housing it owns to a third party, the mere ownership of the housing by the agricultural employer/association would not in itself be a consideration in the joint employment analysis.

The Department also recognizes that benefits, services or functions performed by an agricultural employer/association may directly benefit the workers, and that some persons might argue that these matters should not be considered in the joint employment analysis to avert the unintended and undesirable consequence that agricultural employers/associations would be dissuaded from providing these benefits. While workers may be benefited if an agricultural employer/association provides workers' compensation, withholds and pays employment taxes, or provides housing or transportation, the benefit realized by the workers does not negate, but rather reinforces the relevance of the provision of these services in determining the economic dependence of the workers. As set out above, the courts have held these facts to be probative of joint employment.

Nonetheless, it is not the Department's intention nor desire to create unnecessary disincentives for agricultural employers/associations to provide employment related benefits to agricultural workers or more closely oversee farm labor contractor activities to ensure compliance with legal obligations. Therefore, the MSPA regulation on the assessment of civil money penalties, 29 CFR 500.143 is amended to include as an example of ''good faith efforts to comply with the Act'' an agricultural employer/association providing benefits to workers or taking reasonable measures to ensure FLC compliance with legal obligations. These reasonable measures will be considered by the Department as a mitigating factor in assessing any civil money penalties resulting from violations which arise from the joint employment relationship.

The Department further recognizes that an agricultural employer/association may be harmed by an FLC who violates his/her contract with the agricultural employer/association for the provision of labor and, in so doing, fails to meet an employment obligation to the workers. If an agricultural employer/association is found to be a joint employer, and therefore jointly liable with the FLC for employment obligations to the workers (*e.g.*, payment of wages), the agricultural employer/association would be required to ''make good'' on such obligations where the FLC failed to do so. The joint and several liability inherent in the concept of joint employment requires this result. However, nothing in the case law on joint employment or in this MSPA regulation should be construed as in any way prejudicing any rights the agricultural employer/association may have against the FLC to recover for damages resulting from the FLC's breach of the contract to provide labor to the agricultural employer/association. Thus, if the FLC in that contract agreed to pay the wages of the workers but failed to do so, the agricultural employer/association found to be a joint employer may well have legal recourse against the FLC for any money the agricultural employer/association is required to pay to the workers.

Some employer commenters assert that certain activities are undertaken by the agricultural employer/association not because of an employment relationship with the workers or because it can handle the activity more efficiently or economically than the FLC, but because the agricultural employer/association is obligated under some other law to engage in or refrain from engaging in certain activity. One example is the landowner's obligation under Environmental Protection Agency (EPA) regulations to prevent workers from reentering fields that were recently sprayed with pesticides. The Department takes the view that where an action or inaction is taken under compulsion of a legal requirement which is unrelated to an employment relationship, such action or inaction is not to be considered in the determination of whether an employment relationship exists for purposes of MSPA. Thus, while a grower's action in barring workers from a particular field at a particular time might be viewed as an exercise of the grower's control over the workers' hours and places of work (indicative of an employment relationship), the Department would not take this activity into account in the employment relationship analysis where the grower's action is only that required to fulfill his/her legal obligations under EPA requirements based on his/her status as a landowner and not on any status as an employer.

c. Administrative Procedure Act

NCAE and other commenters assert that the Department has failed to demonstrate a compelling rationale for the proposed rule, *i.e.*, that the Department presented no ''data'' to support the proposal and, therefore, the rule is arbitrary and capricious. The proposed regulation is intended by the Department to clarify the current regulation, to provide more complete and accurate information to affected parties (farm labor contractors, agricultural employers/associations, and agricultural workers), and to make the regulation more useful to the public. NCAE asserts that the rationale is insufficient because the proposed regulation is longer rather than shorter than the current regulation and because, in NCAE's opinion, the regulated community is not confused and, therefore, needs no clarification. Further, these commenters suggest that the proposed rule is fatally flawed because in their opinion courts will not grant deference to the new rule because it is at odds with the current rule (promulgated shortly after MSPA's enactment) and with the *Aimable* decision. The Department has considered these concerns and believes them to be without foundation.

The current regulation is not being repudiated by the proposed rule. Rather, the substance of the current regulation is being reorganized and restated for purposes of clarity, and additional guidance is being offered to the regulated community. In the 13 years since the enactment of MSPA, it has become apparent that the regulation needs to be updated to reflect the Department's enforcement experience and a substantial body of court decisions construing joint employment. Enforcement experience and judicial decisions have highlighted the need for clarification and elaboration of the proper analysis of joint employment.

Since the current regulation was promulgated in 1983, it has become

[35] *Antenor* at 936 (''[T]he farmworkers were dependent on the growers to obtain financial compensation for job-related injuries * * * They relied on [the growers] to see that the social security payments were made as well.')

clear to the Department that the regulation does not offer complete guidance on joint employment and may lead to misunderstanding and confusion. The regulation has been misconstrued in as much as the five factors delineated in 500.20(h)(4)(ii)(A)–(E) have sometimes been viewed as an exhaustive list of factors that the Department believes are probative of joint employment. This has never been the position of the Department, as shown by the express qualification in the existing regulation, which states that the determination of joint employment is not limited to the regulation's list of factors. 29 CFR 500.20(h)(4)(ii). However, some of the regulated community and some courts have taken the position that these are '' '*the* five regulatory factors' '' (emphasis added), treating them as an exclusive or exhaustive list. *Aimable* at 439.

The five factors identified in the current regulation continue to be an essential part of the consideration of joint employment. The proposed rule is intended to place them in the proper context as part of the economic dependence analysis. The five factors, consolidated into two, apply within the broader context of the economic dependence analysis and the more complete list of factors found relevant by the courts and by the Department in conducting this analysis.

The proposed regulation is thus a more complete and accurate description of the appropriate joint employment analysis than is the current regulation. The proposed rule is intended to give better guidance to the regulated community about the purposes to be served by the MSPA joint employment principles and provide additional guidance about the ultimate question to be resolved in both the independent contractor and joint employer analysis—*i.e.,* economic dependence. The Department has set out a nonexclusive list of factors which it believes will help provide the proper framework for deciding whether or not a joint employment relationship (or independent contractor status) exists; the proposed rule preserves the current rule's express notice that factors in addition to those identified in the regulation may be appropriate for consideration. Through the proposed rule, the regulated community is being provided with more complete guidance, the courts will have the benefit of the Department's complete views on these questions, and the Department's enforcement of MSPA will be made more efficient and effective.

The need for clarification has become apparent to the Department. Some recent court decisions—such as *Aimable*—have applied the current regulation as a checklist, or as a rigid formula in which factors simply are entered in two columns with little analysis beyond a comparison of the totals at the bottom of the columns ''for'' and ''against'' joint employment. The most recent case to consider the joint employment in agriculture issue [36] has instructed that this analytical method is not what was intended by the courts in the seminal cases [37] or by Congress in its express adoption of the FLSA's broad concepts of ''employ'' and joint employment. The proposed rule is intended to assist in focusing on and applying the flexible multifactor analysis which is required.

Further, the Department's enforcement experience indicates a need to better articulate and apply Congress's intentions for MSPA joint employment. Studies have shown that the use of farm labor contractors is increasing, thereby exacerbating the harmful effects which FLCs who operate in violation of the laws have in this labor market. [38] These studies have shown that in comparison with growers, farm labor contractors pay lower wages and provide fewer benefits. [39] To the extent that farmworkers, who are entitled to the protections of MSPA, are denied their rights because of misunderstanding of or incorrect application of joint employment principles under the current regulation, it is the Department's belief that the proposed regulation will enable more agricultural employers/associations to understand and fulfill their obligations if, as the American Farm Bureau Federation's Grower Handbook says, they will ''accept that the way you want your operation to work does not allow you to avoid being a joint employer.''

5. AFL–CIO Comment

The AFL–CIO commented in support of the proposed rule as being fully consistent with the statutory language, its legislative history and its intended purposes. Further, the AFL–CIO expresses the view that the proposed rule is likely to better inform the regulated community about its obligations under the Act and thereby promote greater compliance among employers, thus reducing government enforcement expense.

The AFL–CIO found support for its views in the definition of ''employ'' under the FLSA and the Supreme Court's observation that ''a broader or more comprehensive coverage of employee within the stated categories would be difficult to frame.'' [40] The AFL–CIO asserts that as a result of the broad coverage under ''employ,'' it has long been settled that the traditional common law ''control'' tests and principles do not solely determine whether or not a worker is an independent contractor or employee, or whether or not he/she is employed by one or more employers.

The AFL–CIO further emphasizes that Congress intended to capture the broad scope of the FLSA coverage when it enacted MSPA. The AFL–CIO cites the legislative history which shows that joint employment was characterized as the ''central foundation'' of the Act and should not be decided by common law principles.

The AFL–CIO agrees with the courts and the Department that the proper analysis in determining employment status is economic dependency based on consideration of the totality of the circumstances, not a mechanically applied checklist of factors. Citing the language in the Committee Report as evidence of the approach which Congress intended (''* * * the absence of evidence on any one or more of the criteria listed does not preclude a finding that an agricultural association or agricultural employer was not a joint employer along with the crew leader.'' [41]), the AFL–CIO contends that the proposed rule ''reflects fairly the factors which Congress intended to aid in evaluating whether workers are individual contractors or employees'' and who among the parties are employers. The AFL–CIO also suggests that the Department consider including a brief statement explaining the significance of the factors delineated in the NPRM as a way of bringing greater clarity to the regulations.

The AFL–CIO suggests that the regulation make clear that sufficient control on the part of a putative employer is demonstrated if the putative employer retains the right to establish general parameters within which the work is to occur. They assert that a labor

[36] *Antenor, supra.*

[37] *Rutherford Food* at 730; *Lauritzen* at 1538; *Pilgrim Equipment at* 1311.

[38] ''U.S. Farmworkers in the Post-IRCA Period: Based on Data from the National Agricultural Workers Survey,'' Office of the Assistant Secretary for Policy, March, 1993, at 16; ''The Report of the Commission on Agricultural Workers'', Commission on Agricultural Workers, November, 1992, at xxvii.(''In recent years FLCs increasingly have filled the role of matching seasonal workers with jobs. * * * Workers employed by FLCs generally receive lower wages and are employed under working conditions inferior to those offered to farmworkers hired by * * * agricultural employers.'').

[39] *Ibid.*

[40] *U.S.* v. *Rosenwasser,* 323 U.S. 360, 362 (1945).

[41] House Comm. Rept. at 4553.

intermediary may make all the implementing decisions within those broad parameters but the person establishing those parameters retains sufficient control to be deemed a joint employer. In their view, sufficient control would be established if the putative employer retains the right to dictate the ''place, pace and timing'' of the harvest. A grower places his/her interests in the place, pace and timing of the harvest to maximize profit given market price and other factors in contrast with the FLC and piece-rate workers, whose economic interests are to pick as much and as fast as possible to maximize earnings. The grower thereby may make the worker (and the labor contractor) subservient to—and dependent on—the grower's economic goal of maximizing profit by delaying the harvest or by picking only the best quality of fruit.

Because the proposed regulation is intended to address a broad range of circumstances, the Department has concluded that any attempt to delineate precisely how each factor is to be applied as suggested by the AFL–CIO in this regard may well have the effect of unduly limiting the factor's application to an inappropriately narrow range of factual circumstances. As the proposed rule makes clear, the statement of the factors is intended to offer guidance and not to be exhaustive, either in the identification of relevant factors or in their application to specific factual circumstances. In appropriate factual circumstances, it may well be appropriate to conclude that the right to determine the place, pace and timing of the work is sufficient to establish control under the joint employer analysis.

6. Migrant Farmworker Justice Project

The Migrant Farmworker Justice Project (MFJP) submitted comments on behalf of itself and 33 others, generally supporting the proposed rule. Specifically, MFJP asserts that the proposed rule is necessary to clarify the current regulation to more fully and completely conform to case law cited in the MSPA legislative history and the judicial rulings construing the Act. Further, MFJP contends that the current regulation, particularly the listed factors, has excluded other relevant factors, thereby misleading Wage and Hour compliance investigators and the affected community about the obligations under the Act.

MFJP also contends that there is ample factual support for the necessity to further refine the joint employment definition to serve the legislative purpose in enacting MSPA in 1983. MFJP asserts that MSPA was intended to shift responsibility to growers from FLCs for many of the important protections under MSPA's predecessor statute, the Farm Labor Contractor Registration Act (FLCRA). FLCRA did not include the joint employer concept but rather placed responsibility on farm labor contractors. MFJP asserts that the Department's incomplete definition of joint employment in the current regulation has undermined that essential Congressional purpose underlying the enactment of MSPA.

In support of this assertion, MFJP cites the legislative history of MSPA in which Congress found that the FLCRA had ''failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers'' and that ''a completely new approach must be advanced.'' [42] As stated by an original co-sponsor of MSPA, this completely new approach involved placing responsibility for compliance with certain provisions on agricultural employers as well as FLCs:

The [Act] corrects the key weakness of the FLCRA, which held only the farm labor contractor responsible for such abuses and shielded the employer unless he fell within the narrow definition of ''farm labor contractor'' under that Act.

Remarks of Rep. Ford, 128 Cong. Rec. 10456 (daily ed. December 20, 1982).[43]

In addition, MFJP contends that FLCs have proven to be difficult both to regulate and, when found to be in violation, to effectively bring to account. According to MFJP, many FLCs are so devoid of resources that they are unable to satisfy civil money penalty assessments or court judgments awarding monetary damages to aggrieved farmworkers. Additionally, with such a transient population (approximately 20% of the FLC population leaves the industry every year and is replaced by new entrants),[44] it is difficult to effectively regulate labor standards if only FLCs are deemed responsible for compliance.

MFJP suggests that the proposed joint employment analysis needs further clarification in order to reiterate that joint employment is indicated when two or more employers share responsibility for all or some of the factors set out in the proposed rule. According to MFJP, such shared responsibility tends to indicate that the workers are economically dependent on two employers, such as when a FLC provides the clippers needed to harvest citrus and the agricultural employer/association provides the equipment for hauling the fruit and the field sanitation units (See proposed 500.20(h)(5)(iv)(C)). It also tends to demonstrate that the putative employers are not completely disassociated with respect to the employment of an employee. The Department agrees with this point and thus the regulatory language at 500.20(h)(5) will be changed to clarify that shared responsibility is an indication of joint employment. [45]

7. United Farm Workers, AFL–CIO, Texas Division

The United Farm Workers, AFL-CIO, Texas Division (UFW-Texas) submitted comments on behalf of itself and 15 other organizations. The UFW-Texas comments were generally supportive of the proposed rule and many of its statements were consistent with and reflected in the AFL-CIO and MFJP comments. However, UFW-Texas also suggests that the factors set out in the proposed rule should be further explained and reformulated to capture the full scope of the cases applying the factors. For example, the proposed factor at § 500.20(h)(4)(iii) states in relevant part: ''[t]he putative employee's investment in equipment or materials required for the task * * *''. UFW-Texas suggests restating the factor in the following language (modifications underlined): ''[t]he putative employee's investment in substantial equipment, materials, and large capital expenditures as compared to that of the putative employer.'' In the alternative, the UFW-Texas proposes that the factors be amended to include citations to cases in which the factors have been applied.

The Department believes the suggested changes are unnecessary. As stated in the proposed rule, the regulation is intended to summarize the factors applied by the courts and is not intended to be an exhaustive statement of the relevant factors and their applicability in every situation. Under this rule, it would still be necessary for enforcement personnel and courts examining joint employment to refer to the guidance offered by the courts that have applied the factors in joint employment cases. Nothing the

[42] House Comm. Rept. at 4549.

[43] MFJP also cites *Monville* at 45,252 (''Indeed, the elimination of this shielding effect of recruiter-contractors was one consideration leading to the reformulation and broadening of the definition of the term 'employ' when the [MSPA] was enacted to replace the Farm Labor Contractor Registration Act of 1963.'')

[44] This data is based on information from DOL registrations of FLCs.

[45] *See Antenor* at 938; *but see Aimable* at 443 (significant investment in equipment and facilities on the part of both the FLC and the grower does not indicate that the workers are jointly employed by both entities).

Department has done in the proposed rule negates this additional level of analysis.

8. United States Department of Agriculture

The United States Department of Agriculture (USDA) submitted a number of comments concerning the NPRM. Many of USDA's comments were similar to those submitted by agricultural interests and are fully addressed above.

USDA made a number of observations regarding FLCs and their relationships with agricultural employers/associations, and offered several comments concerning the regulation in general. USDA suggested that an amended MSPA joint employment regulation is unnecessary and should not be issued. Further, USDA suggested that should a revised joint employment regulation be deemed necessary or advisable, it should be issued as a regulation applicable to all industries under the Fair Labor Standards Act. After careful consideration, the Department concluded that these USDA suggestions could not be accommodated, since joint employment is already defined in the MSPA regulations and that definition is in need of revision.

USDA also offered specific comments on the NPRM, all of which have been fully considered by the Department. Some of the USDA suggestions have been adopted while others have been rejected, as discussed below.

USDA, like the comments submitted by NCAE and discussed in detail above, suggested that the NPRM test for economic dependence through an analysis of the listed factors would create a strict liability standard under MSPA and is therefore contrary to the case law and legislative intent. To support this position, USDA offered hypothetical factual patterns which it contended would illustrate strict liability in common agricultural settings. USDA further commented that the Department should focus its enforcement activities on the violating farm labor contractors rather than upon agricultural employers/associations who may or may not have any knowledge or control over contractors' activities. USDA also suggested that the Department should delete the NPRM factors concerning the unskilled nature of the work, work that is integral to the overall business operation of the agricultural employer/association, and work performed on the premises of the agricultural employer/association because these factors are indicative of an independent contractor relationship rather than joint employment. The Department has determined—based on a careful review of the legislative history and case law—that these concerns have been appropriately taken into account, as discussed earlier in this preamble with regard to other commenters. In addition, USDA contended that an economic analysis should be completed pursuant to Executive Order 12866. For the reasons stated in the Executive Order section of this preamble, the Department has concluded that such an analysis is not required.

USDA offered a number of specific recommendations to amend or clarify the NPRM that have been adopted in the Final Rule. The Rule expressly states that the test for joint employment is not a strict liability or per se rule. In the Preamble, examples have been included of hypothetical factual situations involving agricultural employers/associations and farm labor contractors in which joint employment is unlikely to be found. The NPRM Factor (A)—concerning the power to control, direct, or supervise the workers or the work—has been amended to clearly state that a reasonable exercise of contract performance oversight by the putative employer would not be sufficient to constitute ''control'' for purposes of joint employment. The NPRM Factor (I)—concerning ''other relevant factors''—has been deleted as being unnecessary and redundant; the regulation's language preceding the list of factors makes it clear that the factors are not an exhaustive list of all relevant considerations in the joint employment analysis. The MSPA regulation on the assessment of civil money penalties (29 CFR 500.143(b)(4)) is being clarified through the addition of a parenthetical illustrating that agricultural employers/associations who take reasonable measures to gain farm labor contractor compliance or who offer employment-related benefits to agricultural worker will have these good faith activities considered as mitigating factors in any penalty assessment resulting from a finding of joint employment. The Preamble also explains that where agricultural employers/associations undertake responsibilities solely as a result of a legal obligation unrelated to an employment relationship, those undertakings will not be considered in the joint employment analysis.

IV. Summary and Discussion of Final Rule

A. Joint Employment Standard Under MSPA

The Department is amending the MSPA regulation defining the employment and joint employment relationship in agriculture. Having reviewed this regulation in accordance with Executive Order 12866, the Department recognized the need for a clearer and more complete regulation. The Department announced its intention to update and clarify this MSPA regulation in the regulatory agendas published in the Federal Register (60 FR 23546 (May 8, 1995); 60 FR 59614 (November 28, 1995)).

The current MSPA ''joint employment'' regulation identifies particular factors which should be considered in determining the existence of such relationships in the agricultural context. This Departmental guidance appears to be subject to some misunderstanding in the regulated community and the courts with regard to the legal standards under MSPA and the Fair Labor Standards Act, which contain the identical statutory standard.[46] It is the Department's view that the MSPA ''joint employment'' regulation will be strengthened by focusing more closely on the ultimate test for employment and joint employment as established by the federal courts, *i.e.*, ''economic dependence,'' and by further clarifying the multi factor analysis to be used to determine the existence of ''economic dependence'' in the agricultural context. Such a clarified regulation will ensure more consistent application of the FLSA principles of employment and ''joint employment'' under MSPA, and will also ensure the full implementation of the Congressional intent in adopting those principles in MSPA.

The FLSA defines the term *employ* as meaning ''to suffer or permit to work'' (29 U.S.C. 203(g)), and the courts have given an expansive interpretation to the statutory definition of *employ* under the FLSA in order to accomplish the remedial purposes of the Act.[47] In accordance with the FLSA's broad definitions and remedial purposes, the traditional common law ''right to control'' test has been rejected in interpreting the FLSA definition of *employ*. Instead, the test of an employment relationship under the FLSA is ''economic dependence,'' which requires an examination of the relationships among the employee(s) and the putative employer(s) to determine upon whom the employee is economically dependent.[48] The determination of economic dependence

[46] *Compare: Antenor, supra, with Aimable, supra.*

[47] *See Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 326 (1992); *Rutherford Food* at 728–729 (1947); *Lauritzen* at 1534.

[48] *See Lauritzen* at 1534, 1538; *Beliz* at 1327; *Real* at 754.

is based upon the ''economic reality'' [49] of all the circumstances and not upon isolated factors or contractual labels.[50] Since the ''economic reality'' test was first delineated by the Supreme Court in *Rutherford Food*, the courts have consistently applied a multi-factor analysis as a means of gauging whether the worker is economically dependent on the putative employer; under this analysis, no single factor is determinative.

The joint employment doctrine, which has long been recognized under FLSA case law,[51] is defined by the FLSA regulation to mean a condition in which ''[a] single individual may stand in the relation of an employee to two or more employers at the same time'', such a determination depending upon ''all the facts in the particular case.'' (29 CFR 791.2(a)).

Under MSPA, the term *employ* has the same meaning as that term under the FLSA. 29 U.S.C. 1802(5). Congress enacted this express incorporation of the FLSA definition of *employ* with the deliberate intention of adopting the FLSA case law defining employment and joint employment. Congress specifically stated that the ''joint employer doctrine'' articulated under the FLSA was to serve as the ''central foundation'' of the MSPA and ''the best means by which to ensure that the purposes of this Act would be fulfilled.'' [52] Congress intended the joint employer doctrine to serve as a vehicle for protecting agricultural employees ''by fixing the responsibility on those who ultimately benefit from their labors—the agricultural employer.'' [53] In declaring this purpose, Congress cited with approval the joint employment analysis utilized by the court of appeals in *Griffin & Brand*; thus, that decision should be the benchmark for the analysis in the agricultural setting.[54] The multi-factor test, as stated in *Griffin & Brand*, is largely the same as the Supreme Court's seminal decision in *Rutherford Food*, although the court of appeals restated some factors to comport more fully and realistically with the unique characteristics of an agricultural operation.

The current MSPA regulation, promulgated in 1983, sets out a non-exclusive list of factors which are appropriately considered in the joint employment analysis. 29 CFR 500.20(h)(4)(ii). The regulation states that the ''* * * determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case.'' 29 CFR 500.20(h)(4)(i). The factors identified in the regulation were not intended by the Department to be a checklist for determining a joint employment relationship; nor were the factors intended to be given greater weight than other relevant factors presented in a particular case or developed in the case law. To the extent that courts and the regulated community may have strayed from the ''economic reality''/''economic dependence'' analysis—by applying the regulation as a rigid checklist, or treating the regulation as an exclusive list which precludes consideration of additional factors (*e.g.*, whether workers' activities are an integral part of a putative employer's operation), or distorting or placing undue emphasis on particular factors (*e.g.*, ''control'' misconstrued as being direct supervision of workers' activities)—the regulation is not only being misinterpreted but is also being applied so as to frustrate the express intention of Congress in enacting MSPA.

B. The Final Rule

In order to resolve any confusion or misunderstanding of the current MSPA regulation and to provide clearer and more complete guidance to the regulated community, the regulation is amended to better delineate the appropriate analysis of the employment and joint employment relationships using ''economic dependence'' as the touchstone, as contemplated by Congress when MSPA was enacted. The regulation also addresses the crucial, initial issue of whether a farm labor contractor is a bona fide independent contractor or an employee of an agricultural association/employer. Where an FLC is actually an employee of the agricultural employer/association, any worker providing services through the FLC is necessarily also an employee of the FLC's employer.

The Final Rule more clearly enunciates the proper analysis for joint employment, as prescribed in the legislative history and set forth in the case law that has properly focused on economic reality and economic dependence. Further, the regulation provides needed guidance on ''control,'' clarifying that the appropriate inquiry is as to a putative employer's power or right to exercise authority in the workplace, either directly or indirectly; the actual exercise of such power or authority is not necessary. The regulation is further clarified in that the illustrative list of factors eliminates redundancy (*e.g.*, items in the current regulation dealing with aspects of control are consolidated) and provides more complete guidance as to appropriate consideration of factors.

C. Changes Made in the NPRM Regulatory Text

Section 500.20(h)(5) in the NPRM has been changed to clarify that shared responsibility on the parts of putative employers is an indication of joint employment.

Section 500.20(h)(5)(iv) in the NPRM has been changed to clarify that this regulation is not intended to create a strict liability or per se standard of joint employment liability.

Section 500.20(h)(5)(iv)(A) in the NPRM is changed to delete the phrase ''and may be either exercised or unexercised.'' The phrase ''and a reasonable degree of oversight of contract performance and coordination with third parties'' has been added to this factor.

Section 500.20(h)(5)(iv)(C) in the NPRM has been deleted and its contents have been incorporated into new factor (G).

Section 500.20(h)(5)(iv)(G) (factor (H) in the NPRM) has been amended to change ''normally'' to ''commonly'' and ''maintaining'' to ''preparing and/or making.'' Factor (C) in the NPRM has been incorporated in this factor along with the phrase ''taking into account the amount of the investment.''

Section 500.20(h)(5)(iv)(I) in the NPRM has been eliminated.

Section 500.143(b)(4) of the current regulation (29 CFR 500.143(b)(4)) has been amended to add examples of good faith efforts to comply with the Act by agricultural employers/associations.

V. Executive Order 12866/Section 202 of the Unfunded Mandates Reform Act of 1995/Small Business Regulatory Enforcement Fairness Act 1995

The Final Rule is not ''economically significant'' within the meaning of Executive Order 12866, is not a major rule within the meaning of Section 804(2) of the Small Business Regulatory Enforcement Fairness Act, and does not require a section 202 statement under the Unfunded Mandates Reform Act of 1995. This rule simply amends the MSPA regulations to clarify the concepts of *employ, employer, employee,* and *joint employment,* which are already contained in the current

[49] *See Rutherford Food* at 727, 729; *Griffin & Brand* at 237.

[50] *Rutherford Food* at 727, 729; *Griffin & Brand* at 237.

[51] *E.g., Falk* v. *Brennan,* 414 U.S. 190, 195 (1973); *Bonnette* v. *California Health and Welfare Agency,* 704 F.2d 1465, 1469 (9th cir. 1983); *Griffin & Brand* at 237–238.

[52] House Comm. Rept. at 6–7.

[53] 128 Cong. Rec. H26008 (Sept. 1982).

[54] House Comm. Rept. at 7

rule. The need for clarification of the current rule is clear, given that the factors listed in the rule are less complete than those applied by the courts and, therefore, require further explanation. Although the Final Rule is simply a clarification of existing concepts, the rule is designed to refocus the analysis of the employment and joint employment doctrines. Therefore, this rule is being treated as a ''significant regulatory action'' within the meaning of section 3(f)(4) of Executive Order 12866. However, no economic analysis is required because the rule will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Furthermore, even if this rule were to result in liability which does not already exist for growers in every circumstance in which farm labor contractors are currently assessed back wages or civil money penalties by the Department of Labor, the Department estimates that the maximum resulting impact on growers would be less than $4 million.

For purposes of the Unfunded Mandates Reform Act of 1995, as well as E.O. 12866, this rule does not include any federal mandate that may result in increased expenditures by either state, local and tribal governments in the aggregate, or by the private sector.

VI. Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612 (1982), the Department, in its NPRM, certified that its proposed rule would not have a significant economic impact on a substantial number of small entities. NPRM at 14037. Similarly, this Final Rule will not have a significant economic impact on a substantial number of small entities.

The Final Rule contains language which is intended to clarify what is meant by the terms *employ, employer, employment,* and *joint employment* under MSPA. NCAE and other commenters contend that the Department must conduct a ''final regulatory flexibility analysis'' to be issued with the final rule because of their view that the rule results in strict liability and, thus, imposes new burdens. As addressed more fully above, the rule does not impose strict liability. The rule simply clarifies existing guidance to bring it into line with the legislative history of the MSPA, as well as the judicial rulings which have construed its statutory terms and definitions. This clarification will not, however, substantively change existing rights or obligations or impose any new requirements, burdens or obligations on entities that are covered by the regulation, including small entities.

In view of the fact that the proposed rule will simply serve to clarify a grower's obligation, not substantively expand or change that obligation, the rule will not have a significant economic impact on a substantial number of small entities. Therefore, no regulatory flexibility analysis is required.

Document Preparation

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 500

Administrative practice and procedure, Aliens, Housing, Insurance, Intergovernmental relations, Investigations, Migrant labor, Occupational safety and health, Reporting and recordkeeping requirements, Wages.

Signed at Washington, D.C., on this 6th day of March, 1997.

John R. Fraser,

Acting Administrator, Wage and Hour Division.

For the reasons set forth above, 29 CFR part 500 is amended as set forth below:

PART 500—MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION

1. The authority citation for Part 500 is revised to read as follows:

Authority: Pub. L. 97–470, 96 Stat. 2583 (29 U.S.C. 1801–1872); Secretary's Order No. 6–84, 49 FR 32473.

2. In § 500.20, paragraph (h)(4) is revised and paragraph (h)(5) is added to read as follows:

§ 500.20 Definitions.

* * * * *

(h) * * *

(4) The definition of the term *employ* may include consideration of whether or not an *independent contractor* or *employment* relationship exists under the Fair Labor Standards Act. Under MSPA, questions will arise whether or not a farm labor contractor engaged by an agricultural employer/association is a bona fide independent contractor or an employee. Questions also arise whether or not the worker is a bona fide independent contractor or an employee of the farm labor contractor and/or the agricultural employer/association. These questions should be resolved in accordance with the factors set out below and the principles articulated by the federal courts in *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1947), *Real* v. *Driscoll Strawberry Associates, Inc.,* 603 F.2d 748 (9th Cir. 1979), *Sec'y of Labor, U.S. Dept. of Labor* v. *Lauritzen,* 835 F.2d 1529 (7th Cir. 1987), *cert.* denied, 488 U.S. 898 (1988); *Beliz* v. *McLeod,* 765 F.2d 1317 (5th Cir. 1985), and *Castillo* v. *Givens,* 704 F.2d 181 (5th Cir.), *cert. denied,* 464 U.S. 850 (1983). If it is determined that the farm labor contractor is an *employee* of the agricultural employer/association, the agricultural workers in the farm labor contractor's crew who perform work for the agricultural employer/association are deemed to be employees of the agricultural employer/association and an inquiry into joint employment is not necessary or appropriate. In determining if the farm labor contractor or worker is an employee or an independent contractor, the ultimate question is the economic reality of the relationship—whether there is economic dependence upon the agricultural employer/association or farm labor contractor, as appropriate. *Lauritzen* at 1538; *Beliz* at 1329; *Castillo* at 192; *Real* at 756. This determination is based upon an evaluation of all of the circumstances, including the following:

(i) The nature and degree of the putative employer's control as to the manner in which the work is performed;

(ii) The putative employee's opportunity for profit or loss depending upon his/her managerial skill;

(iii) The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers;

(iv) Whether the services rendered by the putative employee require special skill;

(v) The degree of permanency and duration of the working relationship;

(vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer's business.

(5) The definition of the term *employ* includes the *joint employment* principles applicable under the Fair Labor Standards Act. The term *joint employment* means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts

in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist. When the putative employers share responsibility for activities set out in the following factors or in other relevant facts, this is an indication that the putative employers are not completely disassociated with respect to the employment and that the agricultural worker may be economically dependent on both persons:

(i) If it is determined that a farm labor contractor is an independent contractor, it still must be determined whether or not the employees of the farm labor contractor are also jointly employed by the agricultural employer/association. *Joint employment* under the Fair Labor Standards Act is joint employment under the MSPA. *Such joint employment* relationships, which are common in agriculture, have been addressed both in the legislative history and by the courts.

(ii) The legislative history of the Act (H. Rep. No. 97–885, 97th Cong., 2d Sess., 1982) states that the legislative purpose in enacting MSPA was ''to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers * * *,'' which would only be accomplished by ''advanc[ing] * * * a completely new approach'' (Rept. at 3). Congress's incorporation of the FLSA term *employ* was undertaken with the deliberate intent of adopting the FLSA *joint employer* doctrine as the ''central foundation'' of MSPA and ''the best means by which to insure that the purposes of this MSPA would be fulfilled'' (Rept. at 6). Further, Congress intended that the *joint employer* test under MSPA be the formulation as set forth in *Hodgson* v. *Griffin & Brand of McAllen, Inc.* 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973) (Rept. at 7). In endorsing *Griffin & Brand*, Congress stated that this formulation should be controlling in situations ''where an agricultural employer * * * asserts that the agricultural workers in question are the *sole* employees of an independent contractor/crewleader,'' and that the ''decision makes clear that even if a farm labor contractor is found to be a bona fide independent contractor, * * * this status does not as a matter of law negate the possibility that an agricultural employer may be a joint employer * * * of the harvest workers'' together with the farm labor contractor. Further, regarding the *joint employer* doctrine and the *Griffin & Brand* formulation, Congress stated that ''the absence of evidence on any of the criteria listed does not preclude a finding that an agricultural association or agricultural employer was a joint employer along with the crewleader'', and that ''it is expected that the special aspects of agricultural employment be kept in mind'' when applying the tests and criteria set forth in the case law and legislative history (Rept. at 8).

(iii) In determining whether or not an employment relationship exists between the agricultural employer/association and the agricultural worker, the ultimate question to be determined is the economic reality—whether the worker is so economically dependent upon the agricultural employer/association as to be considered its employee.

(iv) The factors set forth in paragraphs (h)(5)(iv)(A) through (G) of this section are analytical tools to be used in determining the ultimate question of economic dependency. The consideration of each factor, as well as the determination of the ultimate question of economic dependency, is a qualitative rather than quantitative analysis. The factors are not to be applied as a checklist. No one factor will be dispositive of the ultimate question; nor must a majority or particular combination of factors be found for an employment relationship to exist. The analysis as to the existence of an employment relationship is not a strict liability or *per se* determination under which any agricultural employer/association would be found to be an employer merely by retaining or benefiting from the services of a farm labor contractor. The factors set forth in paragraphs (h)(5)(iv)(A) through (G) of this section are illustrative only and are not intended to be exhaustive; other factors may be significant and, if so, should be considered, depending upon the specific circumstances of the relationship among the parties. How the factors are weighed depends upon all of the facts and circumstances. Among the factors to be considered in determining whether or not an employment relationship exists are:

(A) Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties);

(B) Whether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s);

(C) The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue;

(D) The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;

(E) Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association;

(F) Whether the work is performed on the agricultural employer/association's premises, rather than on premises owned or controlled by another business entity; and

(G) Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).

* * * * *

3. In § 500.143, paragraph (b)(4) is revised to read as follows:

§ 500.143 Civil money penalty assessment.

* * * * *

(b) * * *

(4) Efforts made in good faith to comply with the Act (such as when a joint employer agricultural employer/association provides employment-related benefits which comply with applicable law to agricultural workers, or takes reasonable measures to ensure farm labor contractor compliance with legal obligations);

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[FR Doc. 97–6036 Filed 3–11–97; 8:45 am]

BILLING CODE 4510–27–P