Labor & Employment Law

The Conflict Between the Circuits in Analyzing Joint Employment Under the FLSA: Why the Supreme Court Should Grant Certiorari in *Zheng v. Liberty Apparel*

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Note from the Authors:

While this article was in publication, the Supreme Court denied certiorari in this case. The authors present this article to explain the important circuit split implicated by this case. The authors also believe that due to this split in interpreting joint employment and the important economic consequences thereof, it is only a matter of time before the Supreme Court will take a case addressing the issue.

Introduction

In 1938, Congress passed the Fair Labor Standards Act ("FLSA"), a comprehensive labor law that includes minimum wage[1] and overtime[2] regulations.[3] In drafting the FLSA, Congress extended its protections to workers who would not have been considered employees under the common law definition.[4] The FLSA used a definition of employment, "to suffer or permit to work,"[5] borrowed from child labor laws used by many states.[6] As the Supreme Court has noted, this definition does not "solve[] problems as to the limits of the employer-employee relationship under the [FLSA]."[7]

The problem of what limits exist in the FLSA's definition of employment commonly arises in two separate scenarios. One is where a plaintiff claims to have been employed by a defendant and the defendant claims that the plaintiff was not its employee, but, instead, an independent contractor. This scenario has generated several Supreme Court cases.[8]

A second scenario testing the limits of employment under the FLSA is where a plaintiff sues a defendant claiming that he worked both for the defendant and a third party, who responds that the plaintiff was employed only by the third party, and not by the defendant. This scenario, known as joint employment, can occur when a general contractor utilizes a subcontractor[9] or a staffing company provides employees to another company.[10] The Supreme Court has never addressed this scenario in depth, and multiple tests have been used by the circuit courts to determine if joint employment is present.[11] Recently, a petition for certiorari raising this issue was filed in *Zheng v. Liberty Apparel*, giving the Supreme Court the opportunity to resolve this many-sided circuit split.

I. Analogous Laws: The Family Medical Leave Act

Over fifty years ago, in *Rutherford Food Corp. v. McComb*, the Supreme Court acknowledged that the interpretation of other statutes, such as the "Labor and Social Security acts" were persuasive in determining the definition of an employer-employer relationship under the FLSA.[12] More recently, the Family Medical Leave Act ("FMLA") explicitly based its definition of employee and employ on the FLSA.[13] Many courts have followed suit, holding that the definition of employment in general, and joint employment in particular, is identical in the two statutes.[14] Therefore, in viewing the circuit court split over how to determine if joint employment exists, it is important to look at both FLSA and FMLA case law that holds that the two statutes are interpreted in the same manner.

II. The Various Interpretations of Joint Employment

Although all courts agree that questions of joint employment must be looked at through the lens of the economic realities of the situation, courts have sharply disagreed as to what factors should be used to determine the economic reality in a joint employment situation. One influential case is the Ninth Circuit's decision in *Bonnette v. California Health & Welfare Agency*.[15] In *Bonnette*, suit was "brought against state and county agencies by individuals who provided in-home care to disabled public assistance recipients."[16] The Ninth Circuit employed a four-factor test, used by the district court and drawn from earlier cases, which considered: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[17] Based on this test, the Ninth Circuit affirmed the district court's determination finding joint employment.[18]

The *Bonnette* test has been highly influential with the other circuit courts. The First Circuit Court of Appeals adopted it in *Baystate Alternative Staffing v. Herman*.[19] The Second Circuit used this test in *Herman v. RSR Security Services Ltd.*[20] and *Carter v. Dutchess Community College*.[21] As will be discussed below, it is also part of the more recent Second and Fourth Circuit tests and is frequently relied on by other courts outside these circuits.[22]

Another important formulation[23] of the economic realities test is the Fifth Circuit's[24] test used in *Wirtz v. Lone Star Steel Co.*[25] Lone Star, the owner of a steel mill, contracted with various companies to truck iron ore from a mine to its factory. The Secretary of Labor sued, claiming that the truck companies were violating the FLSA and that those drivers were jointly

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employed by Lone Star. In determining that Lone Star did not jointly employ the truckers, the Fifth Circuit considered:

> (1) Whether or not the employment takes place on the premises of the company?; (2) How much control does the company exert over the employees?; (3) Does the company have the power to fire, hire, or modify the employment condition of the employees?; (4) Do the employees perform a "specialty job" within the production line?; and (5) May the employee refuse to work for the company or work for others?[26]

III. *Zheng v. Liberty Apparel*

Liberty Apparel is a garment manufacturer[27] who, as is common in the domestic[28] garment industry, designed and cut garments, then contracted with factories to assemble the garments.[29] One of the factories Liberty Apparel contracted with was owned and operated by Steven Yam and his wife. In April 2009, Yam disappeared. His employees showed up for work one day to find the factory closed. Yam, at the time of his disappearance, had not paid his workers for approximately two months.

Twenty-six of Yam's employees sued Liberty Apparel, their factory's largest customer.[30] They claimed that Liberty Apparel and its owners were their joint employers under the FLSA and therefore owed them the wages Yam absconded with, along with damages for minimum wage and overtime violations they had been subjected to by Yam on other occasions.[31]

Liberty Apparel defended on the ground that it was not the plaintiffs' employer. Initially, Liberty Apparel prevailed on summary judgment. The district court applied the *Bonnette* test used by the Second Circuit in *Carter* and *Herman* and held that the plaintiffs failed to satisfy any of the four *Bonnette*[32] factors because Liberty Apparel had not hired, fired, or paid them; supervised the terms and conditions of their employment; or kept their employment records.[33]

On appeal, the Second Circuit vacated the district court's decision, holding that while the *Bonnette* factors can be used to show joint employment, joint employment can exist in the absence of any of the *Bonnette* factors.[34] The Second Circuit therefore determined that it needed to create a new test, which it based on the Supreme Court's decision in *Rutherford Food Corp. v. McComb*.[35]

In *Rutherford*, Kaiser,[36] a slaughterhouse, contracted with a series of boners to arrange for a group of boners to debone meat slaughtered and processed in Kaiser's slaughterhouse.[37] The boners' contract was based on the amount of pieces they deboned, and the boners shared equally in the money paid by the factory.[38] The United States Department of Labor sought an injunction barring Kaiser from committing violations of the FLSA against the boners, whom the Department of Labor contended were employed by Kaiser.[39] Kaiser claimed that the boners were independent contractors, not their employees. The district court agreed with Kaiser and refused to grant the injunction.[40]

On appeal, the Tenth Circuit found that, looking at the entire circumstances of the matter, Kaiser was the boners' employer, and the boners were not independent contractors.[41] The Supreme Court agreed with the Tenth Circuit, concluding that because the boners were working in Kaiser's factory, as part of an assembly line, without an organization capable of working for anyone other than Kaiser, under the close supervision of Kaiser, they were, as a matter of law, Kaiser's employees.[42]

Based on *Rutherford*, the Second Circuit ordered the district court to consider:

> (1) whether Liberty's premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants.[43]

Although these six factors may appear straightforward, three of the factors warrant explanation. The third factor, looking at whether the plaintiffs performed a discrete line job integral to the defendant's production, does not just look at the plaintiffs' role in a defendant's production, but looks at the historical origins of the type of outsourcing at issue.[44] The fifth factor, which considers a defendant's supervision of the plaintiff, appears similar to the second *Bonnette* factor, but has been interpreted as broadening the types of supervision that weigh in favor of joint employment.[45] In interpreting the sixth factor, although the Second Circuit stated that a mere majority was insufficient to weigh in favor of joint employment, no lower limit has been set and remains an open question.[46]

On remand, the district court denied Liberty Apparel's renewed motion for summary judgment.[47] Although the court held that the first, second and fourth factors did not weigh in favor of joint employment, it held that the other three factors posed at least genuine issues of material fact and therefore summary judgment was unwarranted.[48] The district court held that the third factor could weigh in favor of joint employment, primarily relying on expert testimony regarding the level of difficulty involved in sewing and expert testimony that historically, in the 1920s, garment manufacturers outsourced to avoid labor laws.[49] The district court also found that there was a genuine issue of material fact regarding the fifth factor due to the presence of quality control inspectors and their interactions with the plaintiffs.[50] The district court also found that the sixth factor raised a genuine issue of material fact because the plaintiffs alleged that 70-75% of their work was on Liberty Apparel's garments.[51]

At trial, the jury found in favor of the plaintiffs and granted them approximately 65% of their requested damages. Although the jury declined to be polled, it appears from their jury verdict that they granted the plaintiffs' claims as related to the period of time from mid-1998 until the factories' closing in April 1999, but denied the claims relating to the period of time from 1997 to mid-1998.[52] The district court, in its post-trial decision on Liberty Apparel's Rule 50 and 59 motions,

upheld the jury's decision for the same reasons it used in its decision on summary judgment.[53] Similarly, the Second Circuit affirmed the district court's decision and the jury's finding for the same reasons.[54]

IV. Post-*Zheng II* Case Law

The *Zheng II* decision was widely noted by courts around the country, and several district courts have discussed how *Zheng II* contributes to a split among the circuits.[55] Several circuit courts of appeal have also issued opinions since *Zheng II*, widening the argument among the circuits.

In *Morrison v. Magic Carpet Aviation*, the Eleventh Circuit addressed joint employment in a FMLA case.[56] Morrison was a pilot with Magic Carpet Aviation, a subsidiary of Amway that had a contract to fly the Orlando Magic basketball team.[57] Morrison claimed that Magic Carpet violated the FMLA, and the company defended that they did not have fifty employees within a seventy-five mile radius, which is required for the FMLA to apply.[58] Morrison therefore claimed that the company which owned the Magic was a joint employer and, therefore, the FMLA applied.[59]

The Eleventh Circuit applied a test derived from the Fifth Circuit's test in *Wirtz*.[60] The court looked at "(1) whether or not the employment took place on the premises of the alleged employer; (2) how much control the alleged employer exerted on the employees; and (3) whether or not the alleged employer had the power to fire, hire, or modify the employment condition of the employees."[61] Using this test, the Eleventh Circuit found that there was no joint employment.[62]

In *Schultz v. Capital International Security*, the Fourth Circuit considered the case of five security personnel who guarded Saudi Arabian Prince Faisal.[63] The guards worked for the Prince through a series of contractors.[64] They sued Capital, one of the contractors, claiming that Capital and its owner failed to pay them overtime as required by the FLSA.[65] Capital claimed that they were independent contractors, and the Fourth Circuit determined that it first needed to determine if Capital and Prince Faisal were joint employers in order to determine the employee/independent contractor issue.[66] The Fourth Circuit began its analysis by looking at the three examples of joint employment provided by Department of Labor regulations.[67] Although it found that joint employment existed because the relationship between Prince Faisal and Capital fit into one of the joint employment examples, the Fourth Circuit noted that in the absence of a clear parallel to the DOL regulations it would be helpful for courts to look to the *Bonnette* and *Zheng* factors for guidance in determining whether joint employment exists.[68]

V. The Current Situation: Conflicts and Uncertainty

As can be seen from the cases discussed above, the case law interpreting joint employment under the FLSA and the FMLA is filled with conflict. Currently, there are many different tests used by circuit courts to determine joint employment. Many courts, including the First and Ninth Circuits, use the four-factor *Bonnette* test.[69] The Second Circuit uses two tests, and joint employment exists if either the *Bonnette* test or the *Zheng* test indicates so.[70] The Fourth Circuit first looks at whether any of the Department of Labor's examples of joint employment applies in a given case, then looks at both the *Bonnette* and *Zheng* factors. The Fifth and Eleventh Circuits use both their own tests and *Bonnette* as described above.

Zheng provides a good example of how the different tests can lead to conflicting results in a given factual situation. In *Zheng I*, the district court used the *Bonnette* test used by the First and Ninth Circuits and granted summary judgments for the defendants. In *Zheng III*, the district court used the *Zheng II* test and denied summary judgment. Similarly, in *Zhao v. Bebe Stores*, a court within the Ninth Circuit granted summary judgment to defendants in a case with very similar facts to *Zheng*.[71]

In addition to disagreements over which test to use, there are also disagreements over individual factors which have great importance in interpreting joint employment. One central disagreement is what type of supervision weighs in favor of joint employment. As discussed above, the First and Ninth Circuits' *Bonnette* test considers supervision of scheduling and similar terms and conditions of employment. The Second Circuit held in *Zheng IV* that supervision of time and quality can weigh in favor of joint employment. The Fifth and Eleventh Circuits' *Wirtz*-based tests do not explicitly consider supervision as a factor, looking instead at a broader question of control. The Fourth Circuit has not weighed in on the distinction although district courts within the circuit have understood its test as finding only supervision of schedules and terms and conditions to be relevant to a joint employment analysis.[72]

This argument is critical because almost all contractors use quality control inspectors to ensure that their subcontractors meet deadlines and make products that meet the contractors' specifications.[73] In *Zheng*, at trial, the plaintiffs testified that the other manufacturers who contracted with their factory also sent quality control inspectors who acted in the same manner as Liberty Apparel's representatives.[74] The plaintiffs' expert witness also testified that the use of quality control inspectors was customary in the industry.[75]

VI. Why the Supreme Court Should Grant Certiorari

The significant, multi-directional split among the circuit courts provides sufficient reason for granting certiorari in *Zheng*.[76] Moreover, the uncertainty harms both businesses and employees.[77] As explained above, this split is illustrated beautifully by *Zheng* because courts have addressed *Zheng*'s facts under both the *Bonnette* and *Zheng* tests.

The Supreme Court does not have the option of choosing among a large number of cases addressing this issue because three factors strongly encourage settlement of FLSA joint employment cases. The first factor encouraging settlement is that a prevailing plaintiff is entitled to attorneys' fees under the FLSA. Thus, a defendant who loses an FLSA suit can find itself having to pay many times the claimed wages in attorneys' fees. A second factor encouraging settlement is that it is difficult to obtain a resolution of the joint employment issue in a motion to dismiss or summary judgment.[78] This means that a defendant is unlikely to win prior to trial, which will likely cost more in attorneys' fees than the amount demanded by the plaintiff. The third factor encouraging settlement is that due to the arguments between courts and unpredictability of juries, it is difficult for parties to ascertain their chances of prevailing.

Due to the importance of the issues, the unique circumstances of the case, and the difficulty of the issue reaching the Supreme Court, the Supreme Court should use this case to clarify an important and difficult issue that affects millions of businesses and employees.

Endnotes

1 29 U.S.C. § 206.

2 29 U.S.C. § 207.

3 *See* Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (noting the FLSA was enacted on June 25, 1938).

4 Walling v. Portland Terminal Co., 330 U.S. 148, 150-151 (1947) (The FLSA "contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.").

5 29 USCS § 203(g).

6 *Rutherford*, 331 U.S. at 728.

7 *Id.*

8 *E.g.*, *id.*; Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961).

9 *E.g.*, Quintanilla v. A&R Demolition, Inc., 2005 U.S. Dist. LEXIS 34033 (S.D. Tex. 2005).

10 Barfield v. N.Y. City Health & Hosps. Corp., 537 F.3d 132 (2d Cir. 2008).

11 In *Falk v. Brennan*, 414 U.S. 190 (1973), the Supreme Court held that a management company and building owners were joint employers of the apartment buildings' owners. The Court's analysis was one paragraph long and did not set out a list of factors to be considered in future cases.

12 *Rutherford*, 331 U.S. at 723.

13 29 USCS § 2611(3) ("The terms 'employ', 'employee', and 'State' have the same meanings given such terms in subsections (c), (e), and (g) of section 3 of the Fair Labor Standards Act of 1938.").

14 *See* Ling Nan Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003) ("*Zheng II*") (discussing *Moreau v. Air France*, 343 F.3d 1179 (9th Cir. 2003); *see also* Morrison v. Magic Carpet Aviation, 383 F.3d 1253 (11th Cir. 2004) (relying on FLSA case law to define employment under the FMLA).

15 704 F.2d 1465 (9th Cir. 1983).

16 *Id,* at 1467.

17 *Id.*, at 1470.

18 *Id.*

19 163 F.3d 668 (1st Cir. 1998).

20 172 F.3d 132 (2d Cir. 1999).

21 735 F.2d 8 (2d Cir. 1984).

22 *See, e.g.*, Kwee Ling Tan v. Mr. Pi's Sushi, Inc., 2010 U.S. Dist. LEXIS 134769 (D.N.J. 2010); Wilks v. District of Columbia, 721 F. Supp. 1383 (D.D.C. 1989); Woellert v. Advanced Commc'n Design, Inc., 2007 U.S. Dist. LEXIS 57989 (D. Minn. 2007); Williams v. Henagan, 595 F.3d 610 (5th Cir. 2010).

23 We note these are not the only other tests that have been used by courts to determine joint employment. *See, e.g.*, Lopez v. Silverman, 14 F. Supp. 2d 405 (S.D.N.Y. 1998) (accepted in part and rejected in part by *Zheng II*).

24 *See also* Hodgson v. Griffin & Brand, Inc., 471 F.2d 235 (5th Cir. 1973). However, the Fifth Circuit recently held that the *Bonnette* factors are the "standard factors" but that the Fifth Circuit uses other tests in other contexts. *Williams*, 595 F.3d at 620 & n.17.

25 405 F.2d 668 (5th Cir. 1968).

26 *Id,* at 669-70.

27 The term manufacturer, as used in the garment industry, is a term of art and something of a misnomer. It refers to companies that arrange for the manufacture of the garments and not necessarily the party that does the actual manufacturing. *See, e.g.*, NY Labor Law § 340(d) ("'Manufacturer' shall mean any person who (i) in fulfillment or anticipation of a wholesale purchase contract, contracts with a contractor to perform in New York state the cutting, sewing, finishing, assembling, pressing or otherwise producing any men's, women's, children's or infants' apparel, or a section or component of apparel, designed or intended to be worn by any individual which, pursuant to such contract, is to be sold or offered for sale to a retailer or other entity . . .").

28 Liberty Apparel, for reasons including this lawsuit, no longer engages in domestic manufacture, and now imports garments.

29 The facts of the case is taken from the trial testimony and can largely be found in *Zheng v. Liberty Apparel*, 2002 U.S. Dist. LEXIS 4226 (S.D.N.Y. 2002) ("*Zheng I*"); *Zheng II*, 355 F.3d 61 (2d Cir. 2003); and *Zheng v. Liberty Apparel*, 556 F. Supp. 2d 284 (S.D.N.Y. 2008) ("*Zheng III*").

30 One of the employees later dropped the suit.

31 The jury denied the plaintiffs' minimum wage and overtime claims against Hagai Laniado, one of Liberty Apparel's owners, and the plaintiffs' dropped their other cause of action against him. For convenience, Liberty Apparel and its owners will be referred to simply as "Liberty Apparel."

32 *Zheng I* does not mention *Bonnette* by name, instead referencing *Herman* and *Carter*. This article refers to them as the *Bonnette* factors for consistency and clarity.

33 *Zheng I*, 2002 U.S. Dist. LEXIS 4226, at 21.

34 *Zheng II*, 355 F.3d at 69.

35 331 U.S. 722 (1947).

36 Rutherford Food Corporation owned 51% of Kaiser's stock from 1943-May 1944. Rutherford Food Corp. v. McComb, 331 U.S. 722, 724 (1947).

37 *Id.* at 724.

38 *Id.* at 724-725.

39 *Id.* at 723.

40 *Id.* at 729-30.

41 *Id.* at 726-27.

42 *Id.* at 730.

43 *Zheng II*, 355 F.3d at 72.

44 *Zheng II*, 355 F.3d at 73-74 ("At the same time, historical practice may also be relevant, because, if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws."); *see also* Chen v. Street Beat Sportswear, Inc., 364 F. Supp. 2d 269, 282-283 (E.D.N.Y. 2005).

45 *See Zheng III*, 556 F. Supp. 2d 284, and discussion below.

46 *Zheng III*, 556 F. Supp. 2d at 295, holding that 70-75% could be found to be "predominant" by the jury.

47 *Zheng I* was decided by Judge Casey. Due to Judge Casey's untimely death, the second motion for summary judgment was decided by Judge Sullivan.

48 *Zheng III*, 556 F. Supp. 2d at 289.

49 *Id.* at 290-91.

50 *Id.* at 293.

51 *Id.* at 295.

52 Although a full explanation of the above analysis of the jury verdict is not possible in this forum, it can be obtained from the authors. Briefly, the jurors asked the court if they could find liability only for certain time periods. Subsequently their verdict granted full damages requested for the period of September 27, 1998 until the factory's closing but did not do so for claims preceding that date. By analyzing the percentage granted to various workers,

it appears that they did not grant damages for claims preceding the middle of 1998 and granted full damages requested for all work performed after that time.

53 Oral Order at 13-14, *Zheng III*, 556 F. Supp. 2d 284 (S.D.N.Y. May 14, 2009) (on file with the authors).

54 Ling Nan Zheng v. Liberty Apparel Co., 389 Fed. Appx. 63, 65 (2d Cir. 2010) ("*Zheng IV*").

55 *See* Zavala v. Wal-Mart Stores, Inc. 393 F. Supp. 2d 295 (D.N.J. 2005); Dinkins v. Varsity Contractors, 2005 U.S. Dist. LEXIS 6732 (N.D. Ill. 2005); Morgan v. Speak-Easy LLC 625 F. Supp. 2d 632 (N.D. Ill. 2007).

56 383 F.3d 1253 (11th Cir. 2004).

57 *Id.* at 1254.

58 *See id.* at n.1.

59 *Id.*

60 In previous FLSA cases, the Eleventh Circuit had identified the *Bonnette* and *Wirtz* tests as being the joint employment test. *See* Brouwer v. Metro. Dade County, 139 F.3d 817 (11th Cir. 1998) (identifying *Wirtz*'s test as the appropriate test for joint employment); Villarreal v. Woodman, 113 F.3d 202 (11th Cir. 1997) (using the *Bonnette* test).

61 *Morrison*, 383 F.3d at 1255. The Eleventh Circuit had previously used this test in *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995), which was neither a FLSA or a FMLA case.

62 *Morrison*, 383 F.3d. One interesting element of Morrison's analysis was its reliance on *Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154 (C.D. Cal. 2003), a case with very similar facts to Zheng that granted the garment manufacturer summary judgment.

63 466 F.3d 298 (4th Cir. 2006).

64 *Id.* at 301-302.

65 *Id.* at 300-301.

66 *Id.* at 305.

67 *Id.* at 306.

68 *Id.* at n.2.

69 Although the Ninth Circuit has not replaced the *Bonnette* test, some cases, both in the Ninth Circuit Court of Appeals and district courts within the Ninth Circuit, have also considered the factors used by *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997), in interpreting the Migrant and Seasonal Agricultural Worker Protection Act. *See* Moreau v. Air France, 343 F.3d 1179 (9th Cir. 2003).

70 See the discussion of *Zheng* above. *See also* Barfield v. N.Y. City Health & Hosps. Corp., 537 F.3d 132 (2d Cir. 2008).

71 247 F. Supp. 2d 1154 (C.D. Cal. 2003).

72 *See* Jacobson v. Comcast Corp., 2010 U.S. Dist. LEXIS 102834 (D. Md. 2010).

73 *See Zheng II*, 355 F.3d 61 (2d Cir. 2003) (discussing the importance of quality control to outsourcing); *see also Jacobson*, 2010 U.S. Dist. LEXIS 102834, at 20 (noting that quality control exists to protect the defendants customers).

74 *E.g.*, Hui Fang Lin testimony, Joint Appendix pp.313/14-315/6.

75 Louis Vangas Testimony, Joint Appendix, pp. 547/20-548/2.

76 Sup. Ct. R. 10(a).

77 Abstract, *Drafting and Interpreting Coverage Provisions in Protective Labor Legislation*, Proceedings of the Twentieth Annual Southern Industrial Relations and Human Resource Conference 68-70 (M. Jedel, L. McClurg & Q. Marrero eds., 1999).

78 *See Zheng II*, 355 F.3d at n.13.