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THE AGRICULTURAL WORKER PROTECTION ACT & FLORIDA'S MIGRANT WORKER: THE HANDS THAT FEED FLORIDA

FEDLINE FERJUSTE*

ABSTRACT

Since its enactment in 1982, courts have consistently misinterpreted the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), and the Eleventh Circuit Courts are no exception to this misconstruction. Migrant workers are among the hardest-working and lowest-paid laborers in America, and they do not receive adequate legal protection. Congress, in enacting the AWPA, intended to make farmers and growers liable for abusing and breaching the AWPA. However, the judicial system has allowed them to create loopholes to escape liability. In order to break the cycle of abuse placed upon migrant workers, Florida must pass new legislation to reform and strengthen the AWPA and its legislatively intended purpose. If new legislation is not enacted, Florida will become a slave labor state because the lack of protection will ultimately turn back time and create an implicit form of slave labor.

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I. INTRODUCTION

It is five thirty in the morning in a parking lot in Immokalee, Florida, where hundreds of laborers wait for a bus to take them to the tomato fields. Sadly, these workers may have to leave without being paid for their time if it rains while they are in the field.¹

Even though Florida has a \$62 billion agricultural industry, migrant workers, like the ones in the tomato fields of Immokalee, earn about forty-five cents for every thirty-two pound bucket of tomatoes they pick.² Laborers, including agricultural workers in Florida, earn an average of \$200.00 per week, comprising a segment of an unregulated system established to keep the cost of food down, while keeping Americans’ plates full.

The Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”)³ is the federal law designed to shield migrant farm workers from exploitative working conditions, and to protect vulnerable migrant and seasonal

1. Bernie Sanders, *The Harvest of Shame*, HUFFINGTON POST (Apr. 15, 2008, 11:01 AM), http://www.huffingtonpost.com/rep-bernie-sanders/the-harvest-of-shame_b_96759.html.

2. See Christine Evans et al., *Modern Day Slavery*, PALM BEACH POST (Dec. 7, 2003), http://www.palmbeachpost.com/moderndayslavery/content/moderndayslavery/reports/day1_main1207.html.

3. The Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”), 29 U.S.C. §§ 1801–1872 (2006), succeeded the Farm Labor Contractor Registration Act of 1963 (“FLCRA”), Pub. L. No. 88-582, 78 Stat. 920 (repealed 1983), which was designed to regulate independent contractors who supplied laborers for farms across the nation. The AWP’s scope is broader than that of the FLCRA. See Sherylle Gordon, Note, *Michigan Housing Laws Should Apply To Migrant Farm Workers*, 41 WAYNE L. REV. 1849, 1857 (1995) (arguing that farm labor contractor status is no longer the sole qualification to trigger liability under the AWP). Gordon asserts that, “instead, the AWP requires the following categories of persons to adhere to certain worker protection requirements: (1) farm labor contractors, (2) agricultural associations, (3) agricultural employers, and (4) any persons who own or control farm worker housing.” *Id.*

agricultural workers from abuse.⁴ In Florida, migrant workers' rights have not been adequately protected because Florida courts—specifically in the Eleventh Circuit—have not effectively enforced the AWPAs.⁵

This Article addresses the misinterpretation of the AWPAs and the failure to enforce basic worker protections. Part II lays out common defenses used by fruit and vegetable growers to avoid liability under the AWPAs, based on whether a migrant worker is an “employee” of the grower under the statutory definition.⁶ Part III touches on the AWPAs's joint employment doctrine, which provides that workers may be considered employees of both a grower and a crewleader—the intermediary—who recruits, transports, and supervises migrant and seasonal workers.⁷ Part IV focuses on how the Eleventh Circuit has misinterpreted the AWPAs by incorrectly applying the joint employment test and holding that a migrant worker is solely an employee of the crewleader and not of the grower—as exemplified by the decision of *Aimable v. Long & Scott Farms*.⁸ This section will also address the consequences of that decision, which has left migrant workers with no recourse because crewleaders are often judgment-proof.⁹ Finally, Part V suggests that the Florida legislature should correct this problem by requiring crewleaders to have a surety bond to ensure that migrant workers are compensated when crewleaders violate the AWPAs.¹⁰

4. See Migrant and Seasonal Agricultural Worker Protection Act § 1801 (stating that the purpose of the AWPAs is to regulate activities detrimental to migrant and seasonal agricultural workers).

5. See, e.g., *Renteria-Marin v. Ag-Mart Produce, Inc.*, 537 F.3d 1321, 1327 (11th Cir. 2008) (finding that the plain language construction of the terms “controls a facility” does not include supervising crew leaders because the statute, by referring to the person owning or controlling the facility, targeted the persons who “effectuat[ed] the maintenance of, inter alia, plumbing, electricity, sanitation, fire safety equipment and cleanliness in compliance with applicable federal and state standards.”).

6. See discussion *infra* Part II.B (stating that because the term employ within the AWPAs is based on an ambiguous definition in the FLSA, the relationship between a grower and a migrant worker often requires a detailed analysis of caselaw).

7. See discussion *infra* Part III (defining agricultural association, employees and farm labor contractors under the AWPAs).

8. See discussion *infra* Part IV.A–B, Part V (analyzing the courts decision that even though the grower had contracted with a farm labor contractor the farm labor contractor was the sole employer).

9. See discussion *infra* Part IV.A (arguing that because the 11th Circuit misapplied the AWPAs in *Aimable*, in order to protect immigrant workers, it must require surety bonds for crewleaders .

10. See *id.*

II. THE LEGISLATURE'S ANSWER TO THE MIGRANT WORKERS' QUANDARY

A. *Migrant and Seasonal Agricultural Worker Protection Act*

In 1982, testimony before the House Committee on Education and Labor described patterns of abuse and exploitation of farmworkers, and led to the enactment of the AWPA.¹¹ The AWPA was passed in 1983, and repealed the Farm Labor Contractor Registration Act of 1963 ("FLCRA").¹² The FLCRA provided limited protection to agricultural workers from the "low wages, long hours and poor working conditions" that have long plagued the industry.¹³ The FLCRA imposed certain requirements, particularly on crewleaders rather than on the growers that own or operate the farm.¹⁴ For example, this Act required crewleaders to register with the Department of Labor ("DOL") by providing information regarding their methods of operation as contractors.¹⁵ Additionally, crewleaders had to provide proof of public liability insurance, or proof of financial responsibility, for all vehicles used in the business.¹⁶

Similarly, the AWPA provides for wage, employment, and safety protections for migrant and seasonal agricultural workers.¹⁷ Like the FLCRA, the AWPA defines the DOL registration requirements for farm labor contractors and also requires farm labor contractors and their employees to obtain a certificate of registration from the DOL before starting any farm labor contracting activities.¹⁸

The AWPA, however, was adopted for the broad purpose of protecting migrant and agricultural workers, and it regulates many more aspects of

11. H.R. Rep. No. 97-885, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N 4547, at 4548 ("Evidence received by the Committee confirms that many migrant and seasonal agricultural workers remain today, as in the past, the most abused of all workers in the United States . . . Congress found that the [FLCRA] was largely ignored and not adequately enforced . . . testimony before Congress has shown that the Act of 1963 has failed to achieve its original objectives.").

12. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1872 (2006); Farm Labor Contractor Registration Act ("FLCRA"), 7 U.S.C. § 2041, *repealed by* Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, § 523, 96 Stat. 2600 (1983).

13. *See* H.R. Rep. No. 97-885, at 1; *accord* 7 U.S.C. § 2041. The Committee on Education and Labor concluded, "as a result of direct evidence, that the Farm Labor Contractor Registration Act, as amended, has 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." H.R. Rep. No. 97-885, at 3.

14. H.R. Rep. No. 97-885, at 2 (finding that ten years after its passage, evidence shows that the same abuses the FLCRA addressed continued unabated).

15. 78 Stat. at 921.

16. *Id.*

17. *See* 29 U.S.C. §§ 1802, 1822, 1841 (2006). Under the AWPA, a *migrant* agricultural worker is "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." § 1802(8)(A). A *seasonal* agricultural worker is a person who is "employed in agricultural employment of a seasonal or other temporary nature and is *not* required to be absent overnight from his permanent place of residence." § 1802(10)(A).

18. § 1811.

the employment relationship, by establishing employment standards related to wages, transportation, disclosures, and record keeping.¹⁹ Furthermore, it provides that if housing is furnished, it must meet specific safety and health standards.²⁰ Workers must be provided with written statements of earnings and deductions.²¹ If transportation is provided, vehicles used must be safe and properly insured.²² And most importantly, the AWPAA provides enforcement provisions, including a provision granting aggrieved migrant workers a private right of action to sue for violations.²³

B. Growers' Defenses to Avoid Liability under AWPAA

A grower is responsible to a migrant worker under the AWPAA only if the grower employs the migrant worker under the statutory definition of "employ."²⁴ Because the definition of "employ" is based on an unclear definition from the Fair Labor Standards Act ("FLSA"), determining whether a grower employs a migrant worker requires a detailed analysis of case law.²⁵ In enacting the AWPAA, Congress acknowledged that agricultural-type labor often creates distinctive employment relationships.²⁶ The most common of these types of relationships is a triangle between the grower, the crewleader, and the worker.²⁷ Congress predicted that growers would deny responsibility for AWPAA violations by categorizing crewleaders as independent contractors, not as employees of the agricultural employer or association, and categorizing farmworkers as employees solely of the crewleaders.²⁸ Indeed, growers have

19. §§ 1811, 1821, 1822, 1831, 1832, 1841.

20. § 1823.

21. § 1821.

22. § 1841.

23. *See* § 1854.

24. § 1802(2), (5).

25. § 1802(5); Fair Labor Standards Act of 1938, 29 U.S.C. § 203(g) (2006 & Supp. IV 2010) (defining employ as "to suffer or permit to work").

26. H.R. Rep. No. 97-885, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553 (giving examples of many types of possible employment relationships between employees, employers, and contractors).

27. *Id.* at 6, 7 (explaining that this issue often arises where an "employer/association asserts that the worker in question was not an employee but an independent contractor or in the alternative that such worker was solely an employee of an independent contractor/crewleader").

28. *Id.*

often been successful in using those two defenses to escape liability under AWPA.²⁹

When a court holds that a crewleader or worker is an independent contractor, the crewleader is directly liable to the migrant worker, but the grower is not.³⁰ In other words, the crewleader can be found to be the sole employer of the farmworker.³¹ Yet, crewleaders typically do not have the financial resources to pay farmworkers' judgments in a lawsuit, frequently making it impossible for the farmworker to recover damages against the crewleader.³² This lack of legal recourse places an economic burden on migrant farmworkers, "who are underpaid in the first instance and who cannot realistically recover unpaid wages from a crewleader who is undercapitalized and nowhere to be found."³³

29. See, e.g., *Aimable v. Long & Scott Farms, Inc.*, 20 F.3d 434, 445 (11th Cir. 1994) (finding that absent a clear showing of both the regulatory and non-regulatory factors that the migrant workers were economically dependent on the grower, the crewleader remains the sole employer of migrant workers), cert. denied, 115 S. Ct. 351 (1994); *Howard v. Malcolm*, 852 F.2d 101, 105 (4th Cir. 1988) (concluding that the crewleader was the sole employer of migrant corn pickers because he hired them, arranged for their housing and transportation, bargained for corn price with grower, and set their wages); *Donovan v. Brandel*, 736 F.2d 1114, 1120 (6th Cir. 1984) (noting that migrant pickle harvesters were not employees but independent contractors because of their ability to perform a similar task throughout Michigan); *Charles v. Burton*, 857 F. Supp. 1574, 1581-82 (M.D. Ga. 1994) (invoking the AWPA's legislative history to show there will always be situations where a farmer is not held to be a joint employer of a crewleader's employees, especially where the farmer exercised only cursory supervision, did not determine the wages, did not have the authority to hire or fire, and could not modify the individual conditions of employment, and was not responsible for the preparation of the payroll).

30. A crewleader is also known as farm labor contractor ("FLC"). See AWPA, 29 U.S.C. § 1802(7) (defining the term "farm labor contractor" as "any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity"); see also *Bertrand v. Jorden*, 672 F. Supp. 1417, 1419 (M.D. Fla. 1987) (establishing that the defendant employer "ha[d] worked as a farm labor contractor, or 'crewleader.'").

31. See, e.g., *Aimable*, 20 F.3d at 445 (conducting a multi-factor regulatory and non-regulatory analysis and concluding that the crewleader was the sole employer because the employee was found to be economically dependent on the crewleader).

32. Telephone interview with Gregory Schell, Managing Attorney, Fla. Rural Legal Svcs. (Sept 19, 2008) (on file with author). See *Antenor v. D & S Farms*, 88 F.3d 925, 930 (11th Cir. 1996) (attributing agricultural workers' inability to reverse patterns of abuse to crewleaders' tendency to be insolvent and transient).

33. Jeanne M. Glader, Note, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455, 1472 (1991) (internal citations omitted) (quoting *Maldonado v. Lucca*, 629 F. Supp. 483, 489 (D.N.J. 1986)).

III. THE JOINT EMPLOYMENT DOCTRINE

There are three principal classes of regulated persons under the AWP: agricultural associations, agricultural employers, and farm labor contractors.³⁴ Growers have limited obligations under AWP, and are liable under the Act only if their relationship to the agricultural workers meets the statutory definition of “employ.”³⁵ If the grower is not found to be a joint employer of the migrant or the seasonal worker, she avoids liability under the AWP.³⁶

Under the AWP, the term “agricultural employer” means “any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, *employs*, furnishes, or transports any migrant or seasonal agricultural worker.”³⁷ The term “employ” under the AWP has the same meaning as under the FLSA: “to suffer or permit to work.”³⁸ Congress’s deliberate adoption of the broad definition of employ from the FLSA was the “central foundation” of the AWP and “the best means by which to insure that the purposes of [the AWP] would be fulfilled.”³⁹

Despite claims by growers that crewleaders are the farmworkers’ sole employer, and thus are solely responsible for compliance with the AWP, courts sometimes look beyond this label and hold growers and crewleaders liable as joint employers of farmworkers.⁴⁰ The term joint employment means

34. “The term ‘agricultural association’ means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.” AWP, 29 U.S.C. § 1802(1).

35. § 1802(2). Growers only have to take reasonable steps to determine that the farm labor contractor possesses a certificate of registration. *See* § 1842. *See also Antenor*, 88 F.3d at 929 (“The grower’s liability under the FLSA and the AWP depends on whether they ‘employed’ the farmworkers furnished by [the independent labor contractor].”).

36. § 1802(2). *See* 29 C.F.R. § 500.20(h)(5) (2011) (incorporating into the AWP the definition of joint employment relationship contained in the FLSA); *see also Antenor*, 88 F.3d at 929-30 (discussing the liability of a grower if involved in joint employment relationship).

37. § 1802(2) (emphasis added).

38. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(g) (2006 & Supp. IV 2010); AWP, 19 U.S.C. § 1802(5). *See* S. Rep. No. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002 (1982) (discussing how the 1966 amendment would extend minimum wage protection to 390,000 agricultural workers). Congress passed the FLSA in 1938 to correct and eliminate those “conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” The FLSA establishes minimum wage; regulations concerning maximum hours; record-keeping and reporting requirements; child labor provisions; and a system of civil and criminal penalties for violations of the FLSA. Although the original version of the FLSA excluded agricultural workers from its minimum wage protection, Congress amended the FLSA in 1966 to extend minimum wage protection to some agricultural workers. *Id.* *See generally*, 29 U.S.C. §§ 201–219.

39. H. Rep. No. 97-885 at 7.

40. *See, e.g., Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 756 (9th Cir. 1979) (holding that the farmer and independent contractor jointly employed the worker in light of the level of control the farmer exercised over the workers).

“a condition in which a single individual stands in the relation of an employee to two or more persons at the same time.”⁴¹ A finding of joint employment requires a case-by-case fact-based analysis.⁴² “If the facts establish that two or more alleged employers are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist.”⁴³

Whether an employment relationship exists between the agricultural employer or association and the agricultural worker, depends on whether the worker is economically dependent upon the agricultural employer or association.⁴⁴ This economic dependency test used by courts to determine whether a migrant or seasonal farmworker is jointly employed does not appear in the AWPAs.⁴⁵ In the legislative history of the AWPAs, Congress expressly stated that, for joint employment purposes, the factors used in case law interpreting FLSA violation claims should be the controlling approach used by courts interpreting AWPAs violations.⁴⁶ Congress specifically endorsed several factors used by courts construing FLSA claims in determining joint employment. These elements include but are not limited to:

- (1) Whether the work was a “specialty job on the production line,”⁴⁷
- (2) Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without “material changes,”⁴⁸

41. 29 C.F.R. § 500.20(h)(5) (2002).

42. *Id.*

43. *Id.*

44. *Id.* § 500.20(h)(5)(iii).

45. Rather, the economic dependency doctrine is a judicially constructed device developed by several courts in finding whether a worker is jointly employed by an entity under FLSA claims. *See, e.g.,* *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (finding that the workers were employees of the slaughterhouse since they were economically dependent upon the factory because the workers used the factory’s premises and equipment, because the workers had no independent business organization, and because the workers’ contracts were not individually tailored and never materially altered); *Real*, 603 F.2d at 756 (concluding that the strawberry farmer’s supervision, control over fertilization of plants, and provision of strawberry plants rendered the workers economically dependent upon the farmer and therefore finding an employer-employee relationship between the farmer and workers); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988) (asserting that the migrant workers were economically dependent on the farmer’s land, agricultural expertise, equipment and marketing and accordingly were employees for the purposes of the AWPAs); *Beliz v. McLeod*, 765 F.2d 1317 (5th Cir. 1985) (determining that an employer-employee relationship existed between the crewmembers and the agricultural producer because the agricultural producer controlled and supervised how the work was to be performed and set the piecework rates); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983), *cert. denied*, 464 U.S. 850 (1983).

46. H. R. Rep. No. 97-885 at 7.

47. *See, e.g., Rutherford Food Corp.*, 331 U.S. at 730; *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 238 (5th Cir. 1973).

48. *Rutherford Food Corp.*, 331 U.S. at 730.

- (3) Whether the “premises and equipment” of the employer are used for the work,⁴⁹
- (4) Whether the employees had a “business organization that could or did shift as a unit from one worksite to another,”⁵⁰
- (5) Whether the work was “piecework” and not work that required “initiative, judgment or foresight,”⁵¹
- (6) Whether the employer exercised control over the employees’ work.⁵²

In analyzing the existence of a joint employment relationship, the Supreme Court in *Rutherford Food Corp. v. McComb* utilized the economic reality test in the context of a FLSA claim.⁵³ In *Rutherford*, the DOL sought to enjoin a slaughterhouse and meat packing company from violating FLSA wage and hour provisions.⁵⁴ The Court looked at the economic reality of the relationship between meat deboners, the slaughterhouse operator, and slaughterhouse owner.⁵⁵ The Court sought to determine whether workers who deboned meat in the slaughterhouse were independent contractors or employees of either Rutherford Food Corporation (the slaughterhouse operator) or Kaiser Packing Company (the slaughterhouse owner).⁵⁶ The Court proceeded to look at the broader circumstances of the deboners as they related to all the activities in the slaughterhouse, and concluded that the workers were employees of the owner,

49. *Id.*; accord *Griffin & Brand*, 471 F.2d at 237; *Real*, 603 F.2d at 754 (considering the alleged employees’ “investment in equipment or materials required for his task, or his employment of helpers”).

50. *Rutherford Food Corp.*, 331 U.S. at 730.

51. *See id.* (noting that providing a financial incentive to encourage greater output from the workers by lining payment to output does not result in any independent initiative on the part of the workers, but is more similar to piecework thereby resulting in the worker remaining economically dependent upon the deboning factory); *see also Real*, 603 F.2d at 754 (considering “whether the service rendered requires a special skill”); *Griffin & Brand*, 471 F.2d at 236 (defining piece rate as the amount paid per basket picked and stating that the piece rate varies with the size of the particular vegetable or fruit being harvested).

52. *Rutherford Food Corp.*, 331 U.S. at 730; *see also Griffin & Brand*, 471 F.2d at 237 (indicating that the farmer exercised control over the crew leaders and harvest workers when the farmer assigned what row or patches to harvest each day and the rate at which crew leaders should pay the harvest workers, including whether an hourly or piece rate is appropriate).

53. *Rutherford Food Corp.*, 331 U.S. at 727 (finding that because the FLSA sought to improve labor conditions for workers, the standard it uses to define an “employee” should also be used in AWPA cases).

54. *See id.* at 723 (examining whether there was a violation of the FLSA because the factory failed to keep proper records and pay appropriate overtime).

55. *See id.* at 726 (following the Circuit Court of Appeals’ departure from the common law test of determining the definition of an “employee” and looking at the “underlying economic realities”).

56. *Id.* at 724, 727. Rutherford owned 51% of Kaiser stock. Because Kaiser was operating at a loss, Rutherford advanced money for Kaiser’s operation. In 1943, Rutherford leased the Kaiser slaughterhouse and took over its operations. This arrangement lasted until 1944. *Id.*

Kaiser, as they were performing a specialty job on the production line.⁵⁷ The Court considered Kaiser's ownership of the plant and most of the equipment as well as Kaiser management's close supervision of the workers's performance.⁵⁸ The job was essentially piecework because the deboners' compensation did not actually depend on their own initiative, judgment, or foresight, as it would for a typical independent contractor.⁵⁹ Therefore, the Court concluded that the employer could not label the deboners independent contractors in order to escape compliance with the FLSA.⁶⁰

AWPA's legislative history indicates that the absence of any one or more of the six factors listed above does not preclude a finding that an agricultural association or agricultural employer is a joint employer along with a farm labor contractor.⁶¹ Additionally, Congress recognized that the agricultural economy contains varied employment relationships.⁶² These relationships often involve a combination of employers, contractors and employees. In the enactment of the AWPA, Congress wanted to make clear that, under the construction of the joint employer concept, it envisioned situations in which a single employee may have the required employment relationship with not just one employer, but simultaneously with an employer and an independent contractor, or with several employers, with or without the inclusion of an independent contractor.⁶³ The focus of each inquiry, therefore, must be each employment relationship as it exists between the parties.⁶⁴

Whether a worker is an employee does not depend on technical or "isolated factors but rather on the circumstances of the whole activity."⁶⁵ It depends not on the form of the relationship but on the economic reality, and whether the employee is dependent upon that person for his livelihood.⁶⁶

57. *See id.* at 730 (determining that assessment of the relationship between the deboners and the slaughterhouse does not hinge on isolated factors, but rather on the entirety of the circumstances).

58. *See id.* (considering the ownership of the premises and the equipment factory a when finding an employer-employee relationship and proving that the de-boners were dependent on the managers and were therefore employees).

59. *See id.* (holding that linking pay to worker output can constitute piecework which does entail initiative or judgment by the worker).

60. *See id.* (reasoning that the deboners could not constitute independent contractors since they did not work as a unit, they did piecework, and they relied on the slaughterhouse management equipment).

61. H. R. Rep. No. 97-885 at 7.

62. *Id.*

63. *Id.*

64. *Id.* at 8.

65. *Rutherford Food Corp.*, 331 U.S. at 730.

66. *Id.* (looking at the entire work relationship including the extent of employee organization, payment structure, and managerial oversight).

IV. THE ELEVENTH CIRCUIT'S MISINTERPRETATION OF THE AWP

A. *How the Eleventh Circuit has Interpreted the AWP*

The joint employment doctrine is a judicial mechanism used by courts to determine whether a farm labor contractor and agricultural association or employer jointly employ a migrant or agricultural worker for purposes of AWP violations.⁶⁷ In assessing the existence of this relationship, the Eleventh Circuit has used the economic reality test promulgated in Title 29 of the Code of Federal Regulations (C.F.R.) and interpreted by several judicial decisions.⁶⁸ AWP violations have also been found using the factors outlined in decisions construing FLSA violation claims in determining the existence of joint employment.⁶⁹

Aimable v. Long & Scott Farms is the seminal case in the Eleventh Circuit interpreting the joint employment doctrine under the AWP.⁷⁰ In *Aimable*, a grower had contracted with a farm labor contractor that would provide laborers to harvest its crops. The Eleventh Circuit had to decide whether the grower was the joint employer of those laborers for purposes of the FLSA and AWP.⁷¹ The plaintiffs, 206 migrant and seasonal farm workers, were

67. *Id.*

68. 29 C.F.R. 500.20(h)(5)(iii). *See, e.g.,* Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997) (assessing whether a joint employment relationship exists by examining the “economic reality”—looking at the nature and degree of control of the workers, the degree of supervision, the power to determine methods of payment of the workers, the right to fire or modify employment conditions and the preparation of payroll and the payment of wages); Howard v. Malcolm, 852 F.2d 101 (4th Cir. 1988) (finding joint employment because the farmer arranged the housing, transportation, the piecework rate, tax and maintained work records); Dep’t of Labor v. Lauritzen, 835 F.2d 1529, 1536-38 (7th Cir. 1987) (looking at the control of supervisors, profit and loss, capital investment and degree of skill required to perform the work to assess the economic reality); Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327 (5th Cir. 1985) (finding that control of the farmer over the workers is key in assessing the economic reality and the “critically significant” factors are how specialized the nature of the work and whether the individual is “in business for himself”); Castillo v. Givens, 704 F.2d 181, 185-93 (5th Cir. 1983); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979) (distinguishing employees from independent contractors by examining the employer’s control of the workers, the worker’s opportunity for profit or loss, the worker’s investment in the equipment or materials, whether the service requires a special skill, the degree of permanence of the working relationship, and whether the service rendered is an integral part of the employer’s business).

69. *See, e.g.,* Charles v. Burton, 169 F.3d 1322 (11th Cir. 1999) (stating that the concept of “employ” used in the AWP includes the joint employment principles applicable under the FLSA); Antenor v. D&S Farms, 88 F.3d 925 (11th Cir. 1996) (viewing the AWP definition of “employ” as the same as the FLSA definition); *Aimable v. Long & Scott Farms*, 20 F.3d 434, 438 (11th Cir. 1994) (referring to the FLSA principles to define concept of “joint employment” in the context of the Migrant and Seasonal Agricultural Worker Protection); *accord* Luna v. Del Monte Fresh Produce, 2008 U.S. Dist. LEXIS 21636 (N.D. Ga., March 18, 2008) (construing that both the AWP and the FLSA define “employer” as any entity that “suffers or permits” an individual to work).

70. *See Aimable*, 20 F.3d at 436 (examining the district court’s summary judgment that the farm was not the laborers’ joint employer).

71. *Id.*

alleged to have been employed by John Miller, Jr., the farm labor contractor, to harvest crops grown by Long & Scott Farms—the owner and operator (grower) of a vegetable farm in Florida.⁷² One of the grower owners, Frank Scott, managed the day-to-day activities of the farm.⁷³ Miller, the farm labor contractor, had been recruiting and supplying Scott with migrant workers for his farm for twenty-five years.⁷⁴ Throughout their relationship, Scott never used any contractor other than Miller.⁷⁵ Scott would pay Miller a flat rate for each quantity of produce picked and Miller compensated the workers on a piece-rate basis.⁷⁶ The farmworkers sued both the grower and farm labor contractor to recover unpaid wages—alleging that the defendants were liable as joint employers for violations of the FLSA and the AWPAA for not paying them minimum wage and keeping proper records of their pay.⁷⁷

At the trial court, the United States District Court for the Middle District of Florida held that the farm labor contractor was the sole employer of the farmworkers for purposes of the FLSA and the AWPAA.⁷⁸ On appeal, the Eleventh Circuit upheld these findings.⁷⁹ The Eleventh Circuit used factors formulated by other courts to determine whether a joint employment relation exists under the FLSA, including:⁸⁰

72. *Id.* at 437.

73. Frank Scott owned one-half shares in the Long & Scott farm.

74. *Id.* at 437.

75. *Id.*

76. Piece rate is a payment system where employees are paid according to how much they produce. For example, farmworkers are paid a predetermined amount per bucket of vegetables or fruits picked.

77. *Aimable*, 20 F.3d at 437

78. *Id.* at 436.

79. *Id.*

80. Congress recognized that in each case interpreting joint employment under the FLSA, courts give a slightly different description of the five or six factors used in making the determination of whether joint employment exist. Additionally, Congress suggested that the factors are not exhaustive. *Id.* at 438. *See* *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973) (using a five-part test to examine the employer-employee relationship under the FLSA); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (adopting FLSA factors to determine whether a joint relationship exists by looking at the degree of the employer's control, the employees' opportunity for profit or loss, the employees' investment in equipment, the special skills required, the permanence of the working relationship, and whether the service is an integral part of the employer's business).

- (1) The nature and degree of control of the workers;
- (2) The degree of supervision, direct or indirect, of the work;
- (3) The power to determine the pay rates or the methods of payment of the workers;
- (4) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
- (5) Preparation of payroll and the payment of wages.⁸¹

In interpreting the five factors, the court concluded that Long & Scott were not the joint employers of the farmworkers based on five key findings.⁸² First, the court found that the farm labor contractor, not Long & Scott, controlled the number of workers employed to work on the farm; the farm labor contractor hired and fired specific individuals, and selected specific workers to do specific jobs.⁸³ Second, supervision by Long & Scott was *de minimis*, although Long & Scott employees came out to the field on a regular basis and occasionally gave Miller commands that were, in turn, relayed to the workers.⁸⁴ Third, Long & Scott had no direct or indirect power to set or increase the workers' wages, although plaintiffs argued that Long & Scott controlled the amount Miller received and Miller controlled the amount the workers received and therefore, Long & Scott controlled the amount the workers ultimately received.⁸⁵ Fourth, Long & Scott never commanded that a particular individual be hired or fired and never decided whether the workers would be paid hourly or piece-rate wages.⁸⁶ Lastly, Miller, not Long & Scott, was responsible for calculating and paying each farmworker his wages.⁸⁷

81. *Aimable*, 20 F.3d at 438 (finding that none of the first three factors—the three in dispute—supported a finding of joint employment).

82. *See id.* at 443-44. However, the court continued its analysis by addressing six additional factors proposed by the plaintiff farmworkers. In its examination, the court determined two issues: “whether the factors were relevant to this particular case; and if so, whether the factor supported a finding of joint employment.” The court held that, in this case, only two of the six factors were relevant. Thus, the court created its own unique six-factor test for joint employment as follows: (1) Investment in equipment and facilities; (2) The opportunity for profit and loss; (3) Permanency and exclusivity of employment; (4) The degree of skill required to perform the job; (5) Ownership of property or facilities where work occurred; and (6) Performance of a specialty job within the production line integral to the business. *Id.*

83. *Id.* at 441 (making such a determination even though the court also recognized that Long & Scott made all planting decisions, including which crops to plant, how much to plant, and how to grow the crop (e.g., decisions regarding tilling, fertilization, and irrigation)).

84. *Cf. Hodgson*, 471 F.2d at 238 (holding that supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor).

85. *See Aimable*, 20 F.3d at 442 (explaining the indirect control Long & Scott possessed over the appellants).

86. *See id.* (illustrating how the fourth regulatory factor favors a finding that no joint employment existed).

87. *See id.* at 442-43 (showing how the fifth regulatory factor does not support a finding of joint employment).

The court concluded by stating that the farmworkers were economically dependent upon Miller, not upon Long & Scott.⁸⁸ Moreover, taking the five factors in isolation, “the result is inescapable: Miller alone was appellants’ employer; no joint employment existed.”⁸⁹

B. Why the AWPA does not Protect Migrants in Florida

The legislative history of the AWPA demonstrates that Congress intended to have growers ensure compliance with the AWPA.⁹⁰ During the debate, Rep. Miller noted that: “Agricultural employers . . . will for the first time be sure of their duties to migrant workers. Agricultural employees will, in turn, know who is responsible for their protections, by fixing responsibility on those who ultimately benefit from their labors—the agricultural employer.”⁹¹ Section 1842 of the AWPA provides that “[n]o person shall utilize the services of any farm labor contractor . . . unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized.”⁹²

Additionally, the legislative history of the AWPA states that Congress’s purpose in enacting the AWPA was to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers.⁹³ According to Gregory Schell, a leading AWPA attorney who has represented many migrant workers in AWPA violation cases, “the courts simply are not enforcing AWPA against the growers.”⁹⁴ He went on to say that “when Congress enacted AWPA, it meant to regulate the crewleaders.”⁹⁵ But, he further stated, “The law is doing what it is supposed to do, protecting migrant workers from crewleaders’ violations.”⁹⁶ The crewleaders, however, do not usually have very much money.⁹⁷ Even when a migrant worker wins a lawsuit against a crewleader under the AWPA,

88. See *id.* at 445 (holding that when the court examines all of the non-regulatory factors in light of the five regulatory factors, each of which demonstrates that the farmworkers were economically dependent upon Miller).

89. See *id.* at 443 (establishing that *Aimable* is still the law in the Eleventh Circuit); accord *Luna v. Del Monte Fresh Produce*, 2008 U.S. Dist. LEXIS 21636, at *29 (finding no joint employment where the wholly-owned subsidiary hired and fired workers and the parent company purchased and sold the produce).

90. See 29 U.S.C. § 1802(2) (2006) (“The term ‘agricultural employer’ means any person who owns or operates a farm . . . and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.”).

91. 128 CONG. REC. 26,008 (1982) (statement of Rep. Miller).

92. 29 U.S.C. § 1842 (2006).

93. H.R. REP. NO. 97-885, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, at 4549.

94. Telephone interview with Gregory Schell, Managing Attorney, Fla. Rural Legal Servs. (Sept. 19, 2008) (on file with author).

95. *Id.*

96. *Id.*

97. *Id.*

the migrant usually cannot collect the damages.⁹⁸ Thus, “when a person is riding on the back of a crewleader’s truck that is not insured, the person is just out of luck if he is injured [because] he has to pay his own hospital bills.”⁹⁹ Furthermore, Schell also stated that the crewleaders deduct social security insurance from the workers’ paychecks, but the Internal Revenue Service will never see a dime, as many of the workers do not have valid social security numbers with which to collect social security payments.¹⁰⁰ The same is true for alleged worker’s compensation payments collected by the growers.¹⁰¹

In another Eleventh Circuit AWPA decision, *Charles v. Burton*,¹⁰² the court had to decide whether the growers were liable for actual damages to the farmworkers for the growers’ failure to verify the farm labor contractor’s registration and insurance.¹⁰³ In *Burton*, the farm labor contractor’s uninsured truck overturned on the highway while driving the workers to the growers’ farm, killing and seriously injuring several farmworkers aboard the truck.¹⁰⁴ The Eleventh Circuit reversed the district court’s holding that the growers’ failure to check the farm labor contractor’s certificate of registration precluded the workers from having access to insurance coverage.¹⁰⁵ In reversing, the court reasoned that if the growers had utilized a farm labor contractor with a valid certificate of registration, there would have been insurance coverage for the workers’ physical injuries.¹⁰⁶ Thus, the court concluded that the growers violated the AWPA and therefore were liable for the workers’ lost wages and medical care.¹⁰⁷

The district court’s ruling in *Burton* shows some courts’ refusal to hold growers liable under the AWPA, even where the grower blatantly violated the act by not checking the farm labor contractor’s certificate of registration.¹⁰⁸ The decision had to be reversed on appeal in order to hold the grower liable. During a phone interview, Gregory Schell explained why such decisions are so common:

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*; see also *Charles v. Burton*, 169 F.3d 1322, 1335-36 (11th Cir. 1999) (failing to check worker’s certificate of registration).

102. *Burton*, 169 F.3d at 1322.

103. 29 U.S.C. § 1842 (2006) (requiring farm labor contractor to possess the certificate of registration); § 1841(b) (requiring vehicles used for transporting migrants to carry insurance or a liability bond).

104. *Burton*, 169 F.3d at 1326.

105. *Id.* at 1335 (explaining that the trial court found that checking the farm labor contractor’s license was too far removed from the type of harm the workers suffered).

106. *Id.*

107. *Id.* at 1336.

108. *Id.*

[N]obody cares about these people. The fact is the majority of these workers are undocumented which saves the company that hires them a lot of money because the labor is cheap. The government does not care about them either, because they are minorities. They don't pay taxes; they don't pay campaign contributions, and therefore [they], are not [a] priority on anyone's list. [This is why] so many bills intended to protect them fail—the migrants are powerless.¹⁰⁹

V. FLORIDA SHOULD REQUIRE CONTRACTORS TO HAVE SURETY BONDS

In enacting AWPAs, Congress adopted the joint employment doctrine to aid courts in enforcing AWPAs violations.¹¹⁰ At the same time, when a worker is found not to be an employee of the agricultural association or the employer, the farmworker is often left without recourse for his injuries.¹¹¹ Still, enacting stricter penalties will likely not remedy the problem of judgment-proof farm labor contractors. Congress has already attempted this by repealing the AWPAs predecessor, the FLCRA, and adopting standards that are more stringent for growers and farm labor contractors.¹¹²

The author of a Note entitled, *Picking Produce and Employees: Recent Developments in Farmworker Injustice*, suggests that Congress should amend the AWPAs and create a per se rule that migrant farmworkers are employees of agricultural businesses.¹¹³ The article reasoned that adopting a per se rule would make it impossible for large growers to avoid liability under the AWPAs.¹¹⁴ The author further noted, “this per se rule should begin in the courts as a signal to growers that judges will no longer be fooled by the veil of a mere contractual agreement with a crewleader.”¹¹⁵ However, as with the joint employment doctrine, a per se rule would still be subject to judicial construction. Notably, inconsistent judicial construction is one of the weaknesses of the AWPAs, as

109. Telephone interview with Gregory Schell, Managing Attorney, Fla. Rural Legal Servs. (Sept. 19, 2008) (on file with author).

110. See H.R. REP. NO. 97-885, at 8 (1982).

111. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006 & Supp. 2008). Overwhelmingly, migrant and seasonal farmworkers do not have social security numbers and are not employees of the grower. Therefore, they cannot collect worker's compensation and unemployment benefits when they are out of work. Many migrant farmworkers come to the United States under the H-2A program, authorized by the Immigration and Nationality Act (“INA”), which permits U.S. employers to bring temporary foreign workers into the United States to perform seasonal agricultural work. *Id.*

112. H.R. REP. NO. 97-885, at 13. Farm labor contractors, agricultural employers, and agricultural associations that recruit workers must provide the workers with a written disclosure statement informing them of the wage rates, the period of employment, where the employment will take place, and what it will involve, as well as whether housing, transportation or other benefits are provided.

113. Jeanne E. Varner, Note, *Picking Produce and Employees: Recent Developments in Farmworker Injustice*, 38 ARIZ. L. REV. 433, 469-71 (1996).

114. *Id.* at 435.

115. *Id.* at 470.

courts do not apply the factors of the joint employment doctrine uniformly, and each court may develop its own factors where applicable.¹¹⁶ Thus, the per se rule is a dilemma with no end.

A. *California and Oregon: Additional Protection for Migrant Workers*

In order to remedy the problems created by the joint employment loophole, Florida should require that crewleaders obtain a surety bond upon registering as a farm labor contractor.¹¹⁷ Such regulation already exists in at least two states—California and Oregon—both of which require that farm labor contractors be bonded before employing migrant workers.¹¹⁸

Both California and Oregon statutes provide agricultural workers added protections in addition to the ones already offered by AWP. ¹¹⁹ Whenever federal statutes confer certain rights and benefits to individuals, states can always provide even greater benefits to their citizens.¹²⁰ Typically, where a person brings a cause of action under the federal statute, that person may sue under the state statute as well.¹²¹ This is because state statutes often replicate federal statutes pertaining to particular rights.¹²² In addition to the protections offered by the AWP, California and Oregon agricultural workers enjoy added benefits.

116. *See, e.g.*, *Aimable v. Long & Scott Farms*, 20 F.3d 434, 436 (11th Cir. 1994) (affirming that the grower had no control over workers where the farmer gave the farm labor contractor general instructions as to which crops to harvest at a particular time); *see also* *Charles v. Burton*, 169 F.3d 1322, 1325-26 (11th Cir. 1999) (ruling the the grower had control where growers determined the particular fields that they wanted the workers to cultivate, determined when workers would begin picking each field, and supplied workers with boxes); *Antenor v. D&S Farms*, 88 F.3d 925, 937-38 (11th Cir. 1996) (finding the the growers did have control over workers where growers told FLC how many farmworkers to bring each day, the growers' foremen determined the precise moment when picking would commence each day, and the growers were free to directly delay or stop the workers from continuing their work).

117. A surety bond is an insurance policy that pays injured parties for losses suffered from the bondholder's failure to perform under a contract. 30 FLA. JUR. 2D *Insurance* § 27 (2011).

118. CAL. LAB. CODE § 1684(a)(3) (West 2003 & Supp. 2011); OR. REV. STAT. § 658.415(3) (2009).

119. 29 U.S.C.A § (1)(H) (1983). For example, AWP does require that farm labor contractors carry an insurance policy or liability bond. However, the grower has to verify coverage. Insurance is not a requisite to be a licensed farm labor contractor.

120. *Cf.* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing the capacity for state constitutions to help protect individual liberties in a manner separate from the role of federal law and the United States Constitution).

121. *Cf. id.* at 503 (stating that the “very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach.”).

122. *See, e.g.*, *People v. Disbrow*, 545 P.2d 272, 280 (Cal. 1976) (“We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court”)

The California Labor Code provides that a person shall not act as a farm labor contractor until the California Labor Commissioner licenses that person.¹²³ The California Labor Commission must investigate an individual's character, competency, and responsibility before it issues or renews his license as a farm labor contractor.¹²⁴ The statute also requires that a person deposit with the Labor Commissioner a surety bond in an amount based on the size of the person's annual payroll for all employees.¹²⁵ For payrolls up to \$500,000.00, a \$25,000.00 bond is required.¹²⁶ In addition, a \$50,000.00 bond is required for payrolls of \$500,000.00 to \$2,000,000.00.¹²⁷ For payrolls greater than \$2,000,000.00, a \$75,000.00 bond is mandated.¹²⁸ Furthermore, the law requires that where a farm labor contractor is subject to a final judgment in an amount equal to the bond requirement, he must deposit an additional bond within sixty days.¹²⁹

Additionally, farm labor contractors in California must take a written examination to measure their knowledge of the current laws and administrative regulations concerning farm labor contractors.¹³⁰ A farm labor contractor needs a score of at least eighty-five percent on the examination to pass and be licensed.¹³¹ Moreover, a person may take the examination no more than three times in a calendar year.¹³² The statute also mandates that a person who wishes to become a farm labor contractor enroll and participate in at least eight hours of relevant educational classes each year, chosen from a list of approved classes prepared by the California Labor Commissioner.¹³³

123. Under the California Labor Code, a farm labor contractor is any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to these persons. *See* § 1682 (2011). *See* § 1684(a)(6) (“[a] person has registered as a farm labor contractor pursuant to the federal Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 et seq.), when registration is required pursuant to federal law.”).

124. § 1684(a)(1)(A).

125. § 1684 (a)(3) (2006).

126. § 1684 (a)(3)(A).

127. § 1684 (a)(3)(B).

128. § 1684 (a)(3)(C).

129. *Id.*

130. § 1684 (a)(5). The exam taker is assessed on his knowledge of the current laws and regulations regarding wages, hours, and working conditions, penalties, employee housing and transportation, collective bargaining, field sanitation, and safe work practices related to pesticide use in agricultural employment setting.

131. *Id.*

132. *Id.*

133. § 1684 (b)(2).

Similarly, under Oregon's Revised Statute, a person may not act as a farm labor contractor unless first licensed by the Commissioner of the Bureau of Labor and Industries.¹³⁴ Oregon requires that farm labor contractors carry surety bonds for the protection of its migrant workers.¹³⁵ In contrast, Oregon provides farm labor contractors the option of making a cash deposit if they are unable to obtain the surety bond.¹³⁶ While, the bond in California is based upon the amount of one's payroll, in Oregon it is based on the number of employees a farm labor contractor has.¹³⁷

Any person may file an application for a license to act as a farm labor contractor at any office of the Bureau of Labor and Industries.¹³⁸ However, every person who acts as a farm labor contractor must furnish proof of insurance for any vehicles that will be utilized to transport agricultural workers.¹³⁹ In addition, each farm labor contractor applicant has to provide and maintain proof of financial ability to pay the wages of employees and other obligations that may arise under this statute.¹⁴⁰ Proof of financial ability to obtain and carry a corporate surety bond of a company licensed to do such business in Oregon is necessary.¹⁴¹ Where a farm labor contractor cannot purchase the requisite surety bond, that person may establish a cash deposit or deposit the cash equivalent through a savings account at a bank in the name of the Commissioner.¹⁴²

The Commissioner acts as trustee for the employees of the farm labor contractor and others as their interests may appear. The farm labor contractor, in turn, has to deliver proof of the account and the ability to withdraw the funds for the Commissioner under the terms of a bond approved by the Commissioner.¹⁴³ The amount of the bond a farm labor contractor is required to carry depends on the number of workers the contractor employs.¹⁴⁴ For example, a \$10,000 bond is required if the contractor employs up to twenty employees, and a \$30,000 bond is required if the contractor employs over twenty workers.¹⁴⁵ The statute further provides that any person who suffers lost wages or any other loss because of an agricultural association or the private nonprofit corporation as a farm labor contractor shall have a right of action against the surety bond or against the bank deposit.¹⁴⁶ In addition, any person

134. OR. REV. STAT. § 658.415(1) (2007).

135. OR. REV. STAT. § 658.415(8) (2007).

136. § 658.415(3) (2007).

137. *Id.*

138. *Id.*

139. § 658.415(2)(a) (2007).

140. § 658.415(3) (2007).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. § 658.415(3)(b) (2007).

146. § 658.415(8) (2007).

who knowingly uses the services of an unlicensed farm labor contractor shall be personally, jointly, and severally liable along with the person acting as a farm labor contractor.¹⁴⁷

In addition, Oregon makes any person jointly and severally liable with a farm labor contractor if that person knowingly uses the services of an unlicensed farm labor contractor.¹⁴⁸ Consequently, this provision seems to indicate that even if a court finds that an agricultural association or owner is not a joint employer of a migrant worker for AWPA violations, the owner or association could still be liable under the this statute.¹⁴⁹ For instance, in *Burton*, the growers violated AWPA by not verifying that the farm labor contractor had a valid certificate of registration. So long as the owner or association knowingly uses the services of an unlicensed farm, they are liable for the workers' claims.¹⁵⁰ Under this approach, a court does not even need to define joint employment in order to hold a grower liable under Oregon law for AWPA violations. The grower would be jointly and severally liable if it fails to verify the farm labor contractor's certificate of registration.

Requiring farm labor contractors to take an exam holds the individuals to a greater standard, as contractors should know the laws that can potentially affect their status as farm labor contractors.¹⁵¹ The exam ensures that before someone even applies to be a licensed farm labor contractor, that person already knows the standard to which he must conform.¹⁵² Requiring farm labor contractors to carry surety bonds ensures that workers are compensated for injuries suffered from farm labor contractors' non-compliance with AWPA and the California Code.¹⁵³

B. Florida Should Follow Oregon's Surety Bond Law

Often, migrant workers cannot collect on civil judgments won under AWPA. This is because farm labor contractors usually do not have the financial ability to pay the judgments, and the growers who have the economic ability to pay are found not to be the employer of the migrant worker. In order to further AWPA's statutory purpose, the Florida legislature should enact a law similar to Oregon's—requiring crewleaders to carry surety bond. The statute should require proof of surety bond before a person can become a farm labor contractor. And in the event a grower fails to verify that the farm labor contractor meets this requirement, the grower would be jointly and severally liable to the migrant workers for any injuries sustained. The Oregon law

147. See § 658.419.

148. § 658.415(7)(a) (2007).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. § 1684(a)(3)(C) (2006).

provides more protection and flexibility than the California law. For instance, in Oregon the farm labor contractor can have a bond or a cash deposit.¹⁵⁴ Furthermore, Oregon makes any person jointly liable under the act for known violations.¹⁵⁵ Moreover, just like Oregon, Florida should make the amount of bond based on the number of personnel a farm labor contractor employs. In addition, Florida should establish a commission that would oversee and act as trustee for any bonds paid and maintained. By enacting this legislation, Florida migrant workers would finally have the much-needed protection they lack in the event of incidents like the one in *Burton*.¹⁵⁶ For example, under current law, if a migrant worker incurs bodily injury or death while being transported by a farm labor contractor and the contractor does not have liability insurance, the migrant worker does not get compensation for medical expenses or lost wages.¹⁵⁷ Under this new recommended law, whether a farm labor contractor is underinsured or uninsured, the surety bond would help pay for the medical expenses and lost wages of the migrant worker.

While the AWPA states that a farm labor contractor should not transport workers in its vehicle unless insured, contractors often break this rule.¹⁵⁸ The AWPA does not require that farm labor contractors first obtain insurance in order to obtain their farm labor contractor status. The Oregon law deals precisely with this issue, requiring a person who wants to apply to be a farm labor contractor to first have a surety bond approved by the Commissioner of Labor.¹⁵⁹

This mandatory policy would aid migrants like the ones in *Burton*.¹⁶⁰ In *Burton*, since the farm labor contractor's truck was uninsured and the migrants could not get medical care or compensation for lost wages.¹⁶¹ *Burton* would have ended differently had Florida required the crewleader to have a surety bond, which would have compensated the migrant workers for the injuries sustained in that crash. Additionally, the grower would be jointly and severally liable for its failure to validate the farm labor contractor's valid certificate of

154. § 658.415(3) (2007).

155. § 658.415(7)(a) (2007).

156. *Charles v. Burton*, 169 F.3d 1322, 1335 (11th Cir. 1999) (finding that farmworkers were unable to obtain medical care and compensation for lost wages because the farm labor contractor did not have a valid certificate of registration and therefore no insurance coverage on the vehicle).

157. See generally *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994) (discussing the factors used to determine joint employer status, as well as related responsibilities).

158. *Burton*, 169 F.3d at 1326.

159. OR. REV. STAT. § 658.415(3) (2007).

160. *Burton*, 169 F.3d at 1322, 1326.

161. See *Burton*, 169 F.3d at 1325-26. Although beyond the scope of this paper, a number of migrant workers may be eligible for workers compensation, insurance paid for by an employer, which provides cash benefits and medical care if an employee sustains job-related injury or illness. On the other hand, a person has to be an employee in order to file a worker's compensation claim, which brings back to the table the joint employment doctrine discussion.

registration. The uncompensated damages suffered by the migrants were the result of the farm labor contractor's truck's lack of insurance.

By mandating that crewleaders carry a surety bond, migrant and agricultural workers will be less likely to suffer from the grave economic hardship like that suffered by the workers in *Burton*. The surety bond would provide some relief so that the migrant workers can be compensated if they win a claim against the farm labor contractor. Moreover, this statute would eliminate the need for the joint employment doctrine because migrant workers would have some expectation of compensation for injuries suffered.

VI. CONCLUSION

The AWPA provides many necessary protections for migrant workers. However, these protections are only available if the farmworkers are found to be employees under the statutory definition.¹⁶² When courts, like the Eleventh Circuit in *Aimable*, misapply the joint employment doctrine and find that migrant farmworkers are not employees of the growers on whose land they work—it is as if the AWPA does not exist. If courts do not hold growers liable for AWPA violations, the migrant workers have almost no hope of recovering the damages to which they are entitled if their farm labor contractor does not have the funds to pay. Courts and Congress must provide an incentive for growers to comply with the AWPA by implementing a surety bond requirement and finding them jointly and severally liable with the farm labor contractor where the grower knowingly uses the services of an unlicensed, non-bonded farm labor contractor. Growers would therefore not try to dodge the joint employment doctrine. *Aimable* and *Burton* demonstrate that without this type of monetary incentive, unprincipled crewleaders will continue to abuse workers and laws while growers look the other way.¹⁶³

Migrant workers have no political voice and little power to organize for their own protection. They are part of an eager yet oppressed work force that enables Americans to purchase a half-gallon of fresh orange juice for just \$3.39 and a pound of tomatoes for only \$1.29 while they earn as little as \$200.00 a week. As major contributors to Florida's \$62 billion agricultural industry, these workers should get more in return.

162. Compare *Burton*, 169 F.3d at 1336 (finding that appellants were employees under weighing factors, leading to a determination that employer appellees were liable for violating AWPA) with *Aimable*, 20 F.3d at 436 (finding that the weighing factors to determine employee status of farmworkers was insufficient to determine their employer).

163. Compare *Aimable*, 20 F.3d at 436 (determining joint employment doctrine did not apply because appellants could not establish sufficient economic dependency on appellees), with *Burton*, 169 F.3d at 1336 (contending *Burton's* use of appellants' services established joint employer relationship).