An Argument for a Vicarious Liability Standard for Agricultural Employers and Associations for the Acts of Contractee Farm Labor Contractors: an Addition to the Migrant and Seasonal Agricultural Worker’s Protection Act of 1983

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Introduction

Though many papers, essays, and articles have covered the topic of seasonal and migrant agricultural workers, most have been content to expand the breadth of violations for which those workers could gain recourse in court. For many law students who have taken a course in Remedies,¹ it is recognized that the real bar to recovery does not usually come from a lack of substantive coverage in regards to federal law, but from the inability to find a party in which to collect a judgment or the lack of an adequate legal theory to effectuate a claim. Such inadequacies are prevalent among groups who have trouble utilizing the legal system in terms of access or knowledge.

This is notably evidenced in the case of seasonal and migrant workers where this failure can take the form of an insolvent farm labor contractor (hereinafter “FLC”)² or this historically exploited group encountering barriers to both education and its pendant resources. The fact is

¹ My thanks to Professor Luna for exposing me to the ins and outs of Remedies Law.

² When the term “farm labor contractor” is used in this paper it refers to how it has been most recently defined under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) 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 29 U.S.C. § 1802 (7) (2012). However, in Section III of this paper where I discuss the Farm Labor Contractor Registration Act of 1963, I refer to “farm labor contractors” as defined under that Act as, “any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ... migrant workers (excluding members of his immediate family) ... for interstate agricultural employment.” 7 U.S.C. § 2042 (b) (1964), repealed by 29 U.S.C. § 1802 (7) (1983). There is, however, little distinction between the two definitions.

“Farm labor activity” as is used in U.S.C. § 1802 (7) (2012), has been most recently defined in the AWPA as “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.” See 29 U.S.C. § 1802 (6) (2012).
that seasonal and migrant workers have substantive federal law at their disposal but lack the ability to reach beyond their FLCs and hold agricultural employers\(^3\) or associations,\(^4\) who benefit most from their labor, liable under that federal law to either help force its compliance or to ensure that a traditionally exploited group has a party from whom they can collect damages. Thus, these workers can find themselves injured with no one to sue and will never be able to make themselves whole.

The purpose of this paper is to present the argument for why there should be a standard of vicarious liability\(^5\) to allow for seasonal and migrant workers to sue agricultural employers or associations for violations of the Migrant and Seasonal Agricultural Worker Protection Act of 1983\(^6\) (hereinafter “AWPA”)\(^7\), instead of being confined to recovery against independent

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\(^3\) The term “agricultural employer” is used in this paper as defined under the AWPA as “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.” See 29 U.S.C. § 1802 (2) (2012).

\(^4\) The term “agricultural association” which is usually used in conjunction with “agricultural employer” is referred as it has been most recently defined under the AWPA as “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. See 29 U.S.C. § 1802 (1) (2012).

\(^5\) The term “vicarious liability” refers to the ability to hold a party liable for the actions of another party. This is seen often in the context of “respondeat superior” where an employer can become liable for the actions of an employee. See Restatement (Third) of Agency § 2.04 (2006).

\(^6\) Signed into law in 1983 by President Reagan. The signing statement accompanying the legislation states that “the old law did not clearly define the responsibilities and obligations of agricultural employers to assure that migrant and seasonal agricultural workers received important transportation, housing, and employment protections. I believe the new law will correct these problems and will result in improved protection of working and living conditions for tens of thousands of our nation's agricultural workers.” See John Woolley and Gerhard Peters, The American Presidency Project.
contractor FLCs those employers and associations attempt to deal with at arms-length. In support of this argument this paper will describe the difficulties and the conditions that seasonal and migrant workers face in performing their jobs, as well as Congress’ failure to adequately deal with seasonal and migrant worker exploitation in the past. This paper will further chronicle why the AWPA and subsequent Department of Labor (hereinafter “DOL”) regulation has been required and explain why such past and present legislation and regulation does not go far enough.

Lastly, specific arguments regarding the important policy reasons for expanding seasonal and migrant workers’ ability to hold agricultural employers or associations vicariously liable for the acts of their contractee FLCs will be laid out. These policy arguments will not only focus on principles founded on fairness and justice but also on lowering the administrative burden of enforcing legislation seeking to protect seasonal and migrant workers. But instead of letting these policy reasons speak for themselves, the guiding principle of vicarious liability in regards to the liability of agricultural employers and associations can be supported by principles found in the common law of torts and agency.9


8 An arms-length transaction can be defined as “The term arm’s length transaction means a transaction in which the parties involved act independently of each other. Also, in such a case, the mechanics of the transaction are handled as if the transaction takes place between strangers.” See U.S. Legal, U.S. Legal homepage at http://definitions.uslegal.com/a/arms-length-transaction/ (last visited April 11, 2012).

9 Both the Restatement (Second) of Torts and the Restatement (Third) of Agency provide sections that support a vicarious liability theory in specific cases when dealing with independent contractors. Such sections will be provided in further detail in Sections VII and VIII.
I. Working Conditions of Seasonal and Migrant Workers

Before chronicling Congress’ and the DOL’s attempts to remedy the problems facing seasonal and migrant workers we must understand what conditions these workers face. Most notably in terms of black and white statistical data, farm work has been recorded as the second most dangerous occupation in the United States\(^\text{10}\) with the average farm worker having a life expectancy of less than fifty years.\(^\text{11}\) This has been attributed to the fact that the work of seasonal and migrant workers consists of long hours doing labor intensive activity in areas covered in pesticides or other contaminants.\(^\text{12}\) The intensity of the labor leads to physical injuries which can be debilitating\(^\text{13}\) and it is the moderate to long term exposure to pesticides that cause cancer and neurological disorders.\(^\text{14}\) Many times the symptoms of pesticide poisoning


\(^{11}\) Id.

\(^{12}\) Jeanne M. Glader, A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children, 42 HASTINGS L.J. 1455, 1458 (1991). In March 2012 the company Arysta LifeScience pulled the chemical methyl iodide from the U.S. market after studies provided strong evidence that it was carcinogenic as well as a water pollutant. The removal of this chemical, which was used as a fumigant on strawberry crops, is a big step in providing a safer working environment for seasonal and migrant workers. See the United Farm Worker’s response at http://www.ufw.org/_board.php?mode=view&b_code=org_key&b_no=11817&page=&field=&key=&n= (last visited April 11, 2012).

\(^{13}\) See Thomas A. Arcury and Sara A. Quandt, Delivery of Health Services to Seasonal and Migrant Farmworkers, ANNU. REV. Public Health 2007 28:345 – 63.

\(^{14}\) U.S. General Accounting Office, Improvements Needed to Ensure the Safety of Farm workers and Their Children, GAO/RCED-00-40, at 6 (2000). Specifically the report states, “The ill effects may follow from short- or long-term exposure through skin contact, inhalation, or ingestion. Acute symptoms range from relatively mild headaches to fatigue, nausea, skin rashes, eye irritation, burns, paralysis, and even death. Chronic illnesses and those with delayed onsets,
initially go untreated and even when the workers are able seek medical attention their diseases have usually progressed too far for meaningful treatment.\textsuperscript{15}

By the 1960s it had become rare for the agricultural employers or associations themselves to hire and oversee seasonal or migrant workers they needed directly.\textsuperscript{16} Many times these agricultural employers or associations would delegate that job to FLCs. These hired contractors were then responsible for providing the transportation to and from the jobsite as well as providing living quarters for the seasonal and migrant workers they hired.\textsuperscript{17} However such housing, in many cases, not provided for, and even the housing provided was extremely isolated and could be best described as living in squalor.\textsuperscript{18} It is this housing for migrant workers that brought open and obvious exposure to unsanitary conditions.\textsuperscript{19} Although this inadequate

such as cancer, which may only appear years after exposure to pesticides, can also occur.” Id. at 5.

\textsuperscript{15} Id. at 5-6.


\textsuperscript{17} See 29 U.S.C. §§ 1823 and 1841 (2012).


\textsuperscript{19} Farmworker Legal Services of Michigan, Revised 10/14/2011, http://www.farmworkerlaw.org/internshipshiring/document.2005-05-29.1473431026 (Last visited on April 11, 2012). The Farmworker Legal Services of Michigan website indentifies the problems facing Michigan farmworkers in regards to housing, “At the end of the season, farmworkers are often told by growers that they must leave the migrant camp immediately. Sometimes the grower threatens to throw them out, call the police, change the locks, or shut off the electricity or gas. Sometimes the grower will not give the worker his last paycheck until they leave.” Id.
housing has been and is currently regulated by the federal government\(^{20}\), many times it is purposely hidden so regulators would not be able to locate it.\(^{21}\)

Aside from the poor working and living conditions themselves, seasonal and migrant workers have at their disposal little political or legal recourse for the harms inflicted upon them.\(^{22}\) This is the case for numerous reasons including language barriers, physical isolation, transience, and many times the lack of education.\(^{23}\) Migrant workers have also been the target of discrimination with many elected officials grouping those legally working in the United States with those who have entered and have worked illegally.\(^{24}\) Even if armed with the knowledge of their rights migrant workers are some of the least compensated laborers in the United States and have trouble affording representation.\(^{25}\)

Most members of the workforce in the United States, when faced with such horrendous pay and working conditions, would be able to attempt to engage in some form of collective


\(^{22}\) Id.

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) 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, 1458 (1991). She also states in her note “Migrant workers are unable to fight for or protect their legal rights because of inadequate access to legal services. One report to the United States Civil Rights Commission noted that ‘migrants, perhaps more than any other group, have historically been confronted with the greatest need for, but the least access to, legal services.’”
bargaining or unionization. This is provided for in The National Labor Relations Act of 1935\textsuperscript{26} (hereinafter “NLRA”) which protects employee organizing, the formation of labor organizations, the right to collectively bargain with employers through employee-chosen representatives, and the right to engage in other concerted activities for “mutual aid and protection.”\textsuperscript{27} However, this is simply not an option for seasonal and migrant workers because anyone who is employed as an “agricultural laborer\textsuperscript{28}” is excluded from the Act.\textsuperscript{29} This exclusion has been targeted as a violation of the very purpose of the NLRA\textsuperscript{30} and is evidence that seasonal and migrant workers are unique as a group because they are prevented from using legal protections available to other workers.

The circumstances that seasonal and migrant workers find themselves in is very distinctive and few other classes of workers are in a position to deal with both exploitive and


\textsuperscript{28} The term “agricultural laborer” goes undefined in the National Labor Relations Act. See 29 U.S.C. § 152 (3) (1935). The Supreme Court tackled the difficult issue of who is considered an “agricultural laborer” under the NLRA in \textit{Holly Farms Corp. v. N.L.R.B.} and found that truck drivers who were transporting chicken to slaughter did not fall under the “agricultural laborers” exception based on the intent of Congress in creating the statute. See Holly Farms Corp. v. N.L.R.B., 517 U.S. 392 (1996).

\textsuperscript{30} According to 29 U.S.C. § 151, Current through P.L. 112-90 approved 1-3-12, states in part, “The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.” Id. Such factors describe and highlight perfectly the problems faced by seasonal and migrant workers.
manipulative employers as well lack the bargaining power to do much about it.\textsuperscript{31} It is this understanding that begs the conclusion that only a unique solution can effectively deal with this overarching problem. To more fully understand the plight of these workers and how to find a proper solution, it is important to understand the system under which these workers are currently protected. This compels the understanding of FLCs and how they have developed to take advantage of the fact that many agricultural producers in the United States desperately need labor to pick, can, or ship their products. It is these contractors that have been the target of migrant and seasonal legislation and regulation.

II. The Focus on FLCs as the Main Problem

By the 1950s, it was recognized that FLCs had become the biggest culprit in the mistreatment and exploitation of seasonal and migrant workers because of the reliance by agricultural employers or associations on these types of contractors to provide and oversee their labor as well as the workers themselves who could only find a job through an FLC.\textsuperscript{32} These contractors were notorious in their exploitation and abuse of seasonal and migrant workers and had taken advantage of their relatively little bargaining power as well as their dependence for housing and transportation to and from their jobs.\textsuperscript{33} Because of this reliance on FLCs, agricultural employers and associations had been able to effectively delegate the tasks of

\begin{footnotes}


\item[33] National Center for Farmworker Health, Occupational Safety and Health, at the National Center for Farmworker Health homepage at http://www.ncfh.org/?pid=4&page=6 (last visited April 11, 2012).
\end{footnotes}
furnishing and caring for the laborers who make made their businesses possible. FLCs also allowed employers and associations to escape potential liability because FL Cs were usually hired as independent contractors. Because of their transgressions, these FL Cs became the primary target of federal law for nearly fifty years.

The precarious position of seasonal and migrant workers as well as their exclusion from laws applicable to other laborers had allowed FL Cs to exploit entire class of laborers. This compelled Congress to attempt to remedy seasonal and migrant workers’ situations as well as allowed the DOL to use their rule-making authority to deal with these ever present problems. Because of unscrupulous FL Cs, seasonal and migrant workers as a group were one of the most exploited classes of worker in the United States. It was with this understanding that Congress


35 See Restatement (Second) of Torts § 409 (1965). “The general rule stated in this Section, as to the non-liability of an employer for physical harm caused to another by the act or omission of an independent contractor, was the original common law rule. The explanation for it most commonly given is that, since the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it.” See Comment b.


37 “It is unfortunately an all too common experience for workers to be abused by farm labor contractors. Testimony revealed that in many cases the contractor: exaggerates conditions of employment when he recruits workers in their home base, or that he fails to inform them of their working conditions at all; transports them in unsafe vehicles; fails to furnish promised housing, or else furnishes substandard and unsanitary housing; operates a company store while making unitemized deductions from workers' paychecks for purchases, and pays the workers in cash without records of units worked or taxes withheld.” See S. REP. NO. 93-1295, reprinted in 1974 U.S.C.C.A.N. 6441, 6442.
initially set out in the early 1960s to remedy the conditions that seasonal and migrant workers faced as they toiled in our nations fields, forests, factories or canneries.\(^{38}\)

III. The Farm Labor Contractor Registration Act of 1963 and the 1974 Amendments: Congress’ First and Second Attempts

After recognizing the rampant exploitation and mistreatment of seasonal and migrant workers by FLCs, Congress attempted to tackle these abuses with legislation in the form of The Farm Labor Contractor Registration Act of 1963\(^{39}\) (hereinafter “FLCR”). The FLCR was initially passed because Congress wanted to curb the transgressions propagated by FLCs who were seen as the serious offenders in regards to the exploitation of seasonal and migrant workers, who agricultural employers and associations hired instead of bringing in the labor themselves. Congress stated that the purpose of the FLCR was, “to protect agricultural workers whose employment had been historically characterized by low wages, long hours and poor working conditions.”\(^{40}\) This intent of Congress seemed to suggest a broad stroke of legislation, but after it was passed its effect could not have been narrower.

The law contained provisions targeting what Congress saw as the root of the problem for seasonal and migrant workers. Included, under the FLCR, were the following provisions: (1) that FLCs must post the terms of the FLCR at both the worksite and labor camp\(^{41}\); (2) that certain

\(^{38}\) The types of work covered under the AWPA are described in its definition of “agricultural employment,” which includes “the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.” See 29 U.S.C. § 1802 (2012).


\(^{41}\) See FLCRA § 6(c), 78 Stat. at 923.
conduct by FLCs that Congress found harmful or exploitive would be prohibited and subject to fine; (3) that FLCs had to use insured vehicles to transport the workers; and (4) contractors had to keep an accurate record of hours worked by the workers. Though the FLCR took these steps to regulate FLCs to prevent them from exploiting seasonal and migrant labor, it was the exceptions to the FLCR that made it easy to escape its coverage. Those exempt from the law were FLCs who had recruited less than ten workers, those who recruited migrant workers who were from a nation in which the U.S. had an agreement for them to provide temporary workers, and exempted most agricultural producers who recruited migrant labor for their own operations. Therefore, such exceptions in effect swallowed the rule.

The enforcement scheme that Congress settled on for the FLCR was also embarrassingly weak. Congress, in its hope of enforcing compliance with the FLCR, classified all violations of the act as “misdemeanors” as well as capped the fines at 500 dollars per violation. These small fines for FLCR violations, combined with the fact that seasonal and migrant workers had no private right of action, meant that such laborers relied on the DOL to bring any action to compel enforcement. Thus, even when the DOL occasionally sought to enforce the FLCR, the fines

42 FLCRA §§ 5 (b) (1)-(7).
43 Id.
44 See FLCRA § 3(b)(2), the most significant exemption, excluding “any farmer, processor, canner, ginner, packing shed operator, nurseryman, freezer, or cold storage operator who engages in any such activity for the purpose of supplying migrant workers solely for his own operation.” 78 Stat. at 920. FLCRA § 3(b)(3) extended the exemption to employees of the parties listed in section 3(b)(2), thereby excluding not only the producer but also its own FLC. See 78 Stat. at 920.
45 Id.
were so small it would have only been effective it brought in a class action, which without that possibility, was not a deterrent for FLCs.\(^47\)

After eleven years of the FLCR Congress reported that, “[i]t is still quite evident that the Act in its present form provides no real deterrent to violations.”\(^48\) Congress noted that FLCs were still not informing workers of the provisions of the FLCR, were transporting workers in unsafe vehicles through unsafe conditions, and provided no or unsanitary housing.\(^49\) Thus, The Farm Labor Contractor Registration Act Amendments of 1974 (hereinafter “FLCRA”) were adopted by Congress and were meant to provide for greater enforcement of the original provisions of the FLCA by providing a private right of action for workers\(^50\) as well as providing for additional duties of FLCs or made illegal various ways in which they deducted pay from their workers.\(^51\) It was later clear, however, that the FLCRA did not plug the many holes that riddled the FLCR and failed to accomplish the goals that Congress had in protecting seasonal and migrant workers.\(^52\)

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\(^47\) FLCR did not provide for a private right of action through which migrant and seasonal workers could attempt to secure class certification. See Pub.L. No. 88-582, 78 Stat. 920 (1963) (repealed 1983).


\(^49\) Id.

\(^50\) See Amendments of 1974 § 14(a), creating a new FLCRA § 12 that provided any aggrieved person the right to file suit in an appropriate district court of the United States without regard to the amount in controversy, or to the citizenship of the parties. 88 Stat. 1652, 1657.

\(^51\) Id.

IV. Congress Passes Additional Law in the Migrant and Seasonal Agricultural Worker Protection Act of 1983

By 1982 Congress was aware that many of the exploitive acts the FLCRA was trying to prevent continued without much hindrance.\textsuperscript{53} Specific examples cited by Congress of actions that continued even after the implementation of the FLRCA and its private right of action included that migrant and seasonal workers were still the most abused workers in the United States,\textsuperscript{54} migrant workers were forced into debt under the guise of owing rent and held as virtual slaves until such debt was repaid to the FLC,\textsuperscript{55} and a lack of payroll record keeping had the result being that a worker’s pay was being riddled with deductions that had nothing to do with the worker him of herself.\textsuperscript{56}

In response to the impotence of both the FLCR and FLCRA, Congress attempted yet again to craft legislation and enacted The Migrant and Seasonal Agricultural Worker Protection Act of 1983 (hereinafter “AWPA”),\textsuperscript{57} repealing the FLCRA\textsuperscript{58}. In the AWPA, Congress continued the private right of action from the FLCRA but also included the “joint employment”

\textsuperscript{53} Id.

\textsuperscript{54} Id. “Migrant and seasonal farm workers have long been among the most exploited groups in the American labor force. Despite their hard toil and valuable contribution to our nation’s economy, their lot has historically been characterized by low wages, protracted hours, and horrid working conditions.” See also S. Rep. No. 93-1295 \textit{reprinted in} 1974 U.S.C.C.A.N. 6441, 6441-43.

\textsuperscript{55} Id.

\textsuperscript{56} Id.


\textsuperscript{58} Id.
doctrine\textsuperscript{59} which was incorporated from the Fair Labor Standards Act of 1938\textsuperscript{60} (hereinafter “FLSA”) so that agricultural employers and associations could also be held responsible for the actions of FLCs they had contracted with to provide their labor.\textsuperscript{61} The “joint employment” doctrine, as interpreted by the DOL in enforcing the earlier passed FLSA, was set out in 29 C.F.R. § 791.2 and supported a finding that a worker could be the employee of more than one entity at the same time and such a conclusion would be contingent upon the facts of a particular case to determine if a worker is considered “jointly employed.”\textsuperscript{62}

The incorporation of the “joint employment” doctrine illustrates that Congress was cognizant of the fact that agricultural employers and associations were hiding behind the independent contractor status of their FLCs,\textsuperscript{63} and thus Congress provided an additional tool under the AWPA to pierce this veil in hopes of greater compliance with the statute.\textsuperscript{64} Congress in committee stated its intent, “that any attempt to evade the responsibilities imposed by this act through spurious agreements…be rendered meaningless; and to make clear that is it the


\textsuperscript{60} 29 U.S.C. §§ 201 – 219 (1938). The AWPA’s use of the FLSA’s definition of employ and employment, “was deliberate and done with the clear intent of adopting the ‘joint employer’ doctrine as a central foundation of this new statute; it is the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of these duties.” See H.R.REP. No. 97-885, 97th Cong., 2d Sess. (1982) 6, reprinted in 1982 U.S.C.C.A.N. 4547, 4552.


\textsuperscript{62} See 29 C.F.R. § 791.2 (2012).


\textsuperscript{64} See 29 C.F.R. § 500.20 (h) (4).
economic reality, not contractual labels nor isolated factors which is to determine employment relationships.”

“Joint employment” was seen as a necessary tool to advance the AWPA which is, at its heart, remedial legislation requiring broad interpretations to effectuate its purpose.

The “teeth” of the AWPA in advancing the rights of seasonal and migrant workers under traditional employment and “joint employment” relationships came from the private right of action carried over from the FLCRA. The AWPA states in regards to its private right of action,

Any person aggrieved by a violation of this chapter or any regulation under this chapter by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein;

By preserving the private right of action for seasonal and migrant workers, they no longer had to wait for the DOL to bring suit to force compliance with the AWPA. Though the amount of fines, 500 dollars per violation, was still somewhat small, the AWPA allowed for class actions and also provided for courts to give any equitable remedy to ensure compliance.

65 Id.

66 See Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1505 (11th Cir. 1993) which states that, “AWPA is a remedial statute and should be construed broadly to effect its humanitarian purpose.” Id. (citing Bracamontes v. Weyerhaeuser Co., 840 F.2d 271, 276 (5th Cir.), cert. denied, 488 U.S. 854 (1988)).


68 29 U.S.C. § 1854. “If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief…” Id.
The AWPA, therefore, went much further than either the FLCR or the FLCRA in attempting to protect seasonal and migrant workers by providing two important additions. First, Congress realized that FLCs were still exploiting their workers but were no longer the only offenders and thus included a broad definition of agricultural employers and associations so abused workers could sue those producers who would not have fit into the traditional definition of an FLC. And second, by using the “joint employment” doctrine from the FLSA, the AWPA attempted to prevent employers and associations from hiding behind the independent contractual status of their FLCs. Congress felt that these additions would fill the void that both the FLCR and FLCRA failed to plug.

V. The Department of Labor’s Attempt to Broaden the AWPA Through Regulation

After more than a decade of the AWPA the DOL found that there was still ample room for improvement. Though the AWPA continued the private right of action given to seasonal and migrant workers as well as uniquely used the “joint employment” doctrine as found under the FLSA to increase the potential number of parties liable for violations, the DOL found that the “joint employment” doctrine was not being interpreted broadly enough to accomplish its

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70 DOL found that the AWPA needed more clarification for it to be more effective so they decided to use their rule making power to promulgate C.F.R. § 500.20 (1997). “This document amends the regulations concerning the definition of “employ” under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) to include a definition of “independent contractor” and to clarify the definition of “joint employment” under MSPA, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty and to better guide the Department's enforcement activities.” See 62 Fed. Reg. 11,734, 11,734 (1997).

Congressional purpose.\textsuperscript{72} Thus, in 1997 the DOL amended its regulation, 29 C.F.R. § 500.20, in order to help the federal courts correctly apply the AWPA and its doctrine.\textsuperscript{73}

The 1997 regulation stated that the “joint employer” doctrine is the “best means” to fulfill the purpose of the act as well as notes that the AWPA’s purpose is “to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers.”\textsuperscript{74} Therefore, the DOL realized that in order to truly reverse the exploitation of seasonal and migrant workers the AWPA’s job as remedial legislation needed a more broad interpretation.\textsuperscript{75} This was evident in cases that had been handed down by the courts after the adoption of the AWPA in which they had failed to find any “joint employment” relationship.\textsuperscript{76}

The most telling problem, as is evidenced by the need for the DOL regulation promulgated in 1997, is that the department’s then current “joint employment” methodology to hold agricultural employers and associations liable for AWPA violations was not sufficient for the DOL.\textsuperscript{77} By analyzing DOL’s 1997 regulation it is obvious that the DOL has tried to interpret the AWPA to a point where they are looking over a cliff in terms of increasing the ability to allow those workers covered by the AWPA to sue agricultural employers or associations. The

\textsuperscript{72} Id.

\textsuperscript{73} Id.

\textsuperscript{74} 29 C.F.R. § 500.20 (h) (5) (2012).


same parties who are reaping the benefit of those workers’ labor through independent FLCs.\textsuperscript{78}

Though the DOL could see that many abuses were still happening under the AWPA, they were limited by the tools available in the congressional intent of AWPA as passed to deal with the problem.\textsuperscript{79} The goal of reducing the exploitation of seasonal and migrant workers has forced the DOL to walk this fine line.

However, the DOL has done what it can to allow seasonal and migrant workers to sue agricultural employers or associations who contract with FLCs.\textsuperscript{80} The most influential part of 29 C.F.R. § 500.20, as promulgated in 1997, is the test it gives in the determination of “joint employment” status where it states, “In determining whether or not an employment relationship exists between the agricultural employer/association and the agricultural worker, the ultimate question to be determined is the economic reality--whether the worker is so economically dependent upon the agricultural employer or association as to be considered its employee.”\textsuperscript{81} This economic reality test was clearly very broad and was seen as giving courts greater discretion to hold employers and associations liable.

Because the DOL had advanced a test of overall economic reality in their 1997 regulation, they had, in effect, trashed the old tests regarding the “joint employer” status of agricultural employers and associations. Prior to the DOL’s economic reality analysis, courts enforcing the AWPA were simply given a pool of factors in which they could not decide on their

\textsuperscript{78} Id.


\textsuperscript{80} The DOL’s economic reality analysis is quite broad and gives courts a large amount of discretion. See 62 Fed. Reg. 11734 (1997) (codified at C.F.R. § 500.20 (1997)).

\textsuperscript{81} 29 C.F.R. § 500.20 (h) (4) (1997).
applicability or importance. \(^82\) Though a set of applicable factors is still used and was promulgated by the DOL, the overall theme of the economic reality test provides further wiggle room for a court to look more deeply into the matter before it; providing for less of a liability shield for agricultural employers or associations by hiring FLCs. \(^83\)

The fact that the DOL tried to reinterpret the “joint employment” doctrine of the AWPA, much to the dismay of some, \(^84\) illustrates that the AWPA was on the right track when it included such a doctrine but fails the essential purpose of preventing the abuses enumerated among its many provisions. \(^85\) As stated previously, the AWPA was crafted as remedial legislation and courts have stated that remedial legislation should be interpreted broadly so that its purpose can be accomplished. \(^86\) Therefore, the DOL has attempted to make it easier to find an agricultural employer or association vicariously liable for the acts of their contractee FLCs under the theory of “joint employment” because that is seen as the only way to actually enforce the provisions of the AWPA and protect seasonal and migrant workers.

\(^82\) See Michael H. LeRoy, Farm Labor Contractors and Agricultural Producers As Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis, 19 Berkeley J. Emp. & Lab. L. 175, 200 (1998) (providing a table of AWPA court decisions prior to the DOL 1997 regulation where the number of factors used by the courts is not consistent with some relying on only 5 factors while other courts relied on as many as 9).


\(^84\) The National Council of Agricultural Employers stated that the “strict liability standard would allow the Department and farmworker legal services lawyers to reach into the deep pockets of agricultural employers/associations when violations occur, without the need to produce adequate evidence bearing on the joint employment determination.” See 62 Fed. Reg. 11,734 (1997).

\(^85\) Id.

\(^86\) See Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d at 1505.
VI. The Logic Behind Finding Agricultural Employers and Associations Vicariously Liable for the Actions of Farm Labor Contractors

Thus far, the terrible conditions that migrants and seasonal workers face has been laid out as well as the inability of Congress to provide for adequate legislation to allow for the suing seasonal and migrant worker to enforce substantive provisions under the respective migrant and seasonal worker legislation. The DOL has done what it can to protect seasonal and migrant workers under the AWPA, but cannot continue further due to congressional and judicial limitations. There are more than sufficient reasons to conclude that those workers should possess a greater ability to enforce their rights against agricultural employers or associations.

To find agricultural employers and associations liable for the actions of FLCs they have contracted with under a vicarious liability theory would be beneficial for three key policy reasons: (1) agricultural employers or associations would be more cognizant of the conditions of seasonal and migrant workers on their land and would be more willing to remedy any problems; (2) agricultural employers or associations would take greater care in selecting FLCs by picking those who have a solid record and few past problems and would reduce the burden on the workers to prove negligence in hiring or selection; and (3) migrant workers would not have to worry about the failure of recovery under the AWPA because of an insolvent or fleeing FLC and thus overall compliance with the AWPA would increase because attorneys would be more willing to pursue AWPA claims due to the increase in potential defendants.

87 See Hout v. City of Mansfield, 550 F. Supp. 2d 701, 745 (N.D. Ohio 2008), which provides the elements required to sue for negligent hiring and retention.

88 See 29 U.S.C. § 1854(a) (1983), allowing a private right of action under the AWPA.
These broad policy reasons reinforce the plea for Congress to provide for remedial legislation that takes seriously the protection of seasonal and migrant workers and is not dependent on the DOL to promulgate waif regulations to accomplish that task.\textsuperscript{89} A statute that holds agricultural employers and associations liable for AWPA violations committed by a FLC they have a contact with would promote the outcomes elucidated above and would be fair and easy in its application in the courts. Such a rule would also simply be an extension of notice that agricultural employers and associations are already said to have.

If agricultural employers and associations were subject to vicarious liability for AWPA violations that were committed by FLCs they had under contract, such employers or associations would increase their focus on the conditions that those workers face on a day to day basis. The “joint employment” doctrine already has such a low threshold that it has even been said to advance a form of strict liability on employers and associations.\textsuperscript{90} Such a change in the law would do very little to further affect an employer’s or association’s ability to stay in business but would further the capacity of seasonal and migrant workers to recover under the AWPA, and give further incentive for agricultural employers and associations to make sure that they and their FLCs complied with the AWPA.

Further support for this position can be found not only in the logical extension of the DOL’s purpose in their 1997 regulation, supra, but also within recent case law that would seem

\textsuperscript{89} 29 C.F.R. § 500.20 (2012). The shortcomings of the AWPA has caused the DOL to stray far from the language of that statute in their attempts to protect seasonal and migrant workers.

\textsuperscript{90} 62 Fed. Reg. 11,734 (1997) (63 comments were supportive of the proposed rule and 28 were opposed). The National Council of Agricultural Employers thought that the rule was meant to establish some kind of strict liability in the hopes that agricultural employers/associations stopped using FLCs. Id. at 11,737.
to explain the underlying principles of the “joint employer” doctrine in its application.\textsuperscript{91} The United States District Court for the Western District of Texas explained it well when it stated that the “joint employment” DOL definition and explanations can be read as putting agricultural employers on notice that the actions of FLCs in violating the provisions of the AWPA could lead to liability for that employer.\textsuperscript{92} It was this idea that led the District Court to find that both an agricultural employer and its contractee FLC were liable under a “joint employment” theory. Thus, the court endorsed the idea that an agricultural employer would remedy harmful conditions for workers because of this “notice.”

Under the law available to seasonal and migrant workers, there is little to ensure that agricultural employers and associations contract with FLCs who have a good reputation and working record. A negligent selection suit by a seasonal or migrant worker is improbable and would not likely succeed because of the lack of legal resources and the difficulty in pursuing such claims.\textsuperscript{93} The way in which the private right of action is utilized, when a migrant or seasonal worker does sue under the AWPA, usually takes the form of a class action suit because such cases are not usually worth pursuing unless there is a large enough plaintiff class. This is because the amount of damages under the AWPA is small and only an aggregate in plaintiffs and violations could make the suit worth it for an attorney.\textsuperscript{94}

\textbf{VII. Using the Tools Congress has Provided as a Template for Future Legislation}

\textsuperscript{91} Castillo v. Case Farms of Ohio, 96 F.Supp.2d 578 (W.D. TX. 1999).

\textsuperscript{92} \textit{Id.} at 590.

\textsuperscript{93} See Hout v. City of Mansfield, 550 F. Supp.2d 701.

\textsuperscript{94} Limited to 500 dollars per violation. See 29 U.S.C. § 1854 (1983).
As stated in the previous sections, seasonal and migrant workers continue to be the most exploited class of workers in the United States. The attempts by Congress as well as the DOL to prevent this exploitation has led to three statutes as well as further regulation through the DOL’s interpretation of the AWPA, which is Congress’ most recent attempt to prevent harm to seasonal and migrant workers. Though nothing to date has adequately dealt with the underlying problems, all these efforts do, however, provide the framework for future remedial legislation.

The first step to giving these exploited and abused workers the tools they need to enforce or recover under their statutory given rights is to identify those provisions which serve this purpose. First, the private right of action given under the AWPA is the best way to allow seasonal and migrant workers enforce their rights because they do not have to sit and wait for a government agency to bring suit. The deprivation of these worker’s rights is an injury under the AWPA and compensating those workers for that injury through a private action serves the purposes of justice and fairness and is the overall goal of remedial legislation. Thus, allowing for a private right of action for workers covered under the AWPA is the best way to ensure compliance by agricultural employers, associations, and FLCs.


Another positive tool provided by Congress in the AWPA was to incorporate the “joint employer” doctrine from the FLSA. According to 29 C.F.R. § 500.20, as promulgated by the DOL, this essential move made it easier for a harmed worker to find an adequate defendant as well as prevented agricultural employers and associations from unscrupulously exploiting the independent contractor status of FLCs. Thus, by making this move, Congress promoted the idea that the recovery for the seasonal or migrant worker could be made against anyone in connection with their employment and by following the DOL regulation, that it was the economic reality that determines who should be stuck with liability for AWPA violations.

To use the word “reality” brings the focus back to the salient fact that seasonal and migrant workers have the least political power as a labor group, and they face dangerous working conditions and many times unsanitary housing. Should the laws that govern such a politically insular and subjugated group simply look over these facts and treat such a group the same as any who faces such work related dangers? The answer should be: no. By using the framework set up by Congress in the AWPA and the DOL’s regulations, the argument for vicarious liability for agricultural employers and associations stems from these statutory devices already in place.

To go even further, simply weighing the equities as courts have done for centuries, support the argument that because seasonal and migrant workers have been exploited politically, physically, and financially, the United States should have a duty to further tailor the laws to

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98 See H.R. Rep. No. 97-885, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 4547, 4552. The House Committee on Education and Labor commented on why they used the same definition of “employ” in the Migrant and Seasonal Agricultural Workers Protection Act as was used under the Fair Labor Standards Act, “use of this term was deliberate and done with the clear intent of adopting the ‘joint employer’ doctrine as a central foundation of this new statute.” Id.


reflect the historical inability for these workers to gain recourse in the court system of this
country.101 Considering what Congress and the DOL have done so far in terms of protecting
seasonal and migrant workers, much still needs to be done to fulfill the enforcement aspect so
desired by Congress and well as the recovery aspect desired by seasonal and migrant workers
who have been harmed.102

VIII. Why the Common Law of Agency and Torts Provides the Rationale for a
Vicarious Liability Standard

The idea that agricultural employers and associations should be liable for the acts of
FLCs that they contract with to provide labor is not simply plucked from the air or would even
be considered a novelty under the law by any stretch of the imagination. Agency and tort law
has been around for hundreds of years and serves to establish liability based on one party’s
relationship to another.103 It is these relationships that can decide whether an injured party can
sue all those who are connected with a specific activity. In the context of the AWPA,
agricultural employers and associations form many contractual relationships with FLCs and it is
this connection that begins the analysis to show that it would be both fair and just to find those
employers and associations responsible in some way for the conduct of their contractees.

An agricultural employer or association may argue and have argued in the past, that they
have no overt control over the work done by seasonal and migrant workers provided by the
FLCs, and in that sense are innocent of wrongdoing when an FLC exploits or abuses the seasonal

101 Farmworker Legal Services of Michigan, Revised 10/14/2011, Farmworker Legal Services of
29.1473431026 (Last visited on April 11, 2012).

102 See Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d at 1505.

and migrant workers. The employer does have the power of selection, however, and in the application of concepts of distributive justice perhaps much can be said for the view that a loss arising out of the tortious conduct of an irresponsible FLC should fall on the employer or association.\textsuperscript{104} Doctrine has emerged that can support this exact situation.

The theory that an employer has some duty to an independent contractor’s employees is sometimes referred to as the inherently dangerous doctrine, which was advanced by the Illinois Supreme Court more than a century ago.\textsuperscript{105} In laying out this exception to the general rule that principles are not liable for the acts of independent contractors,\textsuperscript{106} the court found that when

\textsuperscript{104} The outcomes of the putting the burden of harms committed by independent contractors back on employers was explored by Edward J. Henderson’s article published in the Fordham Law Review, “This system has the advantage of placing the ultimate social and economic burden of employee safety on the employer for whose benefit the inherently dangerous work is being performed. The employer can relieve himself of this burden by hiring a financially responsible contractor. At the same time, the burden of risk prevention, the primary safety factor, is placed on the independent contractor, who is usually in a better position to provide for his own employees' safety in any event.” See Edward J. Henderson, Liability to Employees of Independent Contractors Engaged in Inherently Dangerous Work: A Workable Workers’ Compensation Proposal, 48 Fordham L. Rev. 1165 (1980).

\textsuperscript{105} Chicago Economic Fuel Gas C. v. Meyers, 48 N.E. 66, 68-69 (1897). The court stated their own rule preventing a corporation from escaping liability by hiring a contractor to lay pipes and pump explosive gas, “while it is the general rule that the principle of respondeat superior does not extend to cases of independent contracts, where the person for whom the work is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of workmen, and no control over the manner of doing the work under the contract, yet one of the exceptions to this general rule is where the contract directly requires the performance of a work, which, however skillfully done, will be intrinsically dangerous.” Id. at at 68.

\textsuperscript{106} “At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work.” See Privette v. Superior Court, 854 P.2d 721, 724 (1993) (citing Prosser & Keeton on Torts (5th ed. 1984) § 71, p. 509).
employees are engaged in inherently dangerous work, an employer can be found liable for the injuries of those employees even though they were hired through an independent contractor.\textsuperscript{107}

The Restatement (Second) of Torts contains sections that illustrate the ability for a principle to be held liable for the acts of independent contractors. § 416 of the Restatement (Second) states,

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a \textit{peculiar risk of physical harm} to others unless special precautions are taken, \textit{is subject to liability for physical harm} caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise;\textsuperscript{108}

This section of the Restatement (Second) supports the argument that seasonal and migrant workers, who are injured by FLCs and sue under the AWPA for damages, could also sue agricultural employers or associations who have contracted with the offending FLC. The reasonable care standard contained in § 416 is such a low threshold that the punitive conduct prohibited by the AWPA is unquestionably providing an explicit duty to those covered by the statute.

The Restatement (Second) of Torts also provides further support for the idea of holding agricultural employers and associations liable for the acts of FLCs, § 424 states,

One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to

\textsuperscript{107} Id.

\textsuperscript{108} Restatement (Second) of Torts § 416 (1965) (emphasis added). “It is not essential that the peculiar risk be one which will necessarily and inevitably arise in the course of the work, no matter how it is done. It is sufficient that it is a risk which the employer should recognize as likely to arise in the course of the ordinary and usual method of doing the work, or the particular method which the employer knows that the contractor will adopt.” See comment e.
the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.\textsuperscript{109}

This section supports the contention that since an agricultural employer or association is recognized as having a duty to seasonal and migrant workers under the AWPA, that this duty imposed by federal statute does not allow them to disclaim any liability for an AWPA violation with the defense that they contracted with an independent contractor to complete the work. Under this non-delegable duty\textsuperscript{110} analysis espoused by § 424, the AWPA would prohibit an agricultural employer or association from transferring any of its liability under the statute by contracting with an FLC to provide the labor.

Though these sections from the Restatement (Second) of Torts refer to the ability of a party to find a principle liable for the negligence of an independent contractor, it has been interpreted by some courts as only applying to third parties.\textsuperscript{111} The overarching theory itself is what lends support to the idea of a non-delegable duty required of agricultural employers and associations. This idea can find further support, however, from the realization that a problem that does greater damage to society because of the adherence to traditional concepts of principle and agent must be subject to a logical extension of traditional tort and agency concepts to promote justice.\textsuperscript{112}

The Restatement (Third) of Agency also addresses the situation of where a principle owes a duty to a third party and is liable for the failure of an agent to fulfill that duty. In § 7.03

\begin{footnotesize}
\textsuperscript{109} Restatement (Second) of Torts § 424 (1965).

\textsuperscript{110} Id.

\textsuperscript{111} See Anderson v. Marathon Petroleum Company, 801 F.2d 936, (7th Cir. 1986).

\textsuperscript{112} See Pride of San Juan, Inc. v. Pratt, 212 P.3d 29, 31 (Ct. App. Ariz. 2009).
\end{footnotesize}
(1) (c), the Restatement states, “[a] principle is subject to direct liability to a third party harmed by an agent’s conduct when…the principle delegates performance of a duty to use care to protect the other persons…to an agent who fails to perform the duty.”113 Under the AWPA, duties are set forth that must be met by agricultural employers and associations. Following the Restatement (Third) of Agency it can be stated that the duties espoused by the AWPA should not be allowed to be pawned off onto FLCs who have traditionally been the biggest exploiters of seasonal and migrant workers.

IX. Recent Federal and State Case Law Interpreting the Inherently Dangerous and Non-delegable Duty Exceptions

Discussion of the common law of torts and agency in looking at the argument that those who contract with others to do inherently dangerous work cannot escape liability was elucidated in the Federal Court of Appeals for the Seventh Circuit by Justice Posner in Anderson v. Marathon Petroleum Company. In that case a worker performed the job of sandblasting oil tanks for a company hired by Marathon Petroleum Company.114 However, because the sand was silicon based, and thus hazardous to breathe in, the worker died after years of exposure and his wife brought suit against Marathon. Though Posner stated that the general rule was that a principle was not liable for the acts of independent contractors,115 his initial analysis of Illinois law in this diversity case was that, “there was an argument for making the principle liable if an accident occurs that is due to the hazardous character of the performance called for by the

113 Restatement (Third) of Agency § 7.03 (2006).

114 Anderson v. Marathon Petroleum Company, 801 F.2d at 938.

115 Id.
Thus, Posner recognized an exception to the general rule regarding independent contractors.

However, the worker’s claim ultimately failed according to Posner because he did not present facts to show why sandblasting was inherently or an abnormally dangerous activity and because he was not an injured third party but an employee of the independent contractor and therefore his “wages” and workers compensation benefits would compensate the him for his risk taking. Posner found that such benefits “compensated the worker for the risks that he took in his job.

Posner’s analysis would fail in the context of seasonal and migrant workers because there is a plethora of statistical data showing that work covered under the AWPA is some of the most dangerous in the United States. Also, the vulnerable state of seasonal and migrant workers means that they are not going to be “compensated” for the risks they take in the performance of their labor. This includes, many times, a lack of workman’s compensation. The unique situations of seasonal and migrant workers beg the exception to liability standards normally associated with independent contractors.

The Supreme Court of Montana, in *Paull v. Park County*, 218 P.3d. 1198 (2009), presents the most recent state supreme court decision which found a principle vicariously liable for the actions of an independent contractor in carrying out inherently dangerous activity. In *Paull*,

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116 Id. at 939.

117 Id. at 941.


plaintiff was injured in a car accident when a county in Montana contracted with a private prisoner transport company to return plaintiff to Montana because he violated his probation while living in Florida. Even though the county did not exert any control over the private prisoner transport company, the Montana Supreme Court found that the county had a non-delegable duty to the plaintiff because the transportation of prisoners was an “inherently dangerous” activity.\textsuperscript{120} The rule adopted by the court was as follows, “a contractor is vicariously liable for injuries by a subcontractor’s failure to take precautions to reduce the unreasonable risks associated with engaging in inherently dangerous activity.”\textsuperscript{121}

The Montana Supreme Court in \textit{Paull} applied the principles from the Restatement (Second) of Torts, more specifically §§ 416 and 427.\textsuperscript{122} In doing so, the court noted that a plaintiff would still need to support their contention by proving the normal prima facie elements of negligence as to the conduct of the independent contractor.\textsuperscript{123} This would make sense because such a plaintiff would be relying on a common law duty of reasonable care. Therefore, the logical inference from this issue as to the proof of negligence would extend to cases arising under the AWPA because such duties are provided by statute.\textsuperscript{124} Claims arising under the AWPA would be more analogous to negligence per se and would not be subject to any problems in establishing a duty required of an agricultural employer or association.

\begin{itemize}
\item \textsuperscript{120} Id. at 1202.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Restatement (Second) of Torts §§ 416 and 427.
\item \textsuperscript{123} Paull v. Park Country, 218 P.3d 1198, 1202 (Mont. 2009).
\item \textsuperscript{124} See 29 U.S.C. § 1801 et. seq. (2012).
\end{itemize}
Using the analysis of the court in *Paull*,\(^{125}\) an agricultural employer or association would be liable for the acts of a FLC they contracted with to provide labor because the labor itself would carry with it an inherent risk of harm. Because the work itself is inherently dangerous an employer or association cannot hide behind the veil of the independent contractor relationship. Public policy, as well as a logical extension of applicable common law demands that such liability cannot be disclaimed.

Such an opinion by Posner, in the Seventh Circuit, as well as the Montana Supreme Court helpfully elucidates and sets up the analysis of what it means if something is inherently dangerous and why an agricultural employer or association should be liable for the acts of FLCs under a duty analysis. In both these cases it is noted that when an activity comes with it a high risk that harm will occur in the carrying out of the activity, a principle cannot delegate the risk to an independent contractor. Because farm work has been statistically recorded as the second most dangerous profession in the United States\(^{126}\) as well as the unfortunate fact that seasonal and migrant laborers are the most exploited in this country,\(^{127}\) there should be no question that an agricultural employer or association should not be able to delegate the risk attendant to the type of labor and laborer.

**Conclusion**

The purpose of the AWPA was, “to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor

\(^{125}\) *Paull v. Park Country*, 218 P.3d at 1202.


\(^{127}\) Id.
contractors to register under this chapter; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.”\textsuperscript{128} This goal has seen three Congressional acts as well as DOL regulation that simply espoused some broad stroke test that proponents and opponents saw as accomplishing disparate goals.\textsuperscript{129} The fact is, however, that seasonal and migrant workers have many hurdles in bringing a suit under the AWPA including the burden to prove any connection between an agricultural employer or association, whose sophistication as a business entity allows it to present itself in to the public in a way that it appears to be wholly innocent and lacking any control over their FLC. The current system screams of structural unfairness and inequity.\textsuperscript{130}

The fact that seasonal and migrant workers have to work and survive under a set of circumstances that most other workers do have to face illustrates that that are a unique labor group that needs unique legislation to provide for their protection. Until something further is done we can continue to try and fool ourselves that the current statutory and regulatory arrangement is adequate.

\textsuperscript{128} 29 U.S.C § 1801 (1983).

\textsuperscript{129} The Migrant Farm Justice Project commented on the proposed 1997 DOL regulation and stated, “[T]he current regulation, particularly the listed factors, has excluded other relevant factors, thereby misleading Wage and Hour compliance investigators and the affected community about the obligations under the Act.” See 62 Fed. Reg. 11,734, 11,734 (1997).