December 7, 2007

Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Centre Street
New York, New York 10007

Re: Barfield v. New York Health and Hospitals Corp., Bellevue Hospital Center, 06-4137-cv

Dear Ms. O'Hagan Wolfe:

In a letter dated November 14, 2007, this Court requested that the Department of Labor ("Department") submit an amicus curiae brief addressing the following issue: "Is a hospital a joint 'employer' of temporary nurses and certified nurse's assistants supplied by staffing agencies under the Fair Labor Standards Act?" The Court's question suggests that it is seeking our view on joint employment with respect to the entire temporary nursing staffing industry. As explained infra, however, the fact-specific nature of a joint employment analysis necessitates that the Department limit its response to the facts of this case. Thus, the Department's analysis is based on the undisputed facts as found by the district court. See Barfield v. New York Health and Hospitals Corp., Bellevue Hospital Center, 432 F. Supp. 2d 390 (S.D.N.Y. 2006). For purposes of this brief, the Department assumes that the district court's findings of fact are correct.

1. The question before the district court was whether a nurse placed to work in a hospital for over 40 hours a week by several nursing referral agencies was jointly employed by each referral agency and that hospital pursuant to the Fair Labor Standards Act ("FLSA" or "Act"), thereby making the hospital jointly and severally liable for any overtime compensation due under 29 U.S.C. 207(a).

The undisputed facts as found by the district court are as follows. Plaintiff, Anetha Barfield, was a nurse who was paid by nursing referral agencies for work performed at Bellevue Hospital. Barfield, 432 F. Supp. 2d at 392. From approximately August 2002 to May 2005, Barfield worked at Bellevue, having been referred by three different referral agencies. Id. From October 30, 2003 to January 31, 2005, there were 16 weeks during which Barfield worked at Bellevue more than 40 hours without receiving any overtime compensation. Id.

Barfield solely used Bellevue's premises and equipment in her work. Barfield, 432 F. Supp. 2d at 393. She worked only for the defendant hospital for the period in question, even though she was referred to the hospital by multiple referral agencies. Id. The

nurse's job duties for the hospital remained the same, regardless of which agency referred her. Id. Bellevue played a role in scheduling the nurse's hours, by providing the nurses with tentative work dates and times, requiring the nurses to call in to confirm their shifts, and communicating with the staffing agencies regarding the nurses' schedules. Id. The hospital contacted Barfield directly "on several occasions" to ask if she would work double-shifts, and approved the shift before she worked. Id. The hospital also exercised "at least some control" over which particular agency nurses were placed at the hospital; evaluated the nurses' performances on a regular basis; and had the ability to bar a certain agency nurse from working at the hospital if the nurse had violated a hospital rule or the hospital was not satisfied with the nurse's performance. Id. at 394.

Applying to these facts the six joint employment factors identified by this Court in Zheng v. Liberty Apparel Co., 355 F.3d 61 (2003) (FLSA), which reflect the economic realities of an employment relationship, and taking into account other factors relevant to an assessment of the economic realities, the district court concluded that the hospital functioned as the nurse's joint employer. Barfield, 432 F. Supp. 2d at 392-94.

2. The FLSA defines "employ" to "include[] to suffer or permit to work." 29 U.S.C. 203(g). The Act's definition of "employer," 29 U.S.C. 203(d), "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." "Employee," in turn, is simply defined as "any individual employed by an employer." 29 U.S.C. 203(e)(1). This Court, noting the FLSA's "broad" definition of "employ" at 29 U.S.C. 203(g), has recognized that the Act's reach is "expansive," "encompass[ing] 'working relationships, which prior to [the FLSA] were not deemed to fall within an employer-employee category.'" Zheng, 355 F.3d at 69 (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 150-51 (1947)); see Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 325 (1992) (citing Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947)); United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945).

These expansive statutory definitions permit two or more employers to jointly employ a worker for purposes of the FLSA. See, e.g., Falk v. Brennan, 414 U.S. 190, 195 (1973). The analysis in joint employment cases does not assess "whether the worker is more economically dependent on [one entity or another], with the winner avoiding responsibility as an employer." Antenor v. D&S Farms, 88 F.3d 925, 932 (11th Cir. 1996). Rather, the test measures the economic reality of the relationship between the worker and the alleged joint employer. See Torrez-Lopez v. May, 111 F.3d 633, 641 (9th Cir. 1997); Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1469-70 (9th Cir. 1983).

3. In its leading case on joint employment under the FLSA, Zheng v. Liberty Apparel Co., Inc., supra, which analyzed whether garment manufacturers jointly employed garment workers hired by subcontractors, this Court explained that the Act's "suffer or permit" language, 29 U.S.C. 203(g), required a joint employment test that went beyond traditional agency law, and measured an entity's "functional control" over the workers even where formal control was not evident. 355 F.3d at 72. This Court dismissed as "unduly narrow" tests that hewed to the common law concept of employment. Id. at 69-

70 (rejecting a four-part test which focused on the employer's formal right to control the employee's work). Instead, this Court developed an economic reality test that could measure "'the circumstances of the whole activity.'" Id. at 71 (quoting Rutherford, 331 U.S. at 730). As this Court has explained, "[a]n entity 'suffers or permits' an individual to work if, as a matter of 'economic reality,' the entity functions as the individual's employer." Id. at 66 (citing Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961)). And, as this Court recognized in Zheng, the Supreme Court in Rutherford established that an entity can be a joint employer under the FLSA "even when it does not hire and fire [the workers], directly dictate their hours, or pay them." 355 F.3d at 70. Thus, when determining whether an entity has functional control over a worker, Zheng requires that the "circumstances of the whole activity [be] viewed in light of economic reality." Id. at 71 (internal quotation marks and citations omitted). This Court in Zheng also clarified that the joint employment test must "examine the circumstances of the entire relationship" to distinguish legitimate contractors from "an entity that 'suffers or permits' its subcontractor's employees to work." Id. at 70. The economic reality factors set out in Zheng, therefore, are intended not to "subsume typical outsourcing relationships," but to identify instances where the entities, "based on the totality of the circumstances, function as employers of the plaintiffs rather than mere business partners of plaintiffs' direct employer." Id. at 76.[1]

Zheng specifically identifies six factors to use in the economic reality test: (1) whether the putative employer's premises and equipment are used for the workers' work; (2) whether the contractor corporation has a business that can or does shift from one putative joint employer to another; (3) the extent to which the workers perform a discrete line-job that is integral to the putative employer's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the putative employer supervises the workers' work; and (6) whether the workers work exclusively or predominantly for the putative employer. 355 F.3d at 72; cf. Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988) (identifying five-factor test to distinguish between employees and independent contractors and measure "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for

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[1] Thus, the courts have recognized that the FLSA's expansive definition of "employ" requires a broader test than that found under Title VII of the Civil Rights Act of 1964 or the National Labor Relations Act ("NLRA"), which do not use the same definition. See, e.g., Arculeo v. On-Site Sales & Marketing, LLC, 425 F.3d 193, 199 n.7 (2d Cir. 2005) (recognizing that the joint employment test for the FLSA is not necessarily the same under Title VII); Downes v. J.P. Morgan Chase & Co., 2006 WL 785278, at *21 (S.D.N.Y. 2006); cf. Darden, 503 U.S. at 326 (the term "employee" under the FLSA, unlike ERISA (which does not define "employ" to mean "suffer or permit to work," as does the FLSA), "cover[s] some parties who might not qualify as such under a strict application of traditional agency principles"). The Title VII and NLRA cases cited by the hospital that apply common law tests for employment, therefore, are inapposite to the FLSA analysis for joint employment conducted under the broader economic reality test. See, e.g., Defendants' opening brief at 29-30, 32.

themselves"). These factors are not exclusive, but may be used in conjunction with any other factors relevant to assessing the economic realities of the relationship. See Zheng, 355 F.3d at 71-72.

The joint employment test set forth in Zheng is consistent with the FLSA joint employment regulation, as well as with joint employment tests used in analogous contexts and by other courts.[2] The economic reality test is also used to determine joint employment, for example, under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), which imposes certain requirements on the compensation, housing, and transportation of migrant and seasonal workers. See, e.g., Torrez-Lopez, 111 F.3d at 640. One of Congress' goals in enacting MSPA was to "reverse the historical pattern of abuse of migrant and seasonal farmworkers" by holding both contractors and growers liable for substandard labor conditions. Antenor, 88 F.3d at 929-30 (citing H.R. Rep. No. 97-885, 97th Cong., 2d Sess. (1982) 6, reprinted in 1982 U.S.C.C.A.N. 4547, 4552). To accomplish this goal, Congress adopted the same broad definition of "employ" under MSPA as it had in the FLSA. See 29 U.S.C. 1802(5); see also 29 C.F.R. 500.20(h)(1), (4), and (5) (stating that the term "*employ*" under MSPA has the same definition that it does under the FLSA); Torrez-Lopez, 111 F.3d at 641. Since MSPA uses the same definition of "employ" as the FLSA, the economic reality test is also utilized under that statute to determine joint employment. See, e.g., Antenor, 88 F.3d at 929-30; 29 C.F.R. 500.20(h)(5)(iv)(A)-(G) (MSPA regulation listing joint employment factors).[3]

Similarly, the FLSA economic reality test has been used in cases arising under the Family and Medical Leave Act ("FMLA"), which also incorporates the FLSA definition of "employ," 29 U.S.C. 2611(3). See, e.g., Zheng, 355 F.3d at 76 n.15 (noting that in

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[2] The FLSA joint employment regulation states that: "Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." 29 C.F.R. 791.2(b).

[3] The MSPA joint employment factors consider supervision; ability to control employment conditions, including hiring or firing; duration of relationship; level of skill involved; integral nature of work being performed; whether work is performed on the premises; and preparing payroll records, issuing checks, providing housing and transportation, providing tools and equipment, and other responsibilities commonly performed by employers. 29 C.F.R. 500.20(h)(5)(iv)(A)-(G).

Moreau v. Air France, 343 F.3d 1179, 1189-90 (2003), *amended and superceded on other grounds*, 356 F.3d 942 (2004), the Ninth Circuit "borrowed directly from the FLSA's joint employment case law" in an FMLA case because that statute also uses the FLSA definition of "employ"); see also 29 C.F.R. 825.106 (FMLA regulation addressing joint employment).[4] Under both MSPA and the FMLA (just as under the FLSA, see 29 C.F.R. 791.2(a)), no single criterion is determinative; rather, the totality of circumstances must be examined. See 29 C.F.R. 500.20(h)(5)(iii) and (iv) (MSPA); 29 C.F.R. 825.106(b) (FMLA). Moreover, these joint employment criteria are consistent with, and complement, the Zheng joint employment criteria.

4. In concluding that the hospital was the nurse's joint employer, the district court properly applied the Zheng factors to the facts in this case. Assessing the economic reality as a whole, the district court held, based on the undisputed facts, that where the nurse used the hospital's premises and equipment; was assigned to the same hospital for a continuous period of time; performed a job integral to the hospital's operation; worked at the same hospital through referrals from multiple staffing agencies; and where the hospital directed the agency nurses' hours of work and had the ability to deem the agency nurses fit or unfit to work at its facility, the nurse was jointly employed by the hospital. Barfield, 432 F. Supp. 2d at 393-94.

The district court correctly concluded that the first Zheng factor was indisputably met, as plaintiff used the defendant hospital's premises and equipment for her work. Barfield, 432 F. Supp. 2d at 393. The district court properly concluded that the second factor, whether the referral agencies typically shifted from one putative joint employer to another, was also satisfied because the nurse worked only for the defendant hospital for the period in question. Id. The district court correctly observed that the third factor, "'the extent to which plaintiffs performed a discrete line-job that was integral to [defendants'] process of production,'" was also met in this case where the care provided by the nurse was an essential element of the hospital's operation. Id. at 393 (quoting Zheng, 355 F.3d at 72).[5] As to the fourth factor, the district court correctly concluded that where it was undisputed that the nurse was placed at the hospital by multiple referral agencies, it was clear that "'responsibility under the contracts could pass from one subcontractor to another without material changes.'" Id.

The district court also correctly concluded that the fifth factor revealing a joint employment relationship, "'the degree to which the [defendants] or their agents

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[4] The FMLA regulation tracks the FLSA regulation at 29 C.F.R. 791.2(b). Significantly, the FMLA joint employment regulation also states that "joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer." 29 C.F.R. 825.106(b).

[5] The district court aptly noted, however, that this factor may be less relevant in Barfield than in Zheng, which discussed the factor in the context of a production line. Barfield, 432 F. Supp. 2d at 393 n.1.

supervised plaintiffs' work,'" was met in this case. Barfield, 432 F. Supp. 2d at 393 (quoting Zheng, 355 F.3d at 72). Recognizing that Zheng requires an inquiry under this factor into the hospital's "'effective control of the terms and conditions of the plaintiff's employment,'" the district court properly concluded that this control was evidenced by the hospital's involvement in setting the nurse's schedule by providing agency nurses with tentative dates and times, requiring the nurses to call the hospital to confirm their shifts, and sending schedules to the temporary agencies. Id. (quoting Zheng, 355 F.3d at 75). The district court also correctly determined that control was evidenced by the hospital's direct request to plaintiff to work double-shifts and its approval of those shifts. Id.

With respect to this fifth Zheng factor (supervision), the hospital states (reply brief at 15) that "to the extent that the District Court relied upon evidence of supervision relating to ensuring compliance with patient care regulations and laws, such reliance was not appropriate under Zheng." Defendants appear to be arguing that statutorily-mandated supervision should not count as actual supervision under the Zheng factors because the hospital has no legal discretion in the amount of supervision it exercises over contract nurses. Zheng, however, makes no such distinction. It states only that routine "supervision," such as that found in "run-of-the-mill subcontracting relationships," "with respect to contractual warranties of quality and time of delivery," does not constitute supervision under the fifth factor of the joint employment analysis. 355 F.3d at 74-75. Thus, in Moreau, where the Ninth Circuit found that the airline personnel were not supervising the contractor's ground crew workers but were merely ensuring that the workers were performing work specified in the contract, joint employment status was not found. 343 F.3d at 1189-90. In this case, as the hospital acknowledges, its oversight was substantial, and not undertaken merely to ensure contract performance but to maintain the hospital's accreditation and ensure compliance with legal standards of care. Zheng does not suggest that evidence of substantial supervision is negated by an employer's legal obligation to provide such oversight. Cf. 62 Fed. Reg. 11734, 11736 (March 12, 1997) (preamble to MSPA regulations) ("When a putative employer voluntarily assumes responsibility for workplace obligations that the law imposes on employers, this voluntary assumption . . . is relevant to whether or not the employees were economically dependent upon the putative employer for a workplace protection or benefit," and therefore "is an appropriate fact to be considered in the joint employment analysis"). And, as the hospital admits (opening brief at 13), it supervises contract nurses not only to meet standards required by law but to meet its own standards of "quality healthcare."[6]

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[6] The concept of supervision under the joint employment test is generously applied to give full effect to the FLSA's "suffer or permit" language. Therefore, supervision can be found even when orders are communicated indirectly through the contractor. See e.g., Torrez-Lopez, 111 F.3d at 642-43 (the grower's control over the harvest schedule, determination as to how many workers were needed, right to inspect the work performed by farmworkers, daily presence in the fields, and communication through subcontractor was sufficient to establish control); Antenor, 88 F.3d at 934-35 (noting that the "suffer or permit" standard "was developed in large part to assign responsibility to businesses that did *not* directly supervise the activities of putative employees").

Indeed, in a recent opinion letter, the Wage and Hour Division of the Department of Labor explained that a hospital's legal obligation to oversee and dictate the terms of the care provided by private duty nurses was sufficient to make it a joint employer under the FLSA. 2001 WL 1869967 (May 11, 2001). In the scenario described in the opinion letter, the hospital required, inter alia, the temporary staffing nurses to follow hospital protocol regarding medications and other hospital procedures, follow the hospital dress code, and submit reports to the head nurse at the end of shifts. Wage and Hour concluded that even though the nurses were hired by individual patients through nursing registries, and the hospital did not dictate their hiring, pay, or hours of work, the control and supervision exercised by the hospital over the nurses' conduct established a joint employment relationship.[7]

The district court further correctly concluded that the sixth factor, "'whether plaintiff worked exclusively or predominantly for the defendant,'" was certainly met in this case. Barfield, 432 F. Supp. 2d at 394 (quoting Zheng, 355 F.3d at 72). Finally, the district court properly took into account other indicia of the hospital's control over the nurse's work, such as the hospital's evaluations of agency nurses on a regular basis and its ability to decide not only whether a particular nurse would be scheduled to work at the hospital, but also which nurses would be prohibited from continuing their work (for example, due to a major violation of a rule or dissatisfaction with the nurses' performance). Id. Concluding that "all the Zheng factors here point, to a greater or lesser degree," to joint employment, and taking into account other factors relevant to an assessment of the economic realities, the district court correctly concluded that the hospital was the nurse's employer. Id. Indeed, because it directed the nurses' work and was directly responsible for patients' care, the hospital in this case was hardly a "mere business partner" of the staffing agencies. Zheng, 355 F.3d at 76. Rather these factors show that the hospital was integrally and actively involved in the nurse's work, and as a matter of economic reality was the nurse's employer. [8]

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[7] Defendants argue (reply brief at 21) that this opinion letter is not entitled to deference because it was not signed by the Wage and Hour Administrator. Defendants' argument confuses the ability of employers to use Wage and Hour letters signed by the Administrator as a defense to liability under the Portal-to-Portal Act, 29 U.S.C. 254, with ordinary principles of deference. The non-Administrator opinion letter in this case, which reflects the agency's considered views on joint employment in the heath care industry, "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance" in interpreting the FLSA. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[8] The district court also rejected the hospital's "fallback" argument that it was not liable for overtime compensation because at least one of the referral agencies told the nurse she would not be paid overtime compensation, and the nurse prevented the hospital from determining the hours she worked by signing in through multiple referral agencies. The court concluded, however, that the hospital had suffered or permitted the work. Barfield, 432 F. Supp. 2d at 394-95. Although this Court did not specifically request that the Department address this issue, we agree, consistent with the argument we made in the briefs we filed with this Court in Chao v. Gotham Registry, Inc., No. 06-2432 (pending)

5. The hospital's primary argument on appeal is that, pursuant to Zheng, joint employment can be found only where the employment arrangement is a sham operation or subterfuge, with the purpose of avoiding compliance with labor laws. Defendants argue (reply brief at 9) that the district court ignored "the significance of this essential part of Zheng's holding," and likewise failed to recognize that the hospital's use of temporary staffing nurses has a legitimate business purpose. This argument misunderstands Zheng's basic premise, and would have the effect of substituting a corporate veil-piercing analysis for this Court's established joint employment test. While the decision identifies several examples where an employment relationship is being used as a subterfuge to avoid legal obligations, the underlying facts showing such a subterfuge are "starting point[s] in uncovering the economic realities of a business relationship." See, e.g., 355 F.3d at 72. In this case, the joint employment factors show that the economic reality was that the hospital was the nurse's employer, irrespective whether the arrangement between the hospital and the staffing agency was a subterfuge.

Defendants specifically raise the subterfuge argument (opening brief at 28-33) in relation to the third Zheng factor, which measures "the extent to which plaintiffs performed a discrete line-job that was integral to [defendants'] process of production." 355 F.3d at 73. Recognizing that this factor might unintentionally capture all outsourcing arrangements, Zheng identified two additional considerations to determine the third factor's proper "weight and degree": industry custom and historical practice. Id. Industry custom is relevant because "insofar as the practice of using subcontractors to complete a particular task is widespread, it is unlikely to be a mere subterfuge to avoid complying with labor laws." Id. Likewise, this Court in Zheng stated that "historical practice may also be relevant, because, if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws." Id. at 73-74. But, as noted supra, the lack of "subterfuge" does not preclude a joint employment relationship, which is based on the economic realities. Cf. Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 302 (1985) (FLSA protections cannot be waived, even if done so voluntarily); Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602 (1944) ("Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.").

The hospital also argues (reply brief at 8) that the widespread practice of staffing hospitals with temporary nurses, and an ongoing nursing shortage, show that the hospital's practice is merely industry custom and business necessity, not a subterfuge to avoid liability. As Zheng recognized, however, industry custom, insofar as it shows or militates against a finding of "subterfuge," is one factor to consider in the joint employment analysis; it is not dispositive as to the existence of a joint employment

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(temporary staffing registry suffered or permitted its outplaced nurses to work overtime hours with hospitals in the New York City metropolitan area), that the district court correctly determined that the hospital suffered or permitted the nurse's work.

relationship. In Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 196 (S.D.N.Y. 2003), for example, the district court held that while a drugstore corporation was entitled to maximize its competitiveness in the industry by outsourcing its delivery services function to an independent contractor, such perceived business necessity (based on industry custom) did not relieve the corporation from its liability under the FLSA as a joint employer of the delivery personnel.[9]

For the foregoing reasons, the Department believes that the district court correctly held that the hospital was a joint employer.

Respectfully submitted,

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[9] It bears noting that the practice of using temporary staffing nurses has generated several FLSA enforcement cases in this Circuit. In a case pending before this Court, Chao v. Gotham Registry, Inc., supra, the Department is seeking to enforce a contempt action against a nursing registry that failed to pay its nurses (placed in hospitals) overtime compensation for hours worked over 40 in a workweek for that agency. The Department had entered into a consent judgment with the agency in 1994, effectuating a change in the agency's practice of treating its nurses as independent contractors rather than employees. While the issue in Gotham Registry is whether the nurses performed compensable overtime work for the nursing registry, the Department in its brief (DOL opening brief at 19) also recognized that the hospitals could well be joint employers. Furthermore, the Department's enforcement action against Superior Care, Inc. for misclassifying its temporary staffing nurses as independent contractors resulted in a decision by this Court that the nurses were employees of the staffing agency. Brock v. Superior Care, supra. Of course, employment by a staffing agency does not negate the possibility of joint employment by a hospital.

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