UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AURA SALAZAR, DAMARIS VENTURA, on behalf of themselves and all others similarly situated, Plaintiffs, v. FULFILLMENT AMERICA, INC., JOHN BARRY SR., and JOHN BARRY JR., Defendants.	)	Civil No. 23-11625-LTS

ORDER ON MOTION FOR SUMMARY JUDGMENT (DOC. NO. 61)

June 3, 2025

SOROKIN, J.

Plaintiffs Aura Salazar and Damaris Ventura bring this action, on behalf of themselves and those similarly situated, alleging violations of the Worker Adjustment and Retraining Notification Act of 1988 ("WARN Act"), 29 U.S.C. §§ 2101-2109, and the Massachusetts Payment of Wages Act ("Wage Act"), Mass. Gen. Laws ch. 149, §§ 148, 150. Pending before the Court is Defendants' Motion for Summary Judgment, Doc. No. 61.[1] For the reasons that follow, the Motion is DENIED.

[1] Citations to "Doc. No. __" refer to documents appearing on the court's electronic docketing system ("ECF"); pincites are to the page numbers in the ECF header or to the paragraph numbers used by the document in question.

I. BACKGROUND

The following facts are drawn from Defendants' Statement of Material Facts, Doc. No. 63, supplemented by Plaintiffs' responses, Doc. No. 65, and evidence submitted by both parties. In conducting its analysis, the Court must view the record in the light most favorable to Plaintiffs and make all reasonable inferences in their favor. Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995).

Fulfillment America ("Fulfillment") provides a wide range of services including product distribution, pick and pack, mail order fulfillment, computerized order entry, credit systems, redemption programs, kit assembly, promotion management, packaging automation, and warehouse storage. Doc. No. 65-3 at 6. It has done so since 1992. Id. John Barry, Sr., served as Fulfillment's President and Chief Executive Officer ("CEO"). Doc. No. 63 ¶ 2.

In the early 2000s, Fulfillment employed Jorge Rios. Id. ¶ 43. While working at Fulfillment, Rios started a company that came to be known as Job Done, LLC. Id. Rios was the founder and owner of Job Done. Id. ¶ 32. According to its Certificate of Organization, Job Done's purpose was identical to Fulfillment's, and the former's needs evolved to meet the latter's. Doc. No. 65 ¶ 31. Job Done supplied workers only to Fulfillment, never expanding to provide workers to any other company. Id. ¶ 30 (citing Doc. No. 63-10 at 23). The two companies never entered into a written contract to govern or define their relationship. Id. ¶ 44. The parties dispute whether they entered into an oral agreement. Id. Despite managing Job Done and having long since ceased formal employment with Fulfillment, Rios had an office inside Fulfillment's main location in Billerica through at least the end of 2022. Id. ¶ 91.

In 2014, a class of Job Done employees sued Job Done in state court for failure to pay overtime wages in violation of state law. The parties eventually settled, and the suit was

dismissed. See Mendez v. Job Done LLC, Civil Action No. 12-4992, 2014 Mass. Super. LEXIS 1388 (Nov. 18, 2014).

A few years later, in 2018, another class of employees sued Fulfillment and Job Done over Job Done's imposition of a transportation fee. The state court denied summary judgment, holding that a reasonable juror could find that Fulfillment could be held liable as a joint employer of Job Done under Massachusetts law. See Palacio v. Job Done, LLC, No. 1584CV00813BLS2, 2018 WL 3431698 (Mass. Super. June 15, 2018). The case was also eventually settled and dismissed.

With this contextual background in mind, the Court turns to the recent events giving rise to the pending lawsuit. In late 2022, Fulfillment carried approximately seventy-four employees on its payroll. Doc. No. 63 ¶ 23. Fulfillment requested additional workers from Job Done on an "as-needed" basis, and the number of such workers fluctuated. Id. ¶¶ 56, 60. Job Done workers, some temporary and others having worked at a Fulfillment facility for years, worked alongside Fulfillment workers at various Fulfillment's departments, including pick and pack, receiving, shipping, inventory, production, and print on demand. Doc. No. 65 at 9, 19, 47. Among its own employees, Fulfillment distinguished in its handbook between full-time employees (those who worked thirty to forty hours per week), part-time employees (those who worked twenty to twenty-nine hours per week), and temporary employees (those hired as interim replacements, to temporarily supplement the workforce, or for a specific project). Id. at 4. Fulfillment characterizes all of the workers supplied by Job Done as temporary workers. See, e.g., Doc. No. 63 ¶¶ 11, 31, 43.

Although Fulfillment can point to some facts supporting this characterization, viewed through the prism of the summary judgment lens, many (but not all) of the Job Done workers fit

Fulfillment's own definition of full-time employees. These workers came to Fulfillment every day for lengthy periods of time, in one case, for eighteen years. Doc. No. 65 at 4. Ventura worked in the pick-and-pack department every day for seven years and stated that "[t]he only thing that change[d]" was that she would "sometimes [work] overtime." Doc. No. 65 at 31-32 (citing Doc. No. 63-12 at 36-37). The number of Job Done temporary employees supplied to Fulfillment fluctuated with the season or promotion for each Fulfillment client. Doc. No. 63 ¶ 60. Of the 103 Job Done workers supplied to Fulfillment in 2022, sixty-five worked over forty hours per week, and fifty-one had worked at Fulfillment the previous year. Doc. No. 65 ¶ 222 (citing Doc. No. 63-10 at 31).

Job Done was responsible for interviewing and hiring the workers it supplied to Fulfillment. Doc. No. 63 ¶ 37. Once hired, Job Done did not track the attendance or hours worked by its employees at Fulfillment. Doc. No. 65 ¶ 40 (citing Doc. No. 63-10 at 30-31). Rather, Fulfillment tracked these workers' hours. Id. The workers punched in on Fulfillment time-keeping equipment; the data was saved on the Fulfillment network. Id. Each week, Fulfillment provided spreadsheets to Job Done showing the hours worked by each Job Done employee. Doc. No. 63 ¶¶ 109-10. Job Done's payroll depended on recorded hours and payments from Fulfillment, which approved the rates employees were paid and sent payment for hours worked two weeks in arrears. Doc. No. 65 ¶ 40 (citing Doc. No. 63-10 at 30-31). Job Done merely forwarded the information from the Fulfillment spreadsheet to Job Done's accountant, who in turn issued paychecks to Job Done employees. Id. Job Done withheld state and federal income tax from its employees' paychecks and issued W-2's to its employees. Doc. No. 63 ¶ 128. It paid for workers' compensation insurance, sick-time benefits, and overtime for

its employees. Id. ¶ 105. Job Done also applied for and received a COVID Paycheck Protection Program loan for its employees in 2021. Id. ¶ 35.

Job Done provided a van service between East Boston (where many Job Done employees lived) and the Fulfillment facility in Billerica where they worked.[2] Id. ¶ 193. The vans were driven by Job Done and Fulfillment employees, though the record is lacking on whether a Fulfillment employee was working on behalf of Fulfillment while driving the van. Doc. No. 66-1 at 9. The Job Done employees taking advantage of the van service paid the drivers, and the proceeds ultimately went to Rios and Job Done. Id.

At the warehouse, Fulfillment's operations were divided into the various departments noted above. Doc. No. 63 ¶ 8. Within each department, Job Done and Fulfillment employees worked at tables under the supervision of a "table lead." Id. ¶ 11. Both Fulfillment employees and Job Done employees served as "table leads." Id. In both scenarios, the table lead supervised the work of the Job Done employees at the table. Id. One Job Done table lead testified that her role included simply translating instructions from Fulfillment managers. Doc. No. 65 ¶ 182 (citing Doc. No. 63-12 at 13-14). In general, Job Done employees were instructed to "obey" Fulfillment managers. Doc. No. 63-10 at 57. Fulfillment managers trained the Job Done employees. Doc. No. 63 ¶ 183. Each day, Job Done employees learned what work Fulfillment required by pulling "jackets" containing instructions prepared by Fulfillment. Doc. No. 65 ¶ 159 (citing Doc. No. 65-7 at 17-18). One Fulfillment manager was observed repeatedly disciplining Job Done workers for issues related to performance and behavior. Id. ¶ 41 (citing Doc. No. 63-12 at 28-29).

[2] Occasionally, when the van service was not available, Fulfillment and Job Done employees carpooled to work without Fulfillment's or Job Done's facilitation. Doc. No. 65 at 59.

Fulfillment set the schedules of Job Done employees and informed them when they had to work overtime or when they could take breaks. Doc. No. 63 ¶ 183; Doc. No. 63-12 at 28-29. Fulfillment also instructed Job Done employees on appropriate dress code and work habits. Doc. No. 63-10 at 42. Fulfillment managers instructed Job Done employees where to work, at times directing certain Job Done employees to "stay where they were" or to work in departments where they had developed expertise. Doc. No. 63-12 at 37. If Fulfillment requested that a Job Done employee be relocated or terminated, Rios would generally acquiesce because "they were the bosses." Doc. No. 65 ¶ 144 (citing Doc. No. 63-12 at 31). When Job Done employees ran late for work or needed to miss a day for some reason, they contacted their Fulfillment managers to provide notice. Id. ¶ 149 (citing Doc. No. 63-12 at 17). While working at a Fulfillment facility, Job Done employees used Fulfillment supplies, such as forklifts and other equipment, to perform their work and were trained by Fulfillment on how to operate such machinery. Id. ¶ 183 (citing Doc. No. 63-12 at 30).

While the foregoing facts are drawn from the period leading up to December 2022, nothing in the record suggests that operations differed materially at any earlier point in time. However, several events occurred in 2022 which changed the relationship between Fulfillment and Job Done. By 2022, two of John Barry, Sr.'s children came to work for Fulfillment, his daughter Susan Rasmussen serving as the Secretary and his son John Barry, Jr., succeeding him as President and CEO. Doc. No. 63 ¶¶ 4-5. In the fall of 2022, Rasmussen spoke to Rios about firing an employee of Job Done named M.[3] Doc. No. 65 ¶ 45 (citing Doc. No. 63-10 at 56). Though an employee of Job Done, M spent all her Job Done working hours at Fulfillment. Id.

[3] For privacy reasons, the Court refers to this employee (who is not a party to this lawsuit) by the letter M.

Rasmussen wanted M fired because Rasmussen believed her brother was having a romantic relationship with M. Id. Rios promptly fired M. Id. According to Rios, M vowed to "remove" Job Done. Doc. No. 63-10 at 56. In the fall of 2022, after the firing of M, Fulfillment commenced a new relationship with Associate Temporary Employment Agency, Inc. ("ATEA"), to supply its workers. Doc. No. 63 ¶ 50. The President of ATEA testified that she had no background in the distribution field or in staffing labor. Doc. No. 65 ¶ 50 (citing Doc. No. 63-6 at 12-13). Nonetheless, she and Barry, Jr., discussed her meeting staffing needs at one of the Fulfillment locations. Doc. No. 65-6 at 12. She also used an attorney suggested by Barry, Jr., to prepare and file organizational papers and to negotiate her contract with Fulfillment. Doc. No. 65 ¶ 228 (citing Doc. No. 65-6 at 12). Initially, ATEA supplied some workers to a Fulfillment facility in Clinton, Doc. No. 65-6 at 6, then eventually provided more workers to replace Job Done's employees at the headquarters in Billerica, id. at 8.

On December 30, 2022, Fulfillment terminated its relationship with Job Done. Doc. No. 63 ¶ 45. A Job Done manager then sent a message to all Job Done employees stating: "We want to tell you that we are no[t] going to work any longer with Fulfillment America. For this reason, you're no longer going to continue with us. Last day was the 30 of December." Doc. No. 63-12 at 38. This message was sent around December 31, 2022. Doc. No. 65 ¶ 213. Thereafter, only ATEA supplied workers to the Fulfillment facility in Billerica. Id. Notably, after ATEA took over Job Done's role at the Billerica facility, virtually all of ATEA's staff, save its founder, worked at Fulfillment. Doc. No. 65-6 at 9. The only ATEA employee who did not work at Fulfillment was M. Id. ATEA had no clients other than Fulfillment. Doc. No. 65 ¶ 51 (citing Doc. No. 65-6 at 8). The head of ATEA has her office at Fulfillment, just as Rios did. Id. ¶ 226.

Job Done never obtained, and took no steps to obtain, any other clients. Id. ¶ 30 (citing Doc. No. 63-10 at 50). While it continues to pay Rios, it no longer "operates." Id. Rios promised some of his employees that he would do his best to find them new jobs, though that never occurred via Job Done. Doc. No. 63 ¶ 220. Instead, Rios created another company called Make It Happen, which hired some former Job Done employees in the first half of 2023. Id. ¶¶ 205, 210-12. Rios told some of his Job Done employees they were free to seek employment at Fulfillment. Id. ¶ 213. Some Job Done employees did just that and started working with ATEA at Fulfillment. Doc. No. 63 ¶ 213.

Plaintiffs filed their putative class action Complaint in this Court on July 20, 2023. Doc. No. 1. They name Fulfillment, John Barry, Jr., and John Barry, Sr.—but not Job Done—as defendants. Id. After briefing and a hearing, the Court certified the following class: "workers who were laid off by Fulfillment America between December 31, 2022, and January 8, 2023, who suffered a loss of employment and/or did not receive full wages owed at termination." Doc. No. 49 at 8. The parties completed fact discovery, and now Defendants seek summary judgment on both the WARN Act and Wage Act claims. Doc. No. 61. Plaintiffs opposed. Doc. No. 64. The Court held a hearing on May 27, 2025. The Court turns now to resolution of the Motion.

II. LEGAL STANDARD

Summary judgment is appropriate where the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine dispute of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact is one which has the "potential to affect the outcome of the suit under applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). "[T]he mere existence of some alleged factual dispute between the parties

will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. In conducting its analysis, the Court must view the record in the light most favorable to the nonmoving party and make all reasonable inferences in that party's favor. Nat'l Amusements, Inc., 43 F.3d at 735.

III. DISCUSSION

Defendants move for summary judgment on several grounds. All of Defendant's challenges to Plaintiffs' WARN Act claim hinge on whether Fulfillment and Job Done were joint employers. If so, the inquiry at summary judgment essentially ends (subject to some additional analysis); if not, as Defendants aver, then they assert that necessarily (1) Plaintiffs do not constitute "affected employees" under the WARN Act, (2) Fulfillment was not an "employer" under the WARN Act, and (3) Plaintiffs did not sustain "employment loss." Doc. No. 62 at 4. Similarly, resolution of Plaintiffs' Wage Act claim largely turns on whether Fulfillment was a joint employer of Job Done employees, although the analysis proceeds under the applicable state laws. Id. at 14. The Court addresses the federal WARN Act claim first.

A. Statutory Framework

The WARN Act requires employers to give employees sixty calendar days' notice in advance of mass layoffs. See 29 U.S.C. § 2102(a)(1). This obligation purports to "provide[] workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market," and allows the state to provide prompt assistance to displaced workers. 20 C.F.R. § 639.1(a). Employers who fail to comply are liable to "affected employees" for up to sixty days of pay and benefits. See 29 U.S.C. § 2104(a)(1). An "affected employee" is one "who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their

employer." 29 U.S.C. § 2104(a)(5). The regulations also provide that "[c]onsultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not 'affected employees' of the business to which they are assigned." 20 C.F.R. § 639.1(e).

Under the WARN Act, "employer" "means any business enterprise that employs" "100 or more employees, excluding part-time employees," or "100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. § 2101(a). The WARN Act does not define "business enterprise." However, the Department of Labor ("DOL") issued regulations under the WARN Act, which provide that "independent contractors . . . are treated as separate employers or as a part of the . . . contracting company depending upon the degree of their independence from the parent." 20 C.F.R. § 639.3(a)(2). As a result, "two or more affiliated companies may be considered a single business enterprise for WARN Act purposes." In re APA Transp. Corp. Consol. Litig., 541 F.3d 233, 242 (3d Cir. 2008). "Some of the factors to be considered in making this determination are" (1) "common ownership," (2) "common directors and/or officers," (3) "de facto exercise of control," (4) "unity of personnel policies emanating from a common source," and (5) "the dependency of operations." 20 C.F.R. § 639.3(a)(2). "As in any balancing test, application of these factors requires a fact-specific inquiry, no one factor set out by the DOL is controlling, and all factors need not be present for liability to attach." Guippone v. BH S&B Holdings LLC, 737 F.3d 221, 226 (2d Cir. 2013).

Under the WARN Act, and as relevant here, a "mass layoff" is a "reduction in force which . . . is not the result of a plant closing, and . . . results in an employment loss at the single site of employment during any 30-day period" for at least "33 percent of the active employees

(excluding part-time employees)" and "50 employees (excluding part-time employees)." 29 U.S.C. § 2101(a)(3). With these definitions in mind, the Court proceeds to apply them to Defendants' arguments in turn.

B. Whether Fulfillment and Job Done Were Joint Employers under the WARN Act

The Court tackles the joint employer analysis first, because all of Defendants' other arguments assume that Job Done and Fulfillment are separate employers under the WARN Act. For example, whether Fulfillment or Job Done had the requisite number of employees to constitute an "employer" under the Act depends on whether one counts the employees of each entity separately or adds them together. Similarly, whether Plaintiffs experienced "employment loss" depends on whether Fulfillment was an "employer who order[ed] a plant closing or mass layoff" when it terminated its contract with Job Done. 29 U.S.C. § 2104(a)(1). Thus, because the Court concludes, for the reasons explained below, that a genuine dispute exists as to material facts pertaining to whether the two entities were joint employers, summary judgment is improper, and the Court need go no further on the WARN Act claim.

The parties agree that the DOL regulation establishes the appropriate test to analyze whether the two entities are joint employers. They are not alone in this view. Another session of this Court, after careful analysis, also applied the multi-factor test laid out in the DOL regulation. See Cleary v. Am. Cap., Ltd., 59 F. Supp. 3d 249, 255 (D. Mass. 2014). The DOL regulations establish a five-factor test. 20 C.F.R. § 639.3(a)(2). The parties dispute the factual record and how to weigh the facts under each factor. The Court addresses each factor in turn.

The first two factors—common ownership and common directors or officers—plainly do not move the needle for Plaintiffs. The undisputed facts establish that Fulfillment and Job Done have neither owners nor directors in common. These factors favor Fulfillment.

That said, Plaintiffs aver that the third factor—de facto exercise of control—should be dispositive. See Doc. No. 64 at 11; see also Pearson v. Component Tech. Corp., 247 F.3d 471, 504 (3d Cir. 2001) (noting "if the de facto exercise of control was particularly striking," "then liability might be warranted even in the absence of the other factors"). "The core of this factor is whether one company was the decision-maker responsible for the employment practice giving rise to the litigation." Guippone, 737 F.3d at 227. Defendants assert that Fulfillment and Job Done "were unaffiliated companies and contracted at arm's length," Doc. No. 62 at 8, while Plaintiffs suggest the opposite, Doc. No. 64 at 11-12. Drawing reasonable inferences from the facts in Plaintiffs' favor, a reasonable jury could conclude that Fulfillment exercised pervasive control over almost all aspects of Job Done's operations.

Fulfillment controlled the firing of Job Done staff, the times and locations they would work, and the quality and pace of the work they did. Id. For example, a Fulfillment manager requested that a certain "troublemaker" not return to work at a Fulfillment facility and Rios, owner of Job Done, stated that Fulfillment was the "boss[] and I have to obey." Doc. No. 63-10 at 57. Job Done did not keep its own records regarding the hours its employees worked at Fulfillment facilities and fully relied on Fulfillment to share its data so Job Done could issue paychecks. Doc. No. 65 ¶ 40 (citing Doc. No. 63-10 at 30-31). Job Done employees were trained by Fulfillment managers and knew what work needed to be done by pulling "jackets" containing instructions prepared by Fulfillment. Id. ¶ 159 (citing Doc. No. 65-7 at 17-18). Fulfillment managers disciplined Job Done workers and dictated when they could take breaks. Id. ¶ 41 (citing Doc. No. 63-12 at 28-29). Fulfillment also set their schedules, including when they had to work overtime. Doc. No. 63 ¶ 183; Doc. No. 63-12 at 28-29. Fulfillment also instructed Job Done employees on appropriate dress code or work habits. Doc. No. 63-10 at 42.

Fulfillment managers determined where Job Done workers would be assigned and requested certain Job Done employees work in certain departments where they had developed expertise. Doc. No. 63-12 at 37. Moreover, Job Done employees also contacted Fulfillment managers when they were late for work or had to miss work. Doc. No. 65 ¶ 149 (citing Doc. No. 63-12 at 17). Indeed, Job Done's corporate purpose was to serve Fulfillment's needs and "grow[] with them." Doc. No. 65 ¶ 31. And in all its years of existence, it neither had, nor sought, other clients. Id. ¶ 30. In short, this factor decisively favors Plaintiffs, applied against the summary judgment rubric.

The fourth factor—unity of personnel policies emanating from a common source—favors Plaintiffs based upon many of the same facts that tilted the third factor. This factor "requires the factfinder to focus the inquiry less on the hierarchical relationship between the companies (as such relationships may be considered in other aspects of the test)" and more "on whether the companies actually functioned as a single entity with regard to its relationships with employees." Pearson, 247 F.3d at 499. It considers any "significant differences in personnel policies . . . including differences in overtime, breaks, methods of pay, and health insurance premiums." Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1006 (9th Cir. 2004).

Many of the facts identified above as to third factor support the conclusion that Fulfillment and Job Done functioned as one entity with respect to Job Done employees. The Court notes briefly a few examples. Fulfillment determined appropriate dress code and work habits for Job Done employees. Doc. No. 63-10 at 42. Rios ran Job Done from an office within a Fulfillment facility. Doc. No. 65 ¶ 91. One named plaintiff, Salazar, did not know she was hired by Job Done (as opposed to Fulfillment) until after commencing work at Fulfillment,

supporting an inference that the same was true of all employees hired by Rios. Id. ¶ 140. Fulfillment set the break and lunch times for Job Done employees. Id. ¶ 176.

As to the fifth factor—dependency of operations—courts "consider the existence of arrangements such as the sharing of administrative or purchasing services, interchanges of employees or equipment, and commingled finances." Pearson, 247 F.3d at 500. The record supports the conclusion that Job Done depended completely upon Fulfillment's administrative support to track hours worked, and that Job Done ceased operation when Fulfillment terminated the relationship. The Court also notes that Fulfillment did not go a single day without either ATEA or Job Done staff. Doc. No. 63-4 at 95-96. Further, Job Done employees used Fulfillment equipment while working at the facility. Doc. No. 65 ¶ 183 (citing Doc. No. 63-12 at 30). These facts, in addition to those noted above, might suffice to convince a reasonable juror that Fulfillment was not, as a matter of law, independent of Job Done.

In sum, considering the facts and drawing reasonable inferences therefrom in the light most favorable to Plaintiffs, and given the weight of the de facto control factor, see Pearson, 247 F.3d at 504, the Court concludes that a reasonable juror could find for Plaintiffs by concluding that Fulfillment and Job Done were joint employers. As such, Defendants are not entitled to judgment as a matter of law.[4] See Taylor v. Gallagher, 737 F.2d 134, 137 (1st Cir. 1984).

[4] This is not to say the record is one-sided. Several facts support the position of Fulfillment, that Job Done and Fulfillment were separate employers. Job Done was responsible for interviewing and hiring its employees. Doc. No. 63 ¶¶ 137, 140. Job Done withheld state and federal income tax from its employees' paychecks and issued W-2's to its employees. Id. ¶¶ 34, 125-26. It also paid for workers' compensation insurance, sick-time benefits, and overtime for its employees. Id. ¶ 105. Job Done kept some records pertaining to its employees, such as identification documents, job orders, and Social Security Numbers. Doc. No. 63 ¶ 202. Job Done also obtained a COVID Paycheck Protection Program loan for its employees. Id. ¶ 35. Job Done facilitated transportation for its employees to get to Fulfillment and accepted payments for that service. Doc. No. 66-1 at 9. Fulfillment did not provide its own handbook to Job Done

C. Whether Fulfillment Was an Employer under the WARN Act

The obligations under the Warn Act only apply to "employers," or "any business enterprise that employs" "100 or more employees, excluding part-time employees," or "100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. § 2101(a). Defendants argue that because Fulfillment only employed seventy-four full-time employees during the week of October 30, 2022, to November 5, 2022, it cannot be held liable under the Act. See Doc. No. 63 at 6. Nevertheless, this is true only if the Court assumes Fulfillment was not a joint employer of Job Done employees and, consequently, disregards the number of Job Done employees in the calculation. If the Court adds the additional sixty-five full-time Job Done employees, Plaintiffs satisfy the threshold showing that Fulfillment was an employer under the Act (assuming it operates as a joint employer). Doc. No. 65 at 7. Therefore, Defendants are not entitled to judgment as a matter of law on this ground, and the Motion for Summary Judgment with respect to it is DENIED.

D. Whether Plaintiffs Were Affected Employees under the WARN Act

The term "affected employees" means "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed . . . mass layoff by their employer." 29 U.S.C. § 2101(a)(5). The implementing DOL regulations provide that "consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not 'affected employees' of the business to which they are assigned." 220 C.F.R. § 639.3(e). The phrase "separate employment relationship" is also used where the regulations define consulting or

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employees. Doc. No. 63 ¶¶ 27, 70. Fulfillment offers evidence disputing some of the factual conclusions drawn from facts submitted by the Plaintiffs. The resolution of these individual factual disputes as well as the overarching factual dispute over joint employment present issues for resolution at trial by a jury, not on summary judgment by the Court.

contracting entities: "independent contractors . . . are treated as separate employers or as a part of the . . . contracting company depending upon the degree of their independence from the parent." 20 C.F.R. § 639.3(a)(2). Thus, whether Fulfillment is treated as a separate employer for "affected employee" purposes depends on the degree of independence between Fulfillment and Job Done, as defined by the DOL factors laid out in 20 C.F.R. § 639.3(a)(2). If Defendants were entitled to judgment as a matter of law with respect to Fulfillment being a separate employer, then they would also be entitled to judgment as a matter of law with respect to Plaintiffs not constituting affected employees. That is, if Job Done was not a joint employer with Fulfillment, then Plaintiffs had a "separate employment relationship with another employer," and were indeed "paid by that other employer," and thus would not be affected employees under the Act. However, because this Court finds that several material facts pertaining to the joint-employer analysis remain in dispute, Defendants are not entitled to judgment as a matter of law regarding the affected-employee analysis.

E. Whether Plaintiffs Sustained Employment Loss under the WARN Act

"[T]he term 'employment loss' means" (1) "an employment termination, other than a discharge for cause, voluntary departure, or retirement," (2) "a layoff exceeding [six] months," or (3) "a reduction in hours of work of more than [fifty] percent during each month of any [six]-month period." 29 U.S.C. § 2101(a)(6). The DOL guidelines explain that, for purposes of defining "employment loss," "termination" means the "permanent cessation of the employment relationship" and "layoff" means the "temporary cessation of that relationship." Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16,047 (Apr. 20, 1989). Further, "it is actuality and not expectations or terminology which control whether an employment loss has occurred." See Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277, 1282 (8th Cir. 1996). In evaluating whether a cessation of an employment relationship was permanent or temporary, the

Seventh Circuit reasoned "if an objective observer would conclude that an employee suffered a permanent cessation of his employment relationship, a § 2101(a)(6)(A) 'employment termination' occurred. The employer's subsequent decision to offer the employee his old job cannot retroactively transform that once-permanent firing into a temporary layoff." Leeper v. Hamilton Cnty. Coal, LLC, 939 F.3d 866, 871 (7th Cir. 2019).

Defendants argue that because several Plaintiffs found new employment within six months of the employment termination with Job Done, they did not suffer an employment loss under the Act. It is undisputed that Fulfillment ended its agreement with Job Done for the supply of workers around December 30, 2022. At that time, Job Done employees received a message stating that their last day of employment with Job Done was December 30. Doc. No. 63-12 at 38; Doc. No. 65 at 65. While it may be true that Fulfillment or other entities hired some of the workers within six months, a reasonable juror could conclude that the message constituted a permanent cessation of a Job Done worker's employment relationship.

Separately, whether Fulfillment would bear liability for causing the alleged employment loss also depends on whether Fulfillment was a joint employer of Job Done employees. In other words, if Fulfillment were treated as a separate employer, its ending its relationship with Job Done cannot constitute a "mass layoff . . . by [Job Done workers'] employer." But as previously explained, because genuine disputes as to several material facts exist pertaining to that question, Defendants are not entitled to judgment as a matter of law on this ground.

F. Whether Job Done and Fulfillment Were Joint Employers under the Wage Act

Finally, Defendants argue that Plaintiffs' Wage Act claims must be dismissed because Fulfillment and Job Done were not joint employers under the Wage Act. Doc. No. 62 at 14. The parties agree that the four-factor test under Jinks v. Credico (USA), LLC, governs the

determination of whether the two entities are joint employers under the Wage Act. See Doc. No. 62 at 15; Doc. No. 64 at 17.

> [W]hether an entity is a joint employer under the wage laws . . . should be determined . . . by examining the totality of the circumstances of the parties' working relationship, guided by a useful framework of four factors: "whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records."

177 N.E.3d 509, 520 (Mass. 2021) (quoting Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998)). As noted above, a genuine dispute exists as to whether Fulfillment had the power to fire Job Done employees. It is undisputed that Job Done interviewed and hired its own employees. Doc. No. 65 at 41-42, 61. Also explained above, Fulfillment staff supervised and controlled the quality, pace, and schedule of the work that Job Done employees performed. As to the third factor, while Job Done initially determined the rate of payment (generally minimum wage), Fulfillment had to approve such rates and audited the hours worked by Job Done staff. Doc. No. 65 ¶ 40 (citing Doc. No. 63-10 at 30-31). A genuine dispute also exists whether Fulfillment maintained employment records of Job Done staff. Doc. No. 65 ¶ 40 (citing Doc. No. 63-10 at 30-31). While Defendants contest that Fulfillment maintained such records, they do not dispute that they kept records pertaining to Job Done employees' hours worked "for the purpose of auditing" Job Done's invoices. Doc. No. 63 ¶ 109. Accordingly, Defendants are not entitled to judgment as a matter of law on the Wage Act claim, and the Motion for Summary Judgment is DENIED as to this basis.

IV. CONCLUSION

For the foregoing reasons, the Defendants' Motion for Summary Judgment, Doc. No. 61, is DENIED. The parties, within fourteen days, shall file a joint status report with their joint or

separate positions proposing a trial date and whether they wish to be referred to the Court's mediation program before trial.

SO ORDERED.

/s/ Leo T. Sorokin
United States District Judge