IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISAAC HARRIS, et al. Plaintiffs, v. MEDICAL TRANSPORTATION MANAGEMENT, INC., Defendant.	)	Civil Action No. 1:17-cv-01371

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin ("Plaintiffs") hereby move this Court for partial summary judgment on the dispositive issue of whether Defendant Medical Transportation Management, Inc. qualifies as a joint employer of Plaintiffs and similarly situated non-emergency medical transportation ("NEMT") drivers who comprise the certified issue class and the FLSA collective. Plaintiffs relatedly move for partial summary judgment on whether MTM qualifies as a general contractor for the transportation service provider ("TSP") subcontractors that employ Plaintiffs and similarly situated drivers.

In support of the relief requested herein, Plaintiffs rely on the accompanying contemporaneously filed Memorandum of Points and Authorities, the exhibits thereto, and the record herein. Pursuant to the governing Discovery Confidentiality Order, Dkt. 68, Plaintiffs have filed their Memorandum and certain exhibits under seal, pending review by this Court.

Dated: July 15, 2022

Respectfully submitted,

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PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Civil Rule 7(h), Plaintiffs submit the following Statement of Undisputed Material Facts in support of Plaintiffs' Motion for Partial Summary Judgment:

1. Defendant Medical Transportation Management, Inc. ("MTM") has contracted with the District of Columbia Department of Health to provide non-emergency medical transportation ("NEMT") for Medicaid-eligible D.C. residents since 2007, when NEMT was first privatized. Ex. 62 to the Motion for Class Certification ("CC Ex."), at DHCF000058, 62 n.3, 64-65, ECF No. 130.

2. MTM also provides NEMT services for D.C. residents with private insurance through its contracts with private managed-care companies. *See, e.g.*, CC Ex. 3, at MTM 003598.

3. The NEMT services MTM provides to managed-care companies are identical to the NEMT services it provides to the D.C. government. CC Ex. 2, Moses II Dep. 60:12-61:7; CC Ex. 6, at 4.

4. Under the terms of its NEMT contract with the District of Columbia, MTM is required to subcontract with Transportation Service Providers ("TSPs"). Excerpts from 2014 DC Contract, at MTM 000005, attached as Ex. A.

5. MTM prohibits TSPs from subcontracting with other companies to provide the same services it provides to MTM without prior written approval from MTM. CC Ex. 5, at MTM 000916.

6. MTM requires TSPs to sign and abide by MTM's Medical Transportation Services Agreement ("Services Agreement"). CC Ex. 5, MTM 000913, 936; CC Ex. 55, at 1-2.

7. The Named Plaintiffs, and the other drivers who are members of the Plaintiff class and the collective, are drivers employed by TSPs to provide NEMT services to MTM clients to fulfill MTM's contractual obligation with the District of Columbia. *See, e.g.*, Decl. of Leo Franklin ¶ 2, CC Ex. 11; Decl. of Darnell Frye ¶¶ 1-2, CC Ex. 12; Decl. of Isaac Harris ¶ 2, CC Ex. 13.[1]

8. Plaintiffs provide the same NEMT services to MTM clients[2] covered by Medicaid and by managed-care policies. CC Ex. 7, Moses I Dep. 64:13-65:2.

MTM Sets Eligibility and Credentialing Requirements for Hiring New Drivers and TSPs

9. Pursuant to a common set of requirements, MTM determines whether drivers hired by the TSPs may provide service to the Medicaid recipients whom MTM serves. CC Ex. 5, at MTM 000917-21.

10. In general, "[n]o driver may perform transportation services for MTM until the driver has been fully credentialed and approved by MTM." CC Ex. 5, at MTM 000920.

11. MTM's basic eligibility requirements provide that:

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[1] Additional evidence describing the services provided by Plaintiffs can be found in ECF Doc. 134, at 4, 4 n.2, 5 n.3.

[2] Although MTM policy documents include varying definitions for "MTM clients," Plaintiffs use the phrase "MTM clients" to refer to individual persons who rely on MTM for NEMT services, including transportation to medical appointments.

11a. "All drivers for MTM trips must possess a current, valid driver's license appropriate for the services rendered and for the size vehicle [the] driver is operating." CC Ex. 5, at MTM 000917.

11b. MTM also requires NEMT drivers to be at least 21 years of age; a U.S. citizen or legal resident; able to read, write, and communicate effectively in English; and physically fit to assist MTM clients in and out of the vehicles. CC Ex. 5, at MTM 000917.

12. Through its "credentialing" requirements, MTM has ultimate approval authority over the NEMT drivers, TSPs, and vehicles utilized by TSPs. CC Ex. 5, at MTM 000920; CC Ex. 52, at MTM 003347-48; CC Ex. 69, at MTM 000829-31; CC Ex. 7, Moses I Dep. 74:17-20.

13. MTM directs the TSPs on how to ensure the drivers possess the required credentials before MTM reviews and verifies that the credentialing requirements have been met. CC Ex. 51, at MTM 000807; CC Ex. 69, at MTM 000824-32; CC Ex. 7, Moses I Dep. 75:18-77:13, 80:21-81:7; *see also* CC Ex. 53.

14. MTM specifically enumerates "a list of required credentials in order for the transportation provider and its drivers to become approved to contract with MTM." CC Ex. 52, at MTM 003347.

15. In addition to fulfilling its basic eligibility requirements, MTM requires Plaintiffs to satisfy 14 credentialing prerequisites before they may provide service to MTM's clients. Those prerequisites are: CPR certification; defensive driving training; driver's license(s); driving record; DDS training; first aid training; FBI background check; drug screen (annual and random); National Sex Offender search; fraud, waste and abuse training; HIPAA training; OIG check; Social Security card; and System for Award Management (SAM) (MTM internal check). CC Ex. 55, at 1-2; *see*

also CC Ex. 7, Moses I Dep. 82:11-88:13; CC Ex. 10, Harris Dep. 22:12-13; CC Ex. 8, Franklin Dep. 34:1-15, 35:1-4; 168:7-168:17.

16. MTM stores all documents uploaded through its credentialing website. CC Ex. 7, Moses I Dep. 77:3-13; CC Ex. 52, at MTM 003348.

17. MTM provides specific insurance-related credentialing requirements to TSPs that TSPs must follow to provide services for MTM. MTM's Corporate Procedure on Credentialing: Insurance Requirements, at MTM 003349-50, attached as Ex. B; CC Ex. 5, at MTM 000922-23.

18. MTM requires TSPs to obtain "all required insurance coverage from legitimate and reputable insurance companies," and to submit insurance-related documentation for MTM to "review and verify all documents for accuracy and compliance" with MTM's insurance requirements. Ex. B, at MTM 003349.

19. MTM requires TSPs to list MTM as an "Additional Insured" and "Certificate Holder" on the TSPs' auto liability and commercial general liability insurance policies. CC Ex. 5, at MTM 000922.

MTM Provides Comprehensive Training for Drivers and TSPs

20. MTM operates a "training department" at its headquarters to coordinate and conduct driver trainings. Additional Excerpts from the 30(b)(6) Deposition of Michelle Moses, December 20, 2018 ("Moses I Dep.") 178:10-179:5, attached as Ex. C.

21. As part of credentialing, MTM requires prospective drivers to successfully complete at least nine training modules conducted in person by MTM employees. CC Ex. 55, at 1; CC Ex. 7, Moses I Dep. 88:3-13, 170:3-171:5, 186:10-187:11.

22. MTM driver training (also called "DDS Training") covers a wide range of topics, including general safety measures; ethics and professionalism; customer service; sexual

harassment; assisting passengers with disabilities; cultural competency; and alcohol and drug abuse. CC Ex. 7, Moses I Dep. 85:17-22, 86:19-88:13, 168:22-169:22; *see also* CC Ex. 56 (MTM's Driver/Attendant Training Course: Ethics & Professionalism); CC Ex. 57 (MTM's Assisting Passengers with Disabilities and Emergency Situation Training Course); CC Ex. 58 (MTM's Sexual Harassment Training); CC Ex. 72 (MTM's Cultural Competency Training); CC Ex. 59 (example of certificate awarded to drivers for completing MTM training on nine training module topics).

23. MTM also requires current drivers to attend periodic re-trainings on these subjects to retain their credentials. Ex. C, Moses I Dep. 171:6-172:6.

24. Furthermore, MTM requires prospective drivers to take MTM's Fraud, Waste and Abuse training and pass an exam following the training. CC Ex. 7, Moses I Dep. at 85:8-16.

25. MTM requires current drivers to successfully complete training on Fraud, Waste and Abuse annually to retain their credentials. *See* Certificate of Completion, at MBI000310, attached as Ex. D.

26. MTM requires each driver to submit a certificate of completion to MTM to confirm completion of the required training modules. CC Ex. 5, at MTM 000919; CC Ex. 7, Moses I Dep. 83:15-20, 188:14-17; *see also* CC Ex. 59, at MTM 003359-60 (example of training certificates required for driver credentialing).

27. MTM directs TSPs to ensure that prospective and current NEMT drivers attend these required training sessions. Email re: Upcoming DDS Training Classes, at HolidayT000001, attached as Ex. E; Email to "Providers" on Upcoming DDS Training, at PittmanM000002, attached as Ex. F.

28. In addition, MTM requires drivers to complete a Defensive Driving Training conducted by MTM employees or third-party trainers. CC Ex. 7, Moses I Dep. 83:6-84:5.

29. To become an MTM subcontractor, TSP employees also must attend training sessions conducted by MTM employees at MTM's offices on a variety of subjects. Ex. C, Moses I Dep. 175:4-19, 181:17-19, 184:7-13, 185:2-186:1; *see also* MTM's Provider Trip Management & Electronic Trip Download Training, attached as Ex. G; MTM's Marketplace Training, attached as Ex. H; MTM's Transportation Provider Compliance Training, attached as Ex. I; MTM's Appeals Training, attached as Ex. J.

MTM Can Fire NEMT Drivers

30. MTM has the authority to bar drivers from providing NEMT services. CC Ex. 5, at MTM 000920; Procedure on Transportation Provider Terminations, at MTM 003334-35, attached as Ex. K.

31. MTM may bar drivers from providing service to its clients based on a non-exhaustive list of reasons, that include: "safety reasons; or where disqualification of a driver or attendant is requested by an MTM client." CC Ex. 5, at MTM 000920.

32. MTM also has the power to discipline and terminate drivers for refusing to submit to drug testing or testing positive for drug or alcohol use. CC Ex. 5, at MTM 000919-20.

33. In addition to the specified reasons for barring drivers from providing service to its clients, MTM may remove drivers "for other reasons of good cause within MTM's sole discretion." CC Ex. 5, at MTM 000920.

34. The TSP Services Agreement provides that:

> MTM reserves the right to disapprove or suspend any driver or attendant for safety reasons; or where disqualification of a driver or attendant is requested by an MTM Client; or for other reasons of good cause within MTM's sole discretion. Transportation Provider acknowledges that the offenses listed herein are not an

> exclusive listing, but that there are other offenses and pertinent circumstances which can result in the disapproval of a driver or attendant.

CC Ex. 5, at MTM 000920.

MTM Can Fire and Discipline TSPs

35. MTM can suspend or terminate TSPs from the MTM network for any reason, including noncompliance with MTM policies. CC Ex. 5, at MTM 000926; CC Ex. 7, Moses I Dep. 132:14-22.

36. MTM specifically warns that use of an unauthorized NEMT driver or attendant can result in MTM's refusal to pay the TSP for the completed trip, assessment of liquidated damages, or even the TSP's termination. CC Ex. 51, at MTM 000807; CC Ex. 54, at MTM 001010.

37. MTM has sole discretion to assess liquidated damages against TSPs for failing to abide by MTM's performance standards. CC Ex. 54, at MTM 001010.

38. MTM imposes liquidated damages on at least one TSP per day. CC Ex. 7, Moses I Dep. 72:18-73:2.

39. MTM also has authority to place TSPs on performance improvement plans for failure to comply with any of MTM's policies. Corporate Policy on Performance Improvement Plan Process, at MTM 003328-29, attached as Ex. L.

40. MTM has the sole discretion to place the TSP on a performance improvement plan, charge liquidated damages, or terminate the TSP if it fails to submit to an MTM audit of its operations. CC Ex. 5, at MTM 000916.

MTM's Policies Impact NEMT Drivers' Terms of Employment

41. As detailed in its "Transportation Provider Handbook" and Services Agreement, MTM sets comprehensive protocols for NEMT drivers' day-to-day work. *See generally* CC Ex. 5; CC Ex. 69.

42. MTM requires that NEMT drivers "maintain an acceptable standard of dress, personal grooming, and behavior in order to present a neat, clean, and professional appearance." CC Ex. 5, at MTM 000934.

43. MTM also requires that NEMT drivers "wear authorized uniforms (pants and shirt required) worn in an approved manner including shirts worn tucked inside the pants with no other logos than those approved by MTM." CC Ex. 5, at MTM 000934; CC Ex. 7, Moses I Dep. 108:10-21.

44. MTM requires that TSPs provide the drivers with MTM-approved uniforms and employee photo identification cards. Ex. C, Moses I Dep. 111:8-13; CC Ex. 5, at MTM 000917.

45. MTM specifies the manner in which the drivers must behave, directing them to "drive in a professional, safe and courteous manner," and requiring them to complete a mandatory training on professionalism and customer service. CC Ex. 5, at MTM 000917; *see also* CC Ex. 56.

46. MTM specifically mandates that TSPs equip NEMT vehicles with seatbelt extenders, and requires NEMT drivers to enforce seatbelt use, including "refus[ing] to continue travel if passengers are non-compliant." CC Ex. 5, at MTM 000917.

47. For MTM clients using wheelchairs and mobility devices, MTM requires drivers to ensure that the clients and their devices are "properly secured" before driving. CC Ex. 5, at MTM 000917.

48. MTM prohibits NEMT drivers from engaging in certain conduct while performing MTM services, including using drugs or alcohol; leaving MTM clients unattended; entering MTM clients' homes without prior authorization from MTM; smoking, eating, or drinking in their vehicles; smoking, eating, or drinking in the presence of MTM clients; and allowing MTM clients to smoke in TSP vehicles. CC Ex. 5, at MTM 000917-18, 934.

49. MTM also prohibits NEMT drivers from using vehicles for personal reasons without prior authorization from MTM, including transporting personal friends and family or using the vehicle for personal stops while transporting MTM clients. CC Ex. 5, at MTM 000917.

50. To comply with MTM's policies, TSPs and drivers are required to "allow a minimum of 5 minutes wait time" for MTM clients who are late for their pick-ups, ensure that trips do not take over an hour (except for long-distance trips), and to complete all pre-scheduled trips "even under the circumstance when the medical service extends past the approximate expected completion time." CC Ex. 69, at MTM 000845.

MTM Routinely Monitors TSPs' and Drivers' On-the-Job Performance

51. To ensure that NEMT drivers and TSPs are complying with MTM's protocols, MTM conducts unannounced "inspections, auditing, monitoring, and duplication of records" related to MTM trips. CC Ex. 5, at 000916.

52. MTM monitors NEMT drivers by sending Field Liaisons to observe drivers' on-the-job performance and report back to MTM directly. CC Ex. 51, at MTM 00808; CC Ex. 7, Moses I Dep. 122:3-123:8.

53. MTM's Field Liaisons specifically "monitor[] the drivers [sic] pick up and drop off activity, including timeliness [and] passenger assistance," and assess whether the driver's attire, ID, and trip documentation are proper. CC Ex. 60, at MTM 000809.

54. MTM Field Liaisons also conduct "random spot checks" of NEMT drivers for appropriate photo IDs and TSP uniforms and observe driver behavior, including spotting erratic driving and other violations of MTM's conduct policies. CC Ex. 7, Moses I Dep. 112:7-12, 113:11-114:19, 115:14-117:9.

55. MTM provides sole discretion to its Field Liaisons to make determinations about whether drivers' conduct comports with MTM's policies. CC Ex. 7, Moses I Dep. 115:22-117:9.

56. MTM installs surveillance devices in "selected vehicles" to monitor driver performance, resolve complaints, and verify incident/accident reports. CC Ex. 61, at MTM 000881.

57. MTM installs surveillance devices in approximately half of the vehicles used for serving MTM clients. Ex. C, Moses I Dep. 140:17-141:7.

58. MTM has exclusive access to the surveillance data and can access it at its discretion. CC Ex. 61, at MTM 000881; Ex. C, Moses I Dep. 139:3-8, 140:1-16, 145:11-146:2.

59. In addition to requiring pre-employment drug screening and prohibiting drivers from using drugs or alcohol while working for MTM, MTM also requires TSPs to conduct "random drug testing of all Drivers and Attendants on a quarterly basis . . . with copies of test results provided to MTM." CC Ex. 5, at MTM 000932.

60. MTM requires TSPs to "immediately remove" drivers where MTM or the TSP has "reasonable suspicion" that the driver has violated MTM's substance abuse policies and requires the driver to submit to alcohol/drug screening at the TSP's expense. CC Ex. 5, at MTM 000919.

MTM Closely Regulates TSP Vehicles

61. MTM closely regulates the vehicles used to transport MTM clients. Ex. C, Moses I Dep. 118:20-120:3; CC Ex. 69, at MTM 000829-32; CC Ex. 5, at MTM 000918-19, MTM000933-34; Corporate Procedure on Transportation Provider Vehicle Inspections, at MTM 003336, attached as Ex. M; CC Ex. 51, at MTM 000807-808.

62. All vehicles must meet MTM's detailed specifications outlined in the Services Agreement. CC Ex. 5, at MTM 000918-19, 934.

63. TSPs must comply with MTM's credentialing process before MTM approves the vehicle for NEMT transportation. CC Ex. 69, at MTM 000829-32.

64. In general, MTM requires that vehicles be "clean, mechanically safe, and road-worthy," without "excessive vibration or noise that creates passenger discomfort." CC Ex. 5, at MTM 0000934.

65. TSPs must also ensure that all vehicles have four doors and raised roofs or lower floors if used to transport MTM clients using wheelchairs. CC Ex. 5, at MTM 0000934.

66. MTM prohibits TSPs from operating vehicles that violate MTM's vehicle policies, such as vehicles "must *not* have . . . [e]xcessive grime, rust, chipped paint or major dents" or "[d]irt, oil, grease or litter." CC Ex. 5, at MTM 0000919 (emphasis in original); *see* CC Ex. 7, Moses I Dep. 120:4-21.

67. MTM requires all vehicles to "have interior signage displaying the name of Medical Transportation Management, Inc. (or "MTM"), [and] MTM's address and phone number." CC Ex. 5, at MTM 000933.

68. Moreover, MTM requires TSPs and drivers to have "information pertaining to MTM . . . available in writing in the vehicle for distribution to passengers upon request." CC Ex. 5, at MTM 000933.

69. On the vehicle's interior, MTM also requires that TSPs and drivers prominently display the TSP's name and phone number; the NEMT driver's photo ID "on the side wall in clear view of passengers at all times"; and signage to inform passengers of the "No smoking, eating or drinking" policy, seatbelt requirement, and prohibition on audio devices. CC Ex. 5, at MTM 000917, 931, 933.

70. On the vehicle's exterior, MTM requires vehicles to be "clearly marked" with the TSP's name, vehicle number, WMATC certificate, MTM's toll free telephone number, and a "How's My Driving, call 1-800" notice on the rear of the vehicle, which provides that any calls regarding driving complaints will go directly to MTM. CC Ex. 5, at MTM 000933; Ex. C, Moses I Dep. 118:20-119:5.

71. MTM also requires that a "Daily Pre-Trip Inspection" is performed, documented, and recorded to ensure that TSP vehicles comply with MTM's credentialing requirements. CC Ex. 5, at MTM 000934.

72. In addition, MTM performs annual vehicle inspections of all TSP vehicles used for MTM services to "ensure compliance with the MTM Transportation Provider Guidelines." Ex. M, at MTM 003336.

73. MTM deploys Field Monitors to conduct random or "special and/or impromptu" inspections of TSP vehicles. Ex. M, at MTM 003336.

74. MTM permits Field Monitors to exercise their own judgment to look for "infractions" using a vehicle inspection sheet provided by MTM to report problems back to MTM directly. CC Ex. 7, Moses I Dep. 120:14-122:2, 123:2-5; CC Ex. 60, at MTM 000809.

75. MTM also conducts "On-Site Visits" to TSP facilities to conduct vehicle inspections and "ensure compliance with the MTM Transportation Provider Guidelines." CC Ex. 51, at MTM 000807.

76. MTM employees affix an "MTM inspection sticker" to each vehicle that passes MTM's vehicle inspection. Ex. M, at MTM 003336; CC Ex. 51, at MTM 000808.

77. MTM can remove vehicles that do not meet its standards "from the provider's fleet and the web credentialing system," and prohibits TSPs from using the vehicles until the TSP corrects problems and passes another inspection. Ex. M, at MTM 003336.

78. MTM also reserves the right to withhold payment for a completed trip and to terminate TSPs for using unauthorized vehicles. CC Ex. 5, at MTM 000918; CC Ex. 54, at MTM 001010.

MTM Manages Reporting Systems for Complaints and Accidents Involving TSPs and NEMT Drivers

79. MTM maintains its own "mechanism and reporting system for all complaints" related to its NEMT services, including managing complaints made against TSPs and NEMT drivers. Corporate Policy on Complaints Management, at MTM 000865, attached as Ex. N; Ex. C, Moses I Dep. 70:21-72:6.

80. Similarly, MTM has developed a "process for handling, documenting and reporting information relating to accidents and incidents" involving MTM clients. Corporate Policy on Reporting and Handling of Accidents/Incidents, at MTM 000868, attached as Ex. O.

81. MTM also provides "an infrastructure" for appealing complaints, which is available to MTM clients, NEMT drivers, and TSPs. Corporate Policy on Management of Grievances and Appeals, at MTM 000871, attached as Ex. P.

82. MTM requires NEMT drivers to report accidents and incidents directly to MTM using MTM's accident/incident form. Ex. O, at MTM 000869; CC Ex. 57, at MTM 000418, 422-423.

83. MTM also specifically requires drivers to report incidents of sexual harassment directly to MTM. CC Ex. 58, at MTM 000706-707.

MTM Assigns Rides to TSPs and Enforces MTM's Trip Verification Policies

84. MTM operates approximately 15 call centers that coordinate trip requests from MTM clients in the Washington, D.C. area. Ex. C, Moses I Dep. 94:9-95:3, 96:2-12.

85. MTM's call centers assign trip requests to individual TSPs based on the TSP's availability, location, and trip rates. Ex. C, Moses I Dep. 96:2-19, 148:21-149:4; Additional Excerpts from the 30(b)(6) Deposition of Michelle Moses, March 14, 2019 ("Moses II Dep.") 90:5-91:12, 95:3-19, attached as Ex. Q.

86. If two TSPs have substantially similar availability and location, MTM will favor assigning the trip to the TSP with the lowest trip rate. CC Ex. 2, Moses II Dep. 97:16-98:2.

87. MTM stores information on which trips are assigned to each TSP in its internal systems. Ex. Q, Moses II Dep. 103:15-104:4.

88. MTM does not allow TSPs to communicate with MTM clients directly regarding arranging or authorizing trips. If an MTM client requests a trip from the TSP rather than MTM, MTM requires the TSP to tell the client to contact MTM instead. CC Ex. 69, at MTM 000843.

89. MTM communicates all trip assignments to TSPs via its Electronic Trip Download site, phone, and/or fax. CC Ex. 69, at MTM 000834.

90. After TSPs receive a trip assignment from MTM, MTM gives TSPs 48 hours to "turn back assignments they don't want." Ex. C, Moses I Dep. 151:11-152:15.

91. MTM provides TSPs with the tools to review the trips assigned to them and to create schedules and manifests for NEMT drivers based on the trips that MTM assigns. CC Ex. 69, at MTM 000833-842; Ex. C, Moses I Dep. 176:3-14.

92. MTM requires TSPs to provide NEMT drivers with a copy of "MTM's Daily Trip Log," which lists the dates and times of all scheduled rides, provides spaces for MTM clients to

sign off on completed trips, and requires the NEMT driver to affirm the veracity of the information they log. CC Ex. 69, at MTM 000841-842; Sample Daily Trip Log, at MTM 003478, attached as Ex. R.

93. MTM requires that NEMT drivers collect signatures from MTM clients to indicate that the trip was completed. CC Ex. 69, at MTM 000841.

94. To be paid for a trip, MTM requires the TSP to upload "signature images" from the MTM Daily Trip Log. CC Ex. 69, at MTM 000819, 841.

95. If a driver does not sign the MTM Daily Trip Log, fails to collect a signature from an MTM client, or does not list the date and time of the trip, MTM will deny the TSP's payment request. CC Ex. 69, at MTM 000841.

96. MTM also requires TSPs to retain copies of the MTM Daily Logs. CC Ex. 69, at MTM 000841.

MTM Sets Standard Pay Rates and TSP Compensation Policies

97. MTM sets standard pay rates for all NEMT trips. Ex. C, Moses I Dep. 66:17-67:12; CC Ex. 63, at MTM 000942.

98. MTM has ultimate control over whether to increase the amounts paid to TSPs for the service provided to its customers, based on criteria it alone sets. Ex. Q, Moses II Dep. 44:3-18.

99. MTM requires TSPs to agree that they "will look solely to MTM for payment for services rendered." CC Ex. 5, at MTM 000921.

100. MTM's trip assignments inform TSPs of the non-negotiable rate that will be paid for completing each trip. Ex. C, Moses I Dep. 155:19-156:10.

101. By completing a trip, the TSP "waives any claim for compensation in excess of the stated compensation on the trip." CC Ex. 69, at MTM 000843.

MTM's NEMT Contracts with the District of Columbia Require It to Hire and Manage TSP Subcontractors

102. Between 2013 and 2015, the total value of MTM's contracts with the District of Columbia was $85,225,477. CC Ex. 62, at DHCF000065.

103. MTM's contracts to provide NEMT services to D.C. Medicaid recipients require it to "[s]erve as the Gatekeeper . . . of transportation service requests." Ex. A, at MTM 000005; Excerpts from 2015 DC Contract, at MTM 000181, attached as Ex. S.

104. MTM's D.C. contracts specifically require MTM to "[n]egotiate and establish [agreements] with existing Transportation Providers . . . to establish a comprehensive transportation Network offering the number and variety of Transportation Providers to meet the needs of [D.C. Medicaid] Recipients." Ex. A, at MTM 000005; Ex. S, at MTM 000181.

105. The District of Columbia also requires MTM to submit a subcontracting plan with detailed description of its competition plan, efforts to locate subcontractors, solicitation responses, and recordkeeping practices. Ex. S, at MTM 000318-19.

106. MTM indicated in its subcontracting plan that it "understands that, by law, [MTM] must subcontract 35% of the total dollar volume of this contract to certified [Small Business Enterprise ("SBE") subcontractors] who "provide attendant and/or transportation services." Excerpts from MTM Subcontracting Plan, at OCP 000484, attached as Ex. T.

107. MTM's subcontracting plan also lists the names and contact information for TSPs it obtained as subcontractors. Ex. T, at OCP 000473-483.

108. MTM's D.C. contract specifically defines "broker" as:

> An entity or company which assists Medicaid clients obtain [sic] transportation service options by matching [Medicaid] Recipients with appropriate Transportation Providers through a central trip request and administrative facility. The entity also recruits and contracts with

> Transportation Providers, performs payment administration, gate keeping, trip assignments, quality assurance, administrative oversight and reporting.

Ex. A, at MTM 000008-09; Ex. S, at MTM 000185.

109. As a "broker," MTM's D.C. contracts require MTM to oversee TSPs and NEMT drivers by "[m]onitor[ing] the overall delivery of Transportation Services including Vehicle requirements, Driver[] and Attendant requirements[,] and performance to ensure consistent delivery of quality [NEMT] services." Ex. A, at MTM 000005; Ex. S, at MTM 000181 (internal citations omitted).

110. MTM's D.C. contracts provide that "the District may impose sanctions against the Contractor for poor performance or noncompliance with Contract terms by the Contractor or its subcontracted Transportation Providers." Ex. A, at MTM 00124; Ex. S, at MTM 000311.

Dated: July 15, 2022

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISAAC HARRIS, et al., Plaintiffs, v. MEDICAL TRANSPORTATION MANAGEMENT, INC., Defendant.	)	Civil Action No. 1:17-cv-01371 (APM)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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B	MTM's Corporate Procedure on Credentialing: Insurance Requirements	Filed Under Seal
C	Additional Excerpts from the 30(b)(6) Deposition of Michelle Moses, December 20, 2018	Filed Under Seal
D	Certificate of Completion for MTM's Fraud, Waste and Abuse Training	Attached
E	Email re: Upcoming DDS Training Classes	Attached
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INTRODUCTION

Plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin, on behalf of themselves and a certified class and collective of similarly situated drivers, seek summary judgment on the issues of whether defendant Medical Transportation Management (MTM) is a joint employer under the Fair Labor Standards Act (FLSA) and District of Columbia wage laws, and a general contractor under D.C. law. The undisputed material facts demonstrate that, as a matter of law, both issues should be answered in the affirmative. MTM is a joint employer of the drivers directly employed by the Transportation Service Providers (TSPs) because MTM shares, agrees to allocate responsibility for, and otherwise codetermines the essential terms of the drivers' employment. Further, under D.C. wage laws, MTM is a general contractor and the TSPs are its subcontractors.

BACKGROUND

A. MTM Contracts with the District of Columbia and with Managed-Care Companies to Provide Non-Emergency Medical Transportation in D.C. and the Surrounding Areas.

For over a decade, MTM has contracted with the District of Columbia to provide non-emergency medical transportation (NEMT) for Medicaid-eligible D.C. residents. Plaintiffs' Statement of Undisputed Facts (SOF) ¶ 1. MTM also has a series of contracts with private managed-care companies to perform NEMT services for privately insured D.C. residents. *Id.* ¶¶ 2–3.

To fulfill its contract with the District of Columbia, MTM subcontracts TSPs to supply vehicles and drivers that provide NEMT services for MTM clients. *Id.* ¶¶ 4, 8. The drivers are directly employed by the TSPs. *Id.* ¶ 7. To subcontract with MTM, MTM requires TSPs to agree to MTM's standard contract for medical transportation services: MTM's Medical Transportation Services Agreement ("Services Agreement"). *Id.* ¶ 6. The Services Agreement sets forth driver

requirements, vehicle requirements, and training and personnel policies that drivers and TSPs are required to follow while providing services to MTM clients. *See id.* ¶¶ 9-12, 21-22, 41-50, 51, 61-71. The Services Agreement does not distinguish between Medicaid trips and managed-care trips. *Id.* ¶¶ 2-3.

B. MTM Imposes Extensive Driver Credentialing and Training Requirements and Approves All Drivers Hired to Perform MTM Services.

Pursuant to the Services Agreement, MTM requires that "[n]o driver may perform transportation services for MTM until the driver has been fully credentialed and approved by MTM." *Id.* ¶ 10. MTM also requires TSP employees to undergo MTM-run training sessions before being approved to provide MTM services. *Id.* ¶ 29. In addition, MTM's corporate policy and procedures set forth a number of requirements that potential drivers must satisfy as part of MTM's "credentialing" process. MTM reviews and verifies drivers' compliance with its credentialing and documentation requirements before MTM approves the driver for work. *Id.* ¶¶ 12-16.

MTM enumerates "a list of required credentials in order for the transportation provider and its drivers to become approved to contract with MTM." *Id.* ¶ 14. MTM mandates basic eligibility requirements for NEMT drivers, including requiring drivers to have valid driver's licenses for the vehicles they operate. *Id.* ¶ 11a. MTM also requires that prospective drivers are at least 21 years old; a U.S. citizen or legal resident; able to read, write, and communicate effectively in English; and physically fit to assist MTM clients in and out of the vehicles. *Id.* ¶ 11b. In addition, drivers must fulfill MTM's fourteen credentialing prerequisites. *Id.* ¶ 15. These prerequisites include providing MTM with identification and licensure documents; submitting to criminal background checks, MTM's internal misconduct check, driving record review, and drug screenings; obtaining CPR and First Aid certifications; and completing MTM's mandatory driver trainings. *Id.* ¶¶ 11a,

15, 31, 32. Indeed, MTM trains TSP subcontractors on its "credentialing" process and its requirements to approve drivers to work. *Id.* ¶ 13.

Further, the Services Agreement identifies trainings that must be completed by the drivers to be eligible to drive for MTM. *Id.* ¶¶ 21-22, 25, 28. In particular, drivers are required to complete at least nine "training modules that MTM utilizes for the drivers" and that are "deliver[ed]" by an MTM employee. *Id.* ¶¶ 21-22. These training modules cover a wide range of topics, including general safety measures; ethics and professionalism; customer service; sexual harassment; assisting passengers with disabilities; alcohol and drug abuse; a defensive driving training; a CPR and first aid training; a fraud waste and abuse training; and an MTM driver certification training (sometimes referred to as the "DDS" training). *Id.* ¶¶ 22, 25, 28. The MTM driver certification training alone contains at least nine individual training components and is delivered "in person" by an MTM representative. *Id.* ¶¶ 21-22. MTM requires current drivers to attend periodic re-trainings to retain their approved credentialing status and directs TSPs to ensure that prospective and current NEMT drivers attend all required training sessions. *Id.* ¶¶ 23, 25, 27. Indeed, "[t]here is a training department at MTM" that provides training to drivers who provide services for MTM. *Id.* ¶ 20.

After completing MTM's mandatory trainings, prospective drivers must submit certificates of completion through MTM's credentialing website, along with all other required documentation to satisfy MTM's fourteen credentialing prerequisites. *Id.* ¶¶ 15, 16, 26. MTM reviews and stores all documentation uploaded through its credentialing website to ultimately determine whether drivers hired by TSPs are permitted to provide NEMT services for MTM clients. *Id.* ¶¶ 12, 16.

MTM ultimately decides whether a driver is approved for hire. *Id.* ¶¶ 9-10, 12. If a TSP engages an unapproved driver on an MTM trip, MTM has the right to assess liquidated damages

against the TSP, including by refusing payment for the trip and terminating its contract with the TSP. *Id.* ¶ 36.

C. MTM Closely Regulates and Imposes Requirements on Drivers' Vehicles.

MTM also imposes a credentialing process to ensure drivers' vehicles receive MTM's approval before being used to transport MTM clients. *Id.* ¶¶ 61-63. The Services Agreement requires all vehicles used for MTM services to comply with all MTM vehicle requirements and prohibits use of any vehicle prior to receiving MTM approval. *Id.* On the vehicle's interior, MTM requires interior signage displaying MTM's name, address, and phone number, and requires drivers to keep copies of MTM-related information on hand to distribute to MTM clients upon request. *Id.* ¶¶ 67-68. In addition, MTM requires that drivers prominently display the TSP's name and phone number; the NEMT driver's photo ID "on the side wall in clear view of passengers at all times"; and signage to inform passengers of the "No smoking, eating or drinking" policy, seatbelt requirement, and prohibition on audio devices. *Id.* ¶ 69. On the vehicle's exterior, MTM requires vehicles to be "clearly marked" with the TSP's name, vehicle number, Washington Metropolitan Area Transit Commission (WMATC) certificate, MTM's toll free telephone number, and a "How's My Driving, call 1-800" notice on the rear of the vehicle, which provides that any calls regarding driving complaints will go directly to MTM. *Id.* ¶ 70.

MTM further mandates that passenger cars "must have four (4) doors," that vehicles used to transport passengers in wheelchairs "must have raised roof[s] or lower floor[s]," and that "[v]ehicles must be clean, mechanically safe, and road-worthy," without "excessive vibration or noise that creates passenger discomfort." *Id.* ¶¶ 64-65. In addition, MTM requires that vehicles "must *not* have" certain problems, such as "[e]xcessive grime, rust, chipped paint or major dents" or "[d]irt, oil, grease or litter"; such characteristics, according to MTM, are "infractions." *Id.* ¶ 66.

MTM requires that all vehicles used to provide MTM services are thoroughly inspected to ensure they comply with MTM's detailed specifications and requirements. *Id.* ¶¶ 71-75. For example, the Services Agreement requires that "[d]aily pre-trip inspections" of the vehicles "are required, must be documented, and maintained." *Id.* ¶ 71. In addition, MTM conducts vehicle inspections annually "to ensure compliance with the MTM Transportation Provider Guidelines" and local and federal law. *Id.* ¶ 72. MTM also conducts "random monitoring" or "special and/or impromptu inspections in response to an identified compliance or quality issue." *Id.* ¶ 73. The MTM employees that conduct these inspections (interchangeably referred to as field monitors, inspectors, or liaisons) make their own judgments about whether the vehicles comply with MTM's requirements. *Id.* ¶ 74. In inspecting the vehicles, the MTM employees utilize a vehicle inspection sheet provided by MTM's corporate office and report the results of the inspection back to MTM's local and corporate offices. *Id.* In addition, an "MTM inspection sticker" is affixed to each vehicle that passes the vehicle inspection. *Id.* ¶ 76.

If MTM discovers that a vehicle does not meet MTM's standards, MTM has the authority to remove the vehicle "from the provider's fleet and [MTM's] web credentialing system." *Id.* ¶ 77. MTM also reserves the right to withhold payment for a completed trip and to terminate TSPs for using unauthorized vehicles. *Id.* ¶ 78.

D. MTM Imposes Requirements on Driver Conduct and Closely Monitors Driver Performance.

Pursuant to its Service Agreement with TSPs, MTM mandates and "enforces" nearly 30 requirements for drivers performing work for MTM clients. *Id.* ¶¶ 11, 15, 41-50. For example, MTM imposes requirements governing drivers' uniforms, employee identification cards, and safe vehicle operation. *Id.* ¶¶ 42-47. MTM requires drivers to "maintain an acceptable standard of dress, personal grooming, and behavior in order to present a neat, clean, and professional appearance."

Id. ¶ 42. MTM also requires drivers to "drive in a professional, safe and courteous manner," enforce seatbelt use, and secure MTM clients and mobility devices before driving. *Id.* ¶¶ 45-47. MTM specifically mandates that drivers wear "authorized uniforms … worn in an approved manner" and an employee photo identification card. *Id.* ¶¶ 43-44.

In addition, MTM mandates drivers to complete training on MTM's customer service standards. *Id.* ¶ 45. For example, MTM through its Transportation Provider Handbook, with which all TSPs agree to comply, MTM imposes "timeliness" requirements that places constraints on the drivers' work, including that drivers must wait for at least five minutes during pick-ups, that all trips must "not exceed one hour in vehicle riding time" except during long distance travel, and that all pre-scheduled round trips must be completed "even under the circumstance when the medical service extends past the approximate expected completion time." *Id.* ¶ 50.

Further, MTM prohibits drivers from engaging in a wide range of behavior while transporting MTM clients. *Id.* ¶¶ 48-49. For example, MTM prohibits drivers from using drugs or alcohol; leaving MTM clients unattended; entering MTM clients' homes without prior authorization from MTM; smoking, eating, or drinking in their vehicles; smoking, eating, or drinking in the presence of MTM clients; and allowing MTM clients to smoke in TSP vehicles. *Id.* ¶ 48. MTM also prohibits drivers from using NEMT vehicles for personal reasons without prior authorization from MTM. *Id.* ¶ 49. In addition, MTM regulates driver conduct by requiring pre-employment drug screening and prohibiting drivers from using drugs or alcohol while working for MTM. *Id.* ¶¶ 15, 48, 60. MTM further requires TSPs to conduct "random drug testing of all Drivers and Attendants on a quarterly basis . . . with copies of test results provided to MTM." *Id.* ¶ 59.

To ensure that its requirements for driver conduct are met, MTM representatives conduct driver and vehicle inspections and report any issues to MTM. *Id.* ¶¶ 52–57, 72-75. For example,

MTM's Field Liaisons conduct in-person inspections and on-site visits to evaluate driver performance and vehicle compliance with a checklist of standards set by MTM's corporate office. *Id.* ¶¶ 51-54, 73-75. MTM monitors driver appearance and conducts "random spot checks" to ensure that the drivers are complying with appearance and photo identification requirements. *Id.* ¶ 54. MTM also monitors drivers for erratic driving, drivers' behavior at pick-up and drop-off locations, drivers' timeliness, passenger assistance practices, trip documentation practices, and vehicle maintenance. *Id.* ¶¶ 53-54, 73-75. MTM further monitors drivers by installing surveillance devices in approximately half of vehicles used to transport MTM clients and retains exclusive access to the surveillance data. *Id.* ¶¶ 56-58. MTM field monitors record any driver conduct or vehicle issues on observation sheets provided by MTM and report these issues directly back to MTM's local and corporate offices. *Id.* ¶¶ 52, 74.

Moreover, MTM oversees driver performance and conduct by maintaining reporting mechanisms for complaints from customers or fellow drivers. MTM requires drivers to report accidents, incidents, and sexual harassment issues directly to MTM using MTM's reporting processes. *Id.* ¶¶ 79-83. As such, MTM maintains its own "mechanism and reporting system," for complaints against drivers and TSPs, and provides "an infrastructure" for MTM clients, drivers, and TSPs to appeal MTM's complaint resolution decisions. *Id.* ¶¶ 79, 81. Similarly, upon receiving reports from NEMT drivers and TSPs, MTM processes all accident and incident reports involving MTM clients. *Id.* ¶ 80.

E. MTM Retains Authority to Remove Drivers from Providing Services to MTM Clients and Terminate TSP Contracts.

MTM has authority to bar drivers and TSPs from providing services to MTM clients, and specifically reserves the right to impose liquidated damages against TSPs for violations of MTM policies. MTM's Services Agreement provides that MTM may remove drivers from providing

service to MTM clients for a variety of reasons, including for reasons within MTM's "sole discretion":

> MTM reserves the right to disapprove or suspend any driver or attendant for safety reasons; or where disqualification of a driver or attendant is requested by an MTM Client; or for other reasons of good cause within MTM's sole discretion. Transportation Provider acknowledges that the offenses listed herein are not an exclusive listing, but that there are other offenses and pertinent circumstances which can result in the disapproval of a driver or attendant.

Id. ¶ 34. In addition, MTM requires TSPs to "immediately remove" drivers where MTM or the TSP has "reasonable suspicion" that the driver has violated MTM's substance abuse policies. *Id.* ¶ 60. MTM also has the power to terminate drivers for refusing to submit to drug testing or testing positive for prohibited substances. *Id.* ¶ 32.

Further, MTM can suspend or terminate TSPs from the MTM network for any reason, including noncompliance with MTM policies or failure to submit to an MTM audit of TSP operations. *Id.* ¶¶ 35, 40. MTM specifically warns that use of an unauthorized NEMT driver or attendant can result in the TSP's termination. *Id.* ¶ 36. MTM can take other disciplinary measures against TSPs short of termination. For example, MTM can place TSPs on performance improvement plans or assessing liquidated damages for violations of MTM's policies and regulations. *Id.* ¶¶ 39-40.

F. MTM Payment Policies Require TSP Compliance with MTM's Trip Verification Procedures.

MTM also controls the process of assigning trips to TSPs and requires TSPs to comply with MTM's trip verification procedures as conditions of payment for completed trips. *Id.* ¶¶ 94-96. MTM provides TSPs with a manifest containing trips that are then assigned among the drivers. *Id.* ¶ 89, 91, 92. TSPs are not permitted to communicate directly with MTM clients in arranging or authorizing trips; if an MTM client requests a trip from the TSP, MTM requires the TSP to inform the client to contact MTM instead. *Id.* ¶ 88. MTM stores data on which trips are assigned

to each TSP. *Id.* ¶87. MTM also provides online tools that allow TSPs to create schedules for NEMT drivers based on assigned trips. *Id.* ¶ 91.

MTM pays TSPs only for completed trips that fully comply with MTM's trip verification procedures. *Id.* ¶¶ 92-95. MTM requires TSPs to provide NEMT drivers with a copy of "MTM's Daily Trip Log," which lists the dates and times of all scheduled rides, provides spaces for MTM clients to sign off on completed trips, and requires the NEMT driver to affirm the veracity of their logged information. *Id.* ¶ 92. To verify TSPs' claims for payment on completed trips, MTM requires TSPs to upload "signature images" from the MTM Daily Trip Log to MTM's website. *Id.* ¶ 94. If a driver does not sign the MTM Daily Trip Log, fails to collect a signature from an MTM client, or does not list the date and time of the trip, MTM will deny the TSP's payment request. *Id.* ¶ 95.

Although MTM does not set individual drivers' wages, MTM sets standard pay rates for all NEMT trips and retains full discretion over whether to increase the amounts paid to TSPs for NEMT subcontract services. *Id.* ¶¶ 97-98. Each of MTM's trip assignments inform TSPs of the non-negotiable rate that will be paid for completing the trip. *Id.* ¶ 100. MTM's policies make clear that by completing a trip, the TSP "waives any claim for compensation in excess of the stated compensation on the trip." *Id.* ¶ 101. MTM's policies also require TSPs to agree that they "will look solely to MTM for payment for services rendered." *Id.* ¶ 99.

LEGAL STANDARD

A moving party is entitled to summary judgment on a claim "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). An issue of material fact is genuine if "the evidence is such that a reasonable jury could return a verdict

for the nonmoving party." *Thompson v. Dist. of Columbia*, 832 F.3d 339, 344 (D.C. Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

ARGUMENT

I. MTM and the TSPs Jointly Employed the Drivers.

A. The FLSA and D.C. Wage Laws Define Employer in the Broadest Possible Terms.

The FLSA broadly defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), and "employ" as "to suffer or permit to work," 29 U.S.C. 203(g). As early as 1945, the Supreme Court explained that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). The FLSA's broad definitions extend the Act's coverage beyond the scope of the common law to protect "many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947)); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (observing that the FLSA's "striking breadth . . . stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles"). The FLSA uses expansive definitions because it serves a "remedial purpose." *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1093 (D.C. Cir. 2015); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 10 (D.C. Cir. 2001). Thus, the Supreme Court has directed that the FLSA "must not be interpreted or applied in a narrow, grudging manner." *Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 597 (1944).

The FLSA's broad definitions are derived from child labor statutes, *Rutherford*, 331 U.S. at 728, that intentionally expanded the legal definition of employer to cover businesses seeking to

avoid liability for illegal child labor by using intermediaries. *See* Laurence E. Norton, II, *Analyzing a Company's "Joint Employer" Liability for Overtime Pay under Federal and State Wage and Hour Laws*, 88 Pa. Bar Ass'n Q. 10, 13 (2017). The joint employment doctrine discourages such efforts by establishing that workers can simultaneously be employed by more than one entity, and holding that all such entities are jointly and severally liable for FLSA violations. Wage laws in the District of Columbia are interpreted in the same way. *See* D.C. Code § 32-1002(1) ("The term 'employ' includes to suffer or permit to work."); *see also Wilson v. Hunam Inn, Inc.*, 126 F. Supp. 3d 1, 5–6 (D.D.C. 2015) (stating that courts construe the FLSA and the D.C. Minimum Wage Act "coterminously for purposes of determining who is liable as an employer"); *Thompson v. Linda & A., Inc.*, 779 F. Supp. 2d 139, 146 (D.D.C. 2011) ("[D]eterminations of employer or employee status under the FLSA apply equally under the District of Columbia wage laws.").

B. Courts Consider a Variety of Factors to Determine When Two or More Entities Are Joint Employers.

The D.C. Circuit has yet to articulate a test for determining joint employment under the FLSA or the D.C. wage laws. *Harris v. Med. Transp. Mgmt., Inc.*, 300 F. Supp. 3d 234, 240–41 (D.D.C. 2018). Other circuits use a variety of multifactor, totality-of-the-circumstances tests to determine whether an entity is a joint employer. Different circuits emphasize different factors, but all of them acknowledge that "it is the totality of the circumstances, and not any one factor" that determines employer status. *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 676 (1st Cir. 1998); *see also Hall v. DIRECTV, LLC*, 846 F.3d 757, 770 (4th Cir. 2017) ("[T]he absence of a single factor—or even a majority of factors—is not determinative of whether joint employment does or does not exist." (internal citation omitted)). Courts are also careful to explain that the factors they invoke are "not exhaustive." *In re Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d 462, 469-70 (3d Cir. 2012). Rather, they are meant to "provide a useful framework for

analysis in this case, but they are not etched in stone and will not be blindly applied." *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). A court is generally "free to consider any other factors it deems relevant." *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71-72 (2d Cir. 2003).

In *Bonnette*, the Ninth Circuit held that workers who performed domestic tasks for public assistance recipients with disabilities were jointly employed by the recipients and the counties that administered the program. The *Bonnette* court listed four factors relevant to its joint employment analysis: "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." 704 F.2d at 1470. In *Baystate Alternative Staffing*, the First Circuit held that the *Bonnette* factors "provide a useful framework" to determine whether a staffing agency jointly employed workers with the client companies for whom the agency provided labor. 163 F.3d at 675. Likewise, the Fifth Circuit used the *Bonnette* factors in *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014), to determine whether an employee of a franchisee was jointly employed by the franchisor.

Other circuits analyze joint employment using factors beyond the four factors set forth in *Bonnette*. For example, the Third Circuit, while emphasizing that its factors do not constitute an exhaustive list, crafted "the *Enterprise* test" for joint employment by adding additional considerations to the factors set forth in *Bonnette*. *In re Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d at 469–70. In *Zheng*, the Second Circuit held that the district court erred by relying exclusively on the four *Bonnette* factors to assess joint employment, explaining that those four factors can be *sufficient* to establish employer status but a positive finding on those factors is not *necessary* to establish joint employment. 355 F.3d at 69. Rather, the Second Circuit noted that

other factors pertinent to the joint employment inquiry include (1) whether a putative joint employer's premises and equipment are used by the workers; (2) whether the immediate employers had a business that could shift as a unit between joint employers; (3) the extent to which the work is an integral part of the putative joint employer's business; (4) whether responsibility under the contracts between the direct employer and the putative joint employer could pass from one subcontractor to another without material changes; (5) the degree to which the putative joint employer could supervise the work; and (6) whether the workers exclusively or predominantly worked for the putative joint employer. *Id.* at 72–75.

The Eleventh Circuit uses an eight-factor test that largely overlaps with the *Bonnette* and *Zheng* factors. *See Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1176–77 (11th Cir. 2012). And, notably, the Ninth Circuit itself has expanded its joint-employer test beyond the four *Bonnette* factors. In *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997), the court concluded that a grower was a joint employer of farmworkers directly employed by a farm labor contractor, based on its analysis of five regulatory factors that closely track those from *Bonnette*, and eight additional factors that largely overlap with those used in *Zheng*.

C. Some Courts Combine the Joint-Employer Factors with Factors Used to Determine Whether a Worker Is an Employee or Independent Contractor.

In the proliferation of multi-factor tests for determining joint employment, courts have sometimes drawn on factors from independent-contractor classification cases. For example, in *Torres-Lopez*, 111 F.3d at 640, the Ninth Circuit adopted several factors from *Real v. Driscoll Strawberry Associates*, 603 F.2d 748 (9th Cir. 1979), including whether the service rendered requires a special skill and whether the worker has an opportunity for profit or loss—factors which are typically used to determine whether a worker is an employee rather than an independent contractor. In *Morrison*, 253 F.3d at 11, the D.C. Circuit identified nine factors relevant to the

issue of whether a worker is an employee or an independent contractor. The first four track *Bonnette*: whether the alleged employer had the power to hire and fire, supervised and controlled work schedules or conditions of employment, determined the rate and method of payment, and maintained employment records. But the remaining five are derived from the independent contractor analysis in *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988): "(1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business." Although *Morrison* did not address joint employment, other courts have relied on the nine *Morrison* factors to assess whether an entity is a joint employer.

Some courts, however, have explained that certain factors used to determine whether a worker is an employee or independent contractor are not relevant to the joint-employer inquiry. For example, in *Zheng*, 355 F.3d at 67-68, the Second Circuit rejected the use of two factors—the workers' investment in the business, and the degree of skill and independent initiative required of the workers—because those factors "have been used primarily to distinguish independent contractors from employees . . . [and] they do not bear directly on whether workers who are already employed by a primary employer are also employed by a second employer." The Eleventh Circuit drew a similar conclusion in *Layton*, rejecting the use of three factors—opportunity for profit and loss, permanency and exclusivity of employment, and degree of skill required to perform the job—that it found "only distinguished whether one was an employee or an independent contractor." 686 F.3d at 1176–78 (citing *Aimable v. Long & Scott Farms*, 20 F.3d 434, 443–44 (11th Cir. 1994)).

D. The Fourth Circuit's Decision in Salinas v. Commercial Interiors Provides the Most Useful Framework for Assessing Joint Employment.

In *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125 (4th Cir. 2017), the court held that a general contractor jointly employed the plaintiffs, drywall installers who were directly employed by a subcontractor. The court explained that, for purposes of the FLSA and analogous state law, "joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment and (2) the two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor." *Id.* at 129–30. The Fourth Circuit's decision in *Salinas* synthesizes existing case law regarding both the joint employment doctrine and the issue of whether a worker is an independent contractor, and it provides a clear two-step framework to address both issues. Here, the only issue is whether MTM is a joint employer of the drivers because it is undisputed that the drivers are directly employed by the TSPs and the drivers are not independent contractors. SOF ¶ 7.

In setting forth its two-step framework, the *Salinas* court observed that despite the long-standing recognition of the joint employment doctrine, the difficulty of developing a coherent test for joint employment has "spawned numerous multifactor balancing tests, none of which has achieved consensus support." *Id.* at 135. The court explained that by "focusing on the relationship between a worker and a putative joint employer . . . *Bonnette* and its progeny do not squarely address the 'joint' element of the 'joint employer' doctrine." As these tests ignore the putative joint employers' combined influence over the terms and conditions of the workers' employment. *Id.* at 137-38. Further, the focus of the *Bonnette* factors and related tests on whether the worker is dependent on the putative joint employer as a matter of economic reality "reflects a failure to distinguish the joint employment inquiry from the separate, employee-independent contractor

inquiry." *Id.* "Although economic dependency is the prism through which courts should distinguish employees from independent contractors, . . . it does not capture key ways in which putative joint employers may be 'not completely disassociated' with respect to establishing the terms and conditions of a worker's employment—the relevant question in determining whether entities constitute joint employers." *Id.* at 139. Thus, the Fourth Circuit concluded that "district courts should not follow *Bonnette* and its progeny in determining whether two or more persons or entities constitute joint employers for purposes of the FLSA." *Id.* Rather, courts should first determine whether two entities should be treated as joint employers and then, if necessary, determine whether the workers are employees or independent contractors.

As to whether two entities constitute joint employers, the Fourth Circuit identified six non-exhaustive factors that speak to "the fundamental threshold question that must be resolved in every joint employment case—whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment." *Id.* at 142. Those factors are:

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
>
> (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
>
> (3) The degree of permanency and duration of the relationship between the putative joint employers;
>
> (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
>
> (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and

> (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

Id. at 141–42.

The *Salinas* test has at least two advantages over the tests used in other circuits. First, by focusing on whether putative joint employers share or codetermine the terms and conditions of a worker's employment, the *Salinas* test separates the question of whether entities are joint employers from the question of whether workers are employees or independent contractors. Second, the *Salinas* test better comports with Congress's intent that the FLSA utilizes the broadest possible definition of "employ." While the *Bonnette* factors are derived from common-law agency principles of control, Congress crafted the FLSA's "suffer or permit" standard for employment to "encompass a broader swath of workers than would constitute employees at common law." *Id.* at 137 (citing *Darden*, 503 U.S. at 326). Similarly, the *Salinas* test is appropriately more expansive than the joint employment tests used for other federal labor statutes, such as Title VII, by reflecting "Congress's intent to define employment more expansively in the FLSA than in other statutes." *Id.* at 143.

Indeed, several district courts outside the Fourth Circuit have endorsed the *Salinas* test for evaluating joint employment under the FLSA. For example, in *Merrill v. Pathway Leasing LLC*, the court concluded that the *Salinas* test should be used because it "properly determines whether more than one person or entity are putative joint employers based on the relationship between them, and the relationship between the putative employee and the putative employers is addressed as a distinct, separate inquiry, unlike the economic realities test advocated by Defendants, which combines these inquiries." No. 16-CV-02242, 2018 WL 2214471, at *6 (D. Colo. May 14, 2018)

(citing *Sanchez v. Simply Right, Inc.*, No. 15-CV-00974, 2017 WL 2222601, at *7 n.13 (D. Colo. May 22, 2017)). In *Ali v. Piron, LLC*, the court applied the *Salinas* joint employer test, finding that it was not inconsistent with Sixth Circuit precedent that utilized other factors because "different factors may be appropriate under different factual scenarios," and the *Salinas* framework was instructive for the circumstances of the case. No. 17-CV-11012, 2018 WL 1185271, at *5 (E.D. Mich. Mar. 7, 2018); *see also Sutton v. Cmty. Health Sys., Inc.*, No. 16-CV-01318, 2017 WL 3611757, at *4 (W.D. Tenn. Aug. 22, 2017) (citing *Salinas* favorably and applying substantially similar factors).

E. MTM and the TSPs Are Joint Employers Under the Salinas Test Because They Are Not Completely Disassociated With Respect to the Drivers' Employment.

The *Salinas* court emphasized that the six factors used to determine whether an entity is a joint employer "do not constitute an exhaustive list of all potentially relevant considerations," 848 F.3d at 142, and a plaintiff need not show that all, or even most, of the factors are present to establish joint employment. "[O]ne factor alone can serve as the basis for finding that two or more persons or entities are 'not completely disassociated' with respect to a worker's employment if the facts supporting that factor demonstrate that the person or entity has a substantial role in determining the essential terms and conditions of a worker's employment." *Id.* Here, the undisputed material facts demonstrate that MTM is a joint employer because MTM and the TSPs share or codetermine the essential terms of the drivers' employment. Indeed, five out of the six factors used by the *Salinas* court weigh in favor of finding that MTM jointly employs the drivers.

The first factor—shared power to direct, control, or supervise the drivers—weighs in favor of finding a joint employer relationship because MTM reserves and exercises the authority to direct the transportation services and shares this power with the TSPs. For example, MTM has a key role in training the drivers; sets detailed rules for how drivers perform their duties, including imposing

requirements on how the drivers dress, behave, and complete trips; prohibits certain conduct by the drivers; requires random drug testing of drivers on a quarterly basis; and dictates the procedures that drivers must follow to report accidents. SOF ¶¶ 20-28, 41-49, 59, 79-83. MTM also sets requirements on the timeliness of trips, *id.* ¶¶ 50, and closely regulates the vehicles used on trips. *Id.* ¶¶ 61-78. MTM supervises the drivers by sending its own inspectors to check on whether the drivers are complying with MTM's work rules, using an MTM inspection form that sets out a checklist of requirements; surveilling drivers through devices installed on vehicles; and by soliciting feedback from the public regarding the drivers' performance. *Id.* ¶¶ 51-58. MTM also supervises driver conduct and performance through MTM's mechanism and reporting system for complaints, accidents, and incidents involving MTM clients. *Id.* ¶¶ 80, 82.

Courts evaluating similar facts have found that they support a finding of joint employment under the first *Salinas* factor. For example, in *McCoy v. Transdev Services, Inc.*, No. DKC 19-2137, 2022 WL 951996 (D. Md. Mar. 30, 2022), the court held that the entity contracted by the Baltimore City Health Department to provide NEMT services (Transdev) was a joint employer of the drivers who were directly employed by a TSP (Davi). The court found that the first *Salinas* factor weighed in favor of finding a joint-employer relationship because the two entities shared control over training, and Transdev had a role in creating the trip manifests, conducted dispatch services, and required updates on accidents. *Id.* at *7. In *Young v. Act Fast Delivery of West Virginia, Inc.*, No. 16-CV-09788, 2018 WL 279996 (S.D. W. Va. Jan. 3, 2018), the court held that a pharmaceutical company (Omnicare) was a joint employer of the drivers who were directly employed by a delivery service (Act Fast) that delivered prescription drugs for Omnicare. The court found that the first *Salinas* factor indicated that Omnicare was a joint employer because Omnicare determined the routes and delivery times, forbade the use of certain vehicles, required

uniforms, and dictated standards for the drivers' appearance and behavior. *Id.* at *6. And in *Salinas*, the court found that the first factor favored a finding of joint employment because the general contractor provided supervision and direction to the workers by having its foremen check the progress of the work and by directing that deficient work be redone. 848 F.3d at 146; *see Lima v. MH & WH, LLC*, No. 14-CV-896, 2019 WL 2602142, at *21–23 (E.D.N.C. Mar. 8, 2019) (holding that a general contractor jointly employed plaintiff for purposes of the FLSA and finding that the first *Salinas* factor was satisfied where a superintendent for the general contractor supervised the plaintiff as a matter of practice).

The second factor—shared power to hire, fire, or modify the terms and conditions of the drivers' employment—also weighs in favor of finding that MTM and the TSPs are not completely disassociated. Although the drivers are hired and directly employed by the TSPs, it is undisputed that the drivers cannot be hired to serve MTM's clients without MTM's approval. SOF ¶¶ 9-10, 12-15. In addition, through its credentialing process, MTM sets minimum standards for drivers and ensures that new hires have met MTM's required characteristics. *Id.* ¶¶ 11, 14, 15. MTM also requires prospective drivers to complete specified MTM-led training and submit certain certifications and other required documentation. *Id.* ¶¶ 15, 21-28. Further, MTM has the "right to . . . suspend any driver" from performing work for MTM, for reasons that included those within its "sole discretion." *Id.* ¶ 34. Because some TSPs work only for MTM, the exercise of such power is the functional equivalent of firing the driver. Even for drivers whom a TSP could assign to non-MTM trips, removing a set of drivers eligible to perform NEMT services has the effect of modifying the drivers' terms and conditions of employment. The court in *Young* drew the same conclusion, because "upon receiving complaints from its clients regarding deliveries, Omnicare directly communicated to Act Fast its wishes to have those drivers reassigned or terminated." 2018

WL 279996, at *7. And in *Lima*, the court found the second *Salinas* factor weighed in favor of finding joint employment where the general contractor did not hire or fire the plaintiff but could prohibit a laborer from working on a particular project. 2019 WL 2602142, at *22. Similarly, with regard to firing, the *McCoy* court found the second *Salinas* factor satisfied because Transdev had the power to require the TSP to remove a driver from providing services under the contract, even though the driver might still have been able to perform other work for the TSP. 2022 WL 951996, at *8

The third factor—the degree of permanency and duration of the relationship between the putative joint employers—shows that MTM and the TSPs are not completely disassociated. Given that MTM is contractually required to subcontract with TSPs, and its restrictions on the terms of employment upon the TSPs, SOF ¶¶ 4, 5, TSPs often work exclusively or mostly for MTM and continue their contracts with MTM for many years. In *Salinas*, such facts satisfied the third factor where most of the subcontractor's work was for the general contractor. 848 F.3d at 147. And in *McCoy*, the fact that the relationship between Transdev and the TSP was not exclusive, and the TSP was an independent company with business beyond its Transdev contracts did not preclude a finding that the third *Salinas* factor was satisfied. 2022 WL 951996, at *8.

As to the fourth factor, there is no evidence that MTM has an ownership interest in the TSPs. No single factor is determinative, however, and no ownership interest was present in any of the four decisions finding joint employment under the *Salinas* standard in circumstances similar to those here. *See Salinas,* 848 F.3d at 147; *McCoy*, 2022 WL 951996, at *8; *Lima*, 2019 WL 2602142, at *22; *Young,* 2018 WL 279996, at *7.

The fifth factor—ownership or control over the drivers' place of work—also supports a finding of joint employment. Although the TSPs own the vehicles in which the drivers work, MTM

exercises control over those vehicles by mandating certain specifications for the vehicles and by requiring that the vehicles have particular signage and safety equipment and that they be maintained and operated in particular ways. SOF ¶¶ 61-70. MTM also regularly inspects the vehicles, utilizing an MTM inspection sheet, to ensure that they comply with MTM standards and local and federal law, and affixing an MTM sticker to the vehicles that pass MTM inspections. *Id.* ¶¶ 72-76. Further, the drivers and TSP employees are required to complete trainings held at MTM's facilities. *Id.* ¶¶ 21, 29. In both *McCoy* and *Young*, which applied the *Salinas* standard to drivers, the fact that the vehicles were not owned by the joint employer did not preclude a finding in the workers' favor. *McCoy*, 2022 WL 951996, at *8; *Young,* 2018 WL 279996, at *7.

The sixth factor factor—shared control over ordinary employer functions—also favors a finding that a joint-employer relationship exists. Although the TSPs handle payroll and provide the vehicles, MTM creates the manifests for drivers' trips and provides the paperwork used to record and verify the trips. *See McCoy*, 2022 WL 951996, at *8 ("Transdev was involved in providing equipment in the form of manifests"). Here, MTM requires drivers to complete daily trip logs of their trips, SOF ¶ 92, and provides online tools for TSPs to create schedules for drivers based on the assigned trips. *Id.* ¶ 91. Further, MTM requires TSPs to include MTM as an insured on their auto liability and commercial general liability policies. *Id.* ¶¶ 18-19.

Looking to the "circumstances of the whole activity," *Salinas*, 848 F.3d at 142, the undisputed evidence shows that MTM has a substantial role in setting the terms and conditions of the drivers' employment. Thus, MTM jointly employs the drivers and is jointly and severally liable for any violations of the FLSA or D.C. wage laws.

F. MTM Jointly Employs the Drivers Under the Multi-Factor Tests Derived from Bonnette.

As explained above (*supra* Argument, Sections I.B-D), courts have used a variety of multifactor, totality-of-the-circumstances tests to determine whether an entity is a joint employer. In the nearly four decades since *Bonnette*, federal courts of appeals (including the Ninth Circuit) have modified and expanded on the *Bonnette* factors, explaining that the joint-employer inquiry should assess whether "an entity has functional control over workers even in the absence of the formal control." *Zheng*, 355 F.3d at 72; *see also Torres-Lopez*, 111 F.3d at 640. Thus, for example, the Ninth Circuit explained that the relevant factors include not only those that closely track *Bonnette*, but also others such as (i) whether a putative joint employer's premises and equipment are used by the workers; (ii) the extent to which the work is an integral part of the putative joint employer's business; (iii) whether responsibility under the contracts between the direct employer and the putative joint employer could pass from one subcontractor to another without material changes; and (iv) whether the workers exclusively or predominantly worked for the putative joint employer. *Torres-Lopez*, 111 F.3d at 640; *Zheng*, 355 F.3d at 72.

Under the multi-factor tests derived from *Bonnette*, MTM is a joint employer of the drivers.

Hiring and Firing. In examining joint-employer status, courts applying the *Bonnette*-derived factors have examined whether the putative joint employer had "the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers." *Torres-Lopez*, 111 F.3d at 639-40; *see also Bonnette*, 704 F.2d at 1470. This factor weighs in favor of concluding that MTM is the joint employer of the plaintiffs.

As explained above (*supra* Background, Section E), MTM exercises authority over the hiring and firing of drivers who provide services to MTM clients. *See* SOF ¶¶ 31-35. As set forth in the Services Agreement that all TSPs are required to execute, MTM must approve all drivers before they can drive MTM clients, and MTM imposes and manages a detailed credentialing,

training, and certification process that all drivers must fulfill. *Id.* ¶¶ 10-17, 22. Under similar circumstances, courts have concluded that the defendant employer is a joint employer of the plaintiffs. For example, in *Schmidt v. DIRECTV, LLC*, the court found that the contract between the putative joint employer and the service provider supported that "Defendants played a role in hiring and firing Plaintiffs by specifying eligibility and certification requirements" because the putative joint employers "authorized [the service providers] to hire Plaintiffs only if they completed specific training, passed criminal background checks and drug screens, … submitted to [the service provider's] motor vehicle record review," and "could approve or terminate any Plaintiff within its sole discretion." No. 14-3000, 2017 WL 3575849, at *4 (D. Minn. Aug. 17, 2017). Similarly, in *Perez v. Lantern Light Corp.*, the court concluded that, based on similar facts, the putative joint employer "'unquestionably' plays a role in hiring and firing" because it "established and enforced the eligibility requirements" for the plaintiff-technicians. No. C12-1406, 2015 WL 3451268, at *5-6 (W.D. Wash. May 29, 2015)(explaining that the putative joint employer "required that potential hires pass prerequisite background checks" and specific certifications).

Further, courts have concluded that the putative joint employer has the power to fire under *Bonnette*-derived tests where, as here, MTM can bar workers from providing services to its client, including for reasons within its "sole discretion." *See* SOF ¶ 34; *Baystate*, 163 F.3d at 675-76 (concluding that the defendants' "power to refuse to send a worker back to a job site where he or she had performed unsatisfactorily" was indicative of joint-employer status). In *Davis v. Omnicare, Inc.*, a putative FLSA collective action on behalf of drivers, the putative joint employer's contract with the service provider gave the putative joint employer the right "to substitute or replace" any driver if the putative joint employer "determines that such substitution

or replacement is in the best interests of [the putative joint employer] or its subsidiaries or patient care." No. 18-CV-142, 2018 WL 6932118, at *7 (E.D. Ky. Dec. 12, 2018). The court explained that such facts plausibly alleged joint-employer status because the putative joint employers' "authority to issue an inviolable 'request' for a driver's 'replacement' gave Defendants—in economic reality—power to fire or, at minimum, economically sanction Plaintiff." *Id.*

Here, MTM can bar a driver from providing services to its clients for many reasons, including the complaint of an MTM client, for a violation of MTM's substance abuse policies, for any "other offenses and pertinent circumstances," and "reasons of good cause within MTM's sole discretion." *See* SOF ¶¶ 31-34. Like the putative joint employer's contractual right to substitute or replace a driver if it is "in the best interests" of that employer, *Davis*, 2018 WL 6932118, at *7, MTM's contractual right to "disapprove or suspend" any driver for "good cause within MTM's sole discretion" demonstrates that MTM is a joint employer of the drivers.

Supervision and control over work. The *Bonnette*-derived tests also examine "[t]he degree of supervision, direct or indirect, of the work" by the putative joint employer, *Torres-Lopez*, 111 F.3d at 639; *see also Bonnette*, 704 F.2d at 1470, as well as "[t]he nature and degree of control of the workers," *Torres-Lopez*, 111 F.3d at 639. The undisputed evidence weighs in favor of finding that MTM is a joint employer under this factor.

As explained above (*supra* Background, Sections B, D), MTM exercises substantial supervision and control over the drivers' work, through setting its mandatory driver standards, closely regulating driver work, and extensively monitoring driver conduct. In *Schmidt*, the court concluded that evidence showing that the defendant employer's guidelines "provided instructions" on how the plaintiff employees should complete their work, required certain attire and identification badges, and required periodic re-trainings supported a finding of joint-employer

status. 2017 WL 3575849, at *4. Similarly, in *Baystate*, the First Circuit concluded that evidence showing that the putative joint employer "instructed workers about appropriate dress and work habits[] and forbade workers from contacting directly a client company" weighed in favor of joint-employer status. 163 F.3d at 676. Here, MTM's contracts, guidelines, and policies require that the drivers conform to a specified "standard of dress, personal grooming, and behavior"; closely regulate the drivers' conduct for MTM clients, including through enforcement of seatbelt use, restrictions on their behavior, and timeliness requirements that govern driver pick-ups and trips; and ensure compliance with vehicle regulations—all of which are essential aspects of the drivers' work. *See* SOF ¶¶ 42-50, 61-71. MTM's imposition of these requirements through a standardized contract "reflects significant control … over the terms and conditions of employment." *Senne v. Kan. City Royals Baseball Corp.*, No. 14-CV-00608, 2022 WL 783941, at *45 (N.D. Cal. Mar. 15, 2022); *see also Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1069 (E.D. Wash. 2013) (explaining that the putative joint employer "provided the employment contracts that set the terms and conditions of Plaintiffs' employment and did not permit the ranchers or Plaintiffs to deviate from the terms of the standard contract").

Moreover, MTM exercises indirect control over the drivers' schedule and work hours by providing TSPs with manifests containing trip assignments for the drivers and requiring drivers to complete pre-scheduled trips even if the estimated time for the trip is exceeded. *See Baystate*, 163 F.3d at 676 (finding that, among other things, setting times at which workers must report to job sites evidenced the putative joint employer's control over work conditions); *see also Torres-Lopez*, 111 F.3d at 642 (finding that the putative joint employer "controlled the overall harvest schedule and the number of workers needed" by setting the dates for harvest and advising the contractor when to begin).

Further, courts have concluded that evidence showing that the defendant employer "promulgates work rules" requiring that employees "complete required training" and that the defendant employer provides such training "weighs in support of concluding that [the defendant] is a joint employer." *Talarico v. Pub. P'ships, LLC*, 837 F. App'x 81, 84–85 (3d Cir. 2020); *see also Schmidt*, 2017 WL 3575849, at *4 (finding that "there is evidence that Defendants played a role in supervising and controlling Plaintiffs" because, among other things, "Plaintiffs submitted evidence [the defendants] training was required when [the plaintiffs] began working, and that [the defendants] required a monthly training session"). Here, MTM establishes standards for Plaintiffs' work through mandatory trainings and periodic re-trainings provided by MTM representatives. *See* SOF ¶¶ 20-23.

Finally, MTM's extensive supervision of the plaintiff drivers' work is indicative of joint-employer status. Courts have explained that the putative joint employer's supervision over the plaintiffs' work can be direct or indirect. *See Baystate*, 163 F.3d at 676 (concluding that "the absence of direct, on-site supervision does not preclude a determination that plaintiffs are the employers of the temporary workers within the broad definition of the FLSA"). Here, it is undisputed that: MTM inspects driver behavior and vehicles through annual vehicle checks and random monitoring and special inspections, using an MTM inspection form that is reviewed by MTM; the monitoring of driver appearance and conduct; the surveillance of drivers through devices installed on vehicles used to transport MTM clients; and the oversight of driver performance and conduct through reporting mechanisms for complaints and other issues. *See* SOF ¶¶ 51-59, 72-76, 79-83. This level of supervision over the drivers' work is ample evidence of MTM's status as a joint employer. *See, e.g.*, *Torres-Lopez*, 111 F.3d at 642 (concluding that the putative joint employer "exercised a substantial degree of supervision over the work performed by

the farmworkers" where an official of the putative joint employer "had the right to inspect all the work performed by the farmworkers, both while it was being done and after" and had a daily presence on the fields); *Senne*, 2022 WL 783941, at *45 (stating that the monitoring and enforcement of tobacco and drug use policies along with other policies governing conduct supported a finding of joint-employer status); *Baystate*, 163 F.3d at 676 (finding that the defendant employer exercised "indirect supervisory oversight of the workers through [the defendant's] communications with client companies regarding unsatisfactory performance").

Pay Rates and Methods. The *Bonnette*-derived tests also examine whether the putative joint employer sets rates and methods of payment. *Torres-Lopez*, 111 F.3d at 639–40; *see also Bonnette*, 704 F.2d at 1470. This factor, too, supports a finding that MTM is a joint employer. In *Talarico v. Public Partnerships, LLC*, the Third Circuit concluded that the putative joint employer "sets [plaintiff workers'] conditions of employment in terms of compensation, benefits, and the rate and method of payment." 837 F. App'x at 85. The court explained that although the putative joint employer did not "select the specific wage rate" for the plaintiff workers, the putative joint employer "caps the maximum rate [the workers] may receive" and "requires [the workers] and the [participating program providers] to submit time sheets, which [the putative joint employer] then reviews before paying the [workers]." *Id.* Here, MTM sets non-negotiable rates for all driver trips, requires that drivers complete trip logs that MTM reviews before making payments to TSPs, and has the discretion to deny TSP payment requests. *See* SOF ¶¶ 92-96, 100.

Maintenance of Employment Records. The *Bonnette*-derived tests also examine the putative joint employer's maintenance of employer records. *See Bonnette*, 704 F.2d at 1470. Employment records are not limited to those "typically found in an employee personnel file, such as paperwork relating to intake, immigration status, and payroll" but also "sweeps more broadly,"

including "a worker's employment contract" and "documents related to the workers' job assignments and transfers and records of past infractions or discipline." *Senne*, 2022 WL 783941, at *49; *see also Ruiz*, 949 F. Supp. 2d at 1070 (concluding that "employment contracts, labor certifications, travel information, and records of the [workers'] transfers," and "a record of any complaints made by or about a particular [worker]" are employment records).

Here, the record demonstrates that MTM maintains the credentialing and onboarding records for each driver, which include drivers' licenses, training records, certification records, and background checks. SOF ¶ 16. In addition, MTM electronically stores records of trip assignments and the drivers' daily trip logs, which include records of the drivers' printed name and signature, the date of service, drivers' license numbers, vehicle ID, each trip number, details of trip, and the client's signature. *Id.* ¶¶ 87, 92-96. It also maintains records of the MTM's inspections of drivers and their vehicles, *id.* ¶¶ 52, 74, as well as records of all complaints, accidents, and incidents involving MTM clients. *Id.* ¶¶ 79-82. Such facts weigh in favor of MTM's joint-employer status. *See, e.g.*, *Perez*, 2015 WL 3451268, at *11-12 (finding the fourth *Bonnette* factor satisfied where the defendant employer kept records that "evaluat[ed] employee performance," compiled data "to 'discipline [workers] by refusing to issue work orders," and kept a database that identified worker information and "specific work orders"); *Senne*, 2022 WL 783941, at *49 n.21 (the defendant employer's maintenance of "records relating any drug or tobacco violations and records of any discipline or suspensions of the player," among other records, were indicative of joint-employer status); *see also Ruiz*, 949 F. Supp. 2d at 1070 (concluding that the defendant employer's maintenance of worker certifications, travel information, and disciplinary complaints weighed in favor of joint-employer status).

Use of MTM's premises and equipment. The Second and Ninth Circuits have explained that "whether the putative joint employer's premises and equipment were used for the work" is also pertinent to the joint-employer inquiry. *Zheng*, 355 F.3d at 68; *Torres-Lopez*, 111 F.3d at 640. For example, the Second Circuit stated, "whether a putative joint employer's premises and equipment are used by its putative joint employees [ ] is relevant because the shared use of premises and equipment may support the inference that a putative joint employer has functional control over the plaintiffs' work." *Zheng*, 355 F.3d at 72. Here, drivers are required to attend trainings at MTM's facilities and use MTM equipment in their daily work. For example, MTM requires that the drivers display MTM's toll-free telephone number and keep copies of MTM-related information in their vehicles to distribute to MTM clients upon request. SOF ¶¶ 67-70. In addition, MTM requires drivers to complete daily trip logs using MTM-provided forms. *Id.* ¶¶ 92-96. MTM also affixes inspection stickers to driver vehicles indicating that a vehicle has passed MTM's inspection process. *Id.* ¶ 76. MTM also provides online tools for TSPs to create driver schedules. *Id.* ¶ 91.

Integral part of MTM's work. The Second and Ninth Circuits also examine the extent to which the plaintiffs' work was integral to the putative joint employer's business. *Zheng*, 355 F.3d at 68; *Torres-Lopez*, 111 F.3d at 640. As the Ninth Circuit has explained, considering "whether 'the service rendered is an integral part of the alleged employer's business'" is "relevant because a worker who performs a routine task that is a normal and integral phase of the [putative joint employer's] production is likely to be dependent on the [putative joint employer's] overall production process." *Torres-Lopez*, 111 F.3d at 641; *accord Zheng*, 688 F.3d at 73 (considering whether the plaintiffs' work was "integral to" the defendant's "process of production").

Here, MTM is in the business of providing NEMT services, in which MTM ensures that its customers are driven to non-emergency medical appointments. *See* SOF ¶¶ 1–3. The plaintiff drivers, who provide the NEMT driving services for MTM clients, are thus an integral part of MTM's business. For example, in *Fernandez v. HR Parking Inc.*, 407 F. Supp. 3d 445 (S.D.N.Y. 2019), the plaintiffs in the FLSA collective action were parking valets who sued a parking company that provided valet services. *Id.* at 447. The court explained that the plaintiff parking valets "were obviously critical to the defendants [sic] business and there is no explanation as to how the day-to-day operations could run without them." *Id.* at 458. Similarly, in *Torres-Lopez*, the Ninth Circuit concluded that "it is beyond dispute" that the farmworkers' work in harvesting crops "was an integral part of [the putative joint employer's] business" because the putative joint employer "would not have been able to realize any of the economic benefits" from its business unless those crops were harvested. *Id.* at 644. Likewise, in *Perez*, the court explained that "[t]he availability" of the entertainment service provided by the putative joint employer (DirectTV) "depends on" work performed by the plaintiff employees that installed the equipment. 2015 WL 3451268, at *12. MTM would not be able to run its transportation business, let alone manage its day-to-day operations, without drivers to perform essential NEMT services for MTM's clients.

No material difference between contracts. "[W]hether responsibility under the contracts could pass from one subcontractor to another without material changes" is also relevant to the joint-employer inquiry. *Zheng*, 355 F.3d at 72; *accord Torres-Lopez*, 111 F.3d at 640. This factor weighs in favor of MTM's joint-employer status. Here, MTM uses a standardized contractual agreement with all TSPs that stipulate how TSPs must perform NEMT work. SOF ¶ 6. In such circumstances, courts have concluded that this factor weighs in favor of joint-employer status. *See, e.g.*, *Torres-Lopez*, 111 F.3d at 643 (stating that the putative joint employer utilized "standard"

contracts for its labor contractors that had "no 'material changes'"); *Johnson v. Serenity Transp., Inc.*, No. 15-CV-02004, 2017 WL 1365112, at *11 (N.D. Cal. Apr. 14, 2017) (noting that the contracts "were boilerplate" and that "the same rules applied" to all persons performing the work); *Morales-Garcia v. Higuera Farms, Inc.*, No. 18-CV-05118, 2021 WL 6774327, at *25 (C.D. Cal. Oct. 15, 2021) (explaining that the putative joint employer utilized form agreements with the grower contractors and that the grower contractors' "responsibilities under each Marketing Agreement was substantially the same").

Exclusivity or predominance of work. Courts also have examined "whether plaintiffs worked exclusively or predominantly for the [putative joint employer]" in assessing joint-employer status. *Zheng*, 355 F.3d at 72. The Second Circuit explained that in such situations, "the joint employer may *de facto* become responsible, among other things, for the amount workers are paid and for their schedules, which are traditional indicia of employment." *Id.* at 75. This factor "would weigh in favor of joint employment if a subcontractor worked solely for a single client but had the ability to seek out other clients at any time." *Id.* at 75 n.12. Here, MTM is contractually required to subcontract with the TSPs, which directly employ the drivers, thereby solidifying a permanent pipeline from which MTM has assumed the traditional indicia of employment. SOF ¶¶ 4, 5. Thus, this factor also supports that MTM is a joint employer. *See Grenawalt v. AT&T Mobility LLC*, 642 F. App'x 36, 40 (2d Cir. 2016) (concluding that "this factor strongly favors a finding of joint employment" where "plaintiffs worked almost entirely at AT&T stores"); *see also Dixon v. Zabka*, No. 11-CV-982, 2014 WL 6084351, at *8 (D. Conn. Nov. 13, 2014) (concluding that the fact that the independent dealers "worked exclusively selling vacuums exclusively for [the putative joint employer]" weighed in favor of joint-employer status).

II. MTM Is a General Contractor Liable for Violations of D.C. Wage Laws by Its Subcontractors.

To establish MTM's liability for violations of D.C. wage laws by the TSPs, the Court need not rely on the multi-factor tests for joint employment discussed above, because the D.C. Minimum Wage Revision Act, D.C. Code § 32-1012(c), and the D.C. Wage Payment and Collection Law, D.C. Code § 32-1303(5), provide that a "general contractor shall be jointly and severally liable to the subcontractor's employees for the subcontractor's violations" of the Acts. In denying MTM's motion to dismiss, the Court noted that because the terms "general contractor" and "subcontractor" are not defined by statute, they should be construed in accordance with their ordinary or natural meanings. Mem. Op. & Order 19, ECF No. 21 (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). The Court then concluded, based on dictionary definitions of the terms and the language of the contract between MTM and the District of Columbia, that MTM and the TSPs "comfortably fit within the definitions of general contractor and subcontractor, respectively." *Id.* Based on largely the same information—along with additional undisputed evidence of MTM's overall control of the NEMT system in D.C.—MTM is a general contractor and the TSPs are its subcontractors.

The D.C. Contracts provide that MTM will "[s]erve as the Gatekeeper . . . of transportation service requests" in the District and will "[n]egotiate and establish [agreements] with existing Transportation Providers . . . to establish a comprehensive transportation Network offering the number and variety of Transportation Providers to meet the needs of [Medicaid] Recipients." SOF ¶ 103. Moreover, the D.C. Contracts define the "broker" as:

> An entity or company which assists Medicaid clients obtain [sic] transportation service options by matching [Medicaid] Recipients with appropriate Transportation Providers through a central trip request and administrative facility. The entity also recruits and contracts with Transportation Providers, performs payment administration, gate keeping, trip assignments, quality assurance, administrative oversight and reporting.

Id. ¶ 108. In other words, these contracts require that MTM manage the NEMT service system in the District, including contracting with, managing, and supervising subcontractors that provide NEMT. In this capacity, MTM serves as the general contractor for the subcontractor TSPs through which service to MTM clients is provided.

Other terms of the D.C. Contracts confirm MTM's status as the general contractor for the services provided to the D.C. Medicaid recipients. For example, in the section providing for sanctions for noncompliance, the contract with the District of Columbia provides that "the District may impose sanctions against the Contractor for poor performance or noncompliance with Contract terms by the Contractor or its subcontracted Transportation Providers." *Id.* ¶ 110. The most recent contract between the District and MTM requires the submission of a subcontracting plan with all solicitation responses. *Id.* ¶ 105. MTM's fourteen-page Subcontracting Plan for this contract states, "Medical Transportation Management, Inc. (MTM) understands that, by law, we must subcontract 35% of the total dollar volume of this contract to certified" subcontractors who "provide attendant and/or transportation services." *Id.* ¶¶ 4, 106. Eleven pages of this subcontracting plan further list the names and contact information for transportation providers categorized as "subcontractors." *Id.* ¶ 107. Thus, MTM's contract with the District require it to "subcontract" NEMT services to TSPs, making the TSPs subcontractors. For these reasons, MTM qualifies as a "general contractor" as a matter of law under D.C. wage laws.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for partial summary judgment and hold that MTM is a joint employer and general contractor.

CERTIFICATE OF SERVICE

I do hereby certify that on July 15, 2022, a copy of this filing was served via the Court's CM/ECF filing system to all parties of record.

/s/ Harini Srinivasan
Harini Srinivasan