The NLRB Joint Employer Cases

An Attack on American Business

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Executive Summary

Your salary, purchasing power, and job are on the line as an independent federal agency takes the core American business concepts of franchising, temporary staffing, contracting, sourcing, and outsourcing to court.

Regular Americans stand to lose a lot as some franchises are regulated out of existence. Franchise businesses provide us food, tax preparation, day care, gasoline, and many other products and services. We all know someone who has worked in a temp agency. Businesses commonly outsource accounting and cleaning. Our cars are manufactured with parts sourced from smaller businesses. Our homes are constructed with subcontractors plumbing the bathrooms and wiring the fixtures. All are at risk.

National Labor Relations Board (NLRB) cases involving three different companies could upend these business practices by radically redefining what constitutes a joint-employment situation—when an employee is considered jointly employed by two businesses.

The joint-employer cases threaten to overturn decades of established precedent, upsetting the expectations of thousands of businesses that have relied on the current rules in developing their business models. These cases involve major American businesses—McDonald's, CNN, and Browning-Ferris Industries (BFI), to list but a few—and regular American citizens across the nation would be harmed.

NLRB General Counsel Richard Griffin and U.S. Department of Labor Wage and Hour Administrator David Weil are pushing a radical redefinition of "employee." Their goal is to give unions greater leverage against the businesses they seek to organize, by turning many American workers' employment by one company into simultaneous joint employment by two or more companies. The effect would be to add an additional, usually larger, employer to the collective bargaining table for negotiating wages, safety, and benefits.

Franchising, temporary staffing, contracting, sourcing, and outsourcing help companies focus on core competencies, improve productivity, and meet consumer tastes. Franchising, for example, helps by providing an established brand, marketing, and tested business methods. Notably, minority-owned franchise businesses succeed at a rate 46 percent higher than that for minority-owned non-franchise businesses.

Currently, businesses jointly employ a worker when their actual practices involve sharing substantial, direct, and immediate control over hiring, firing, discipline, supervision, and direction. General Counsel Griffin seeks to expand the definition of joint employer to include direct or indirect or unexercised potential control, as well as broadly defined "economic and industrial realities"—a fudge factor that would cover most businesses simply by claiming one party is essential to the collective bargaining process.

The NLRB's proposed change would decimate the "bright-line" clarity of the past 30 years of law in this area. Under the Griffin-Weil plan, workers employed by franchisees, staffing agencies, contractors, and suppliers would typically become joint employees of the franchisor, lead company, or manufacturer, but the assessment would be highly speculative and specific to the situation. And the NLRB is sure to find whatever outcome benefits unionization appropriate.

Furthermore, the NLRB is using sly means to impose this new definition of joint employment. Rather than issuing a rule, the Board will simply exploit its ability to decide the cases it prosecutes. Utilizing case law evades a number of congressional checks and balances to administrative rulemaking power.

Substantively, joint employment has major consequences.

First, joint employers can be sued more readily because they share liability for an employee's actions. More parties and deeper pockets to sue translate into more business costs and hampered job growth.

Second, joint employers are unionized more easily because both businesses must negotiate with a union. To unionize one business is effectively to unionize the other. Recent research shows that unionization means a 15 percent wage loss for workers and, for publicly traded companies, a reduction in overall valuation by as much as 14 percent.

Third, Griffin and Weil intend to give unions "economic weapons"—pickets, protests, and boycotts—that have been prohibited for use against the third parties that would be redefined as joint employers. Unions then could pressure third parties into labor peace agreements—which grant union recognition via signed cards rather than secret ballots, give unions access to business premises, and prevent employers from opposing union organizing—in exchange for unions not deploying their weapons.

Fourth, the NLRB's proposed joint-employer standard would force major employers to bring more services in-house, leaving small business with fewer opportunities.

The NLRB's efforts to expand the definition of joint employment seek to aid unions' organizing efforts by exploiting large companies' sensitivity to attacks upon their reputation. Weil's top-focused strategy, which the NLRB is pursuing, seeks to bring others in line by attacking industry leaders like McDonald's.

At stake is the survival of America's popular franchise system—with more than 770,000 businesses and 8.5 million employees—and temporary staffing with an average of 3.15 million workers per week.

Manufacturing in America would be made more difficult if contracting out were penalized. Contractor jobs could dwindle. These jobs are jeopardized by the NLRB's unpredictable and outcome-biased "economic and industrial realities" test, which would make people reluctant to use these prevalent American business practices.

As John Tamny shows in his new book, *Popular Economics*, Silicon Valley, one of the richest regions of America, contracts out practically all production. The only person who touches an iPhone before its user is the UPS man or the clerk in the Apple store. Limiting contracting out will reduce Americans' income and opportunity.

Congressional action is warranted. Litigation could take years to resolve, by which time several entire industries could be thrown into disarray. Congress needs to legislate relief to businesses and workers who would suffer as a result of the NLRB's aggressive, pro-union agenda.

Introduction

Many American businesses rely on several key business practices as part of their business models: franchising, temporary staffing, contracting, sourcing, and outsourcing. These business practices are under threat from the National Labor Relations Board (NLRB), an agency determined to roll American employment conditions decades back into the last century.

For enthusiastic entrepreneurs, franchising offers a tried and true way to open their own businesses. Many of the most widely recognized brands in the world—from Wendy's to Exxon to Kinko's—comprise thousands of independent franchise businesses operating under a major corporate banner. For entrepreneurs, the franchise business model offers brand recognition, operational know-how, and wide-ranging marketing—bundled in an accessible and time-tested package. Now the franchise model that has helped so many Americans launch their own businesses is under threat by a federal agency seeking to aid labor unions' organizing efforts.

Similarly, many businesses use temporary staffing agencies to fill jobs, including reception, data entry, writing, retail, translation, legal assistance, light manufacturing, and teaching. Working-age adults likely know someone who has functioned as temporary staff.

Businesses commonly outsource particular functions to third parties. Contractors and subcontractors play important roles in building construction and cleanup at construction sites. Manufacturers, such as auto makers, source parts from smaller businesses. Offices may hire outside cleaners to empty trash and vacuum floors each night. Vendors commonly process payroll. Manufacturers regularly hire trucking companies to deliver their products.

A group of NLRB cases involving three different companies could upend these business practices by radically redefining what constitutes a joint employment situation—when an considered jointly employed by two businesses. The joint employer cases could overturn decades of well-established precedent, upsetting the expectations of thousands of businesses that have relied on the current rules in developing their business models. These cases involve major American businesses, including McDonald's, CNN, and Browning-Ferris Industries (BFI). Franchisors, franchisees, temporary staffing agencies, contractors, and suppliers across the nation would be materially harmed or forced out of business by being redefined as joint employers.

Joint employers can be sued more readily because they share liability for joint employees. More litigation means greater costs for businesses, hampering job growth.

The joint employer cases could overturn decades of well-established precedent, upsetting the expectations of thousands of businesses that have relied on the current rules in developing their business models.

The NLRB has proposed changing the criteria for what constitutes a joint-employer situation from direct and immediate control over a worker to direct, indirect, or potential control.

Joint employers can also be unionized more easily because the parent company and the franchise must negotiate with a union when one is present in either workplace.

Expanding the definition of a joint employer, as the NLRB proposes, would limit franchising opportunities for entrepreneurs. The franchise system benefits business startups, especially minority entrepreneurs seeking to start their own businesses. Holding corporate headquarters responsible for a franchisee's workforce would make franchising much less attractive as a business model. The NLRB's proposed change would end current business practices, dampen economic growth, and incentivize large corporations to move toward large corporate-run operations. It would also impose enormous costs to our economy resulting from higher levels of unionization and more litigation.[1]

Currently, workers are considered employees of the franchisee, staffing company, contractor, or supplier—not simultaneously employees of another company. In such cases, the existence of a single employer means that the single employer gets to control the relationship and the terms of employment, providing more flexibility to make changes and more certainty about directing the employees.

Bright-line rules inform everyone of what is legal and what is not and what is needed to comply with the law. The NLRB's proposed change would undermine that clarity.

The NLRB General Counsel, in an amicus brief in the BFI case, has proposed changing the criteria for what constitutes a joint-employer situation from *direct and immediate* control over a worker to direct, *indirect, or potential* control, or based on circumstantial criteria determined by "economic and industrial realities." That definition of a joint employer would be broad and sweeping enough to classify typical franchises, contractors, staffing agencies, and suppliers as joint employers. Such a change would reverse over 30 years of precedent and shift joint-employer determination from an easily understood bright-line standard to an entirely circumstantial, if not politicized one. This creates uncertainty and disrupts previously agreed upon business plans.

Congress needs to act to bring immediate relief to businesses and workers who will suffer as a result of the NLRB's overreach.

The McDonald's Cases and the NLRB's Shotgun Approach

On December 19, 2014 and February 13, 2015, the National Labor Relations Board charged a group of McDonald's franchises and the parent company, McDonald's USA, LLC, as joint employers in cases brought by the Service Employees International Union (SEIU) and several affiliated labor advocacy groups.[2] The Board, consolidating 19 complaints containing 101 charges, alleges that McDonald's USA, LLC, and certain franchisees retaliated against protesting employees by interfering with "protected, concerted activity" of employees as described in Sections 7 and 8(a)(1) of the National Labor Relations Act. Specifically the complaints claim coercive actions (surveillance), interrogation (including polling), retaliatory discharge or discipline, threats, promised benefits, coercive rules, and denial of access.[3]

The SEIU and SEIU-funded Fast Food Forward "worker centers" filed the charges in the McDonald's cases, which have since been consolidated. They allege that McDonald's USA is a joint employer because it "possessed and/or exercised control over the labor relations policies" of franchisees via the franchise agreements and computerized advice to franchisees about optimizing workforce hours. The first hearing in the case occurred on March 30, 2015, in New York City.[4] Two additional hearings are set for Chicago and Los Angeles, with dates still to be determined at this writing.

The Board's attempt to change the joint-employer standard is tantamount to an attack on small businesses and entrepreneurs on behalf of unions seeking to organize those businesses.[5]

Franchising is one of the surest ways for upstart entrepreneurs to open their own businesses. Diluting the franchise owner's responsibilities and independence as the NLRB proposes to do will significantly harm small business formation in the United States.

For example, if corporate McDonald's in Chicago were to be held liable for the actions of every worker at every mom-and-pop McDonald's franchise—workers the corporate officials have never even met—corporate McDonald's would be forced to protect itself from the risk of wrongdoing by these workers. McDonald's USA may well have to take operational control over some franchise facilities, including hiring, firing, and scheduling decisions.

This could eventually lead franchisors like McDonald's and other fast food chains, gas stations, and convenience stores—which constitute a substantial portion of the American economy—to eliminate the franchise model altogether.[6] After all, for most of those businesses, labor costs are among their largest expenses. The National Restaurant Association warns that the NLRB's efforts to classify McDonald's Corporation as a joint employer would "jeopardize the success of 90 percent of America's restaurants who are independent operators or franchisees."[7]

Furthermore, the damage would extend well beyond the restaurant industry. As Mondaq, a network of compliance

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and commercial information professionals points out, naming franchisors as joint employers will affect all franchised businesses, including car dealerships, delivery services, hotels, dry cleaners, and many others.[8]

"Should the NLRB expand the definition of joint employer, at best my role would change to be akin to a location manager—at worst, I'd be forced to shut down altogether," said John Sims, owner and operator of Rainbow Station at the Boulders, a preschool program, in Richmond, Virginia, and co-chair of the Coalition to Save Local Businesses, an alliance of small businesses opposing the NLRB's proposed "joint employer" proposal. "This would have a negative impact not only on my family, but also my employees, my customers, and the broader economic community."[9]

CNN Case

In 2003 and 2004, the cable news network CNN brought some technical work in-house. Previously, it had staffed these technical positions with contractors employed by Team Video Services, LLC (TVS), especially during big news stories like the 9/11 terrorist attacks and the Columbia Space Shuttle disaster. On April 4, 2007, the AFL-CIO filed a complaint with the NLRB alleging that the terminated workers had been fired out of anti-union animus and suffered anti-union discrimination when they were replaced by CNN in-house staff.

NLRB Administrative Law Judge (ALJ) Arthur Amchan ruled on November 19, 2008 that CNN had violated the National Labor Relations Act as alleged.[10] CNN sought to appeal several procedural rulings by the ALJ, particularly subpoenas that CNN considered overly burdensome to its business operations. CNN won one appeal, with the two-Member Board reversing an ALJ decision on evidentiary rules. However, after years of procedural fighting between CNN and the NLRB, the U.S. Supreme Court decided in 2010, in *New Process Steel v. NLRB*, that the NLRB cannot make decisions without a quorum of at least three Members.[11] Then in June 2014 the Supreme Court, in *NLRB v. Noel Canning*, held that the president cannot fill the Board with recess appointments without the Senate truly being out of session.[12]

The CNN case, stalled for want of a quorum of NLRB members, ultimately returned to the Board for its amended decision on September 15, 2014.[13] Since then, CNN has pursued an appeal to the U.S. Court of Appeals for the District of Columbia Circuit[14] and a now-concluded[15] NLRB reconsideration of the amended 2014 decision.[16] Crucial to that decision is the NLRB determination that, even though CNN's contract with Team Video Services (TVS) stated that the technical staff were employees of TVS, not CNN, CNN was still to be considered a joint employer and therefore had to abide by the collective bargaining agreements between TVS and the local unions representing TVS technical workers. The upshot: Existing NLRB rules state that when one of the employers is unionized, then joint-employer status essentially confers a "jointly unionized" status.

Dissenting from the Board's 2014 amended decision, NLRB member Philip Miscimarra strongly criticized the Board majority's decision, noting that CNN's contract with TVS explicitly states the TVS workers "are not employees of [CNN], and shall not be so treated at any time by either [TVS or CNN]… [TVS has] sole and absolute discretion and responsibility for hiring, firing, wages, benefits, compensation, direction of the work force and other matters of personnel and labor relations."[17]

Though businesses like CNN may have indirect influence over the employees of contractors like TVS, such indirect influence has not been enough to call the workers joint employees. Miscimarra goes on:

> My colleagues concede that CNN had no direct role in hiring, firing, disciplining, discharging, promoting, or evaluating employees and that CNN did not actively codetermine the TVS technicians' other terms and conditions of employment. Nevertheless, my colleagues find that CNN was a joint employer (together with TVS) based on areas where CNN ostensibly exercised indirect influence on TVS employees.[18]

In short, the Board signaled a sudden shift away from "direct and immediate control" toward "indirect influence" as a criterion to determine or justify joint-employer status.

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BFI Case

In California, Browning-Ferris Industries (BFI), doing business as the Newby Island Recyclery, employs 60 people directly at the recycling plant.[19] BFI contracts with Leadpoint, a temporary staffing agency, for 240 temporary workers as sorters and composters.[20] On July 22, 2013, Teamsters Local 350 petitioned the NLRB to be certified as the exclusive bargaining representative of both the BFI employees and the Leadpoint employees, seeking to unionize both companies, arguing that "BFI and Leadpoint jointly employ the bargaining unit employees."[21]

On August 16, 2013, NLRB Region 32 in Oakland kept with precedent and ruled in favor of BFI, holding that it is not a joint employer.[22] Then on September 3, 2013, the Teamsters union appealed[23] the decision, which has now reached the NLRB headquarters in Washington, D.C. On May 13, 2014, the Board requested amicus briefs about whether or not to abandon joint employer precedent.[24]

The BFI case is key because the Office of the General Counsel filed its own amicus brief, where it sets out its case for a substantial broadening of the definition of joint employer, explicitly stating, "The Board should abandon its existing joint-employer standard."[25] The General Counsel's argument centers on the notion that, "The term 'employer' in the Act was intended to be construed broadly."[26]

In 1982 the United States Court of Appeals for the Third Circuit decided *NLRB v. Browning-Ferris Industries*, establishing the bright-line standard for joint-employer status.[27] It is somehow fitting that the same company, Browning-Ferris Industries, is again involved in the key case on this issue. In 1984, the Board adopted the Third Circuit's standard in *TLI, Inc.*, dictating that when separate entities share or codetermine the essential terms and conditions of employment, they are joint employers.[28] Also in 1984, *Laerco Transportation* further clarified that the essential terms and conditions of employment involve hiring, firing, disciplining, supervision, and direction of employees.[29]

Bright Line Blurred

In 1993 the Board, in *Goodyear Tire & Rubber Co.*, observed that before the Third Circuit established the bright-line test, "the Board's analysis of what constituted a joint employer relationship was somewhat more amorphous than it is today."[30] The current bright-line standard—first applied in *Laerco Transportation*, and *TLI, Inc.*—makes it clear that *direct and immediate* control over the hiring, firing, discipline, supervision, and direction is the standard for joint employer status.

The Board found that Laerco, a trucking and warehouse services business, had "minimal day-to-day supervision…of an extremely routine nature" for contract workers who loaded, unloaded, and delivered merchandise. The Board decided:

> To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.[31]

Likewise in *TLI, Inc.*, the Board found that when Transport Logistics International (TLI), an industrial shipping company, leased drivers to Crown, a forestry and paper products conglomerate, "the supervision exercised by Crown on a day-to-day basis is both limited and routine, and considered with its lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint employer finding."[32]

Under the bright-line standard, the U.S. economy has gained a substantial number of jobs. The temporary workforce has more than doubled in the U.S. economy, exceeding 2 percent of total employment.[33] Potential clients would be deterred from using these staffing companies for fear of being found a joint employer of the workers, should the standard be reversed.

Franchise businesses have created jobs faster than other businesses.[34] In particular, the minority ownership rate for franchise businesses is 46 percent higher than the rate for non-franchise businesses.[35] Rolling back the joint-employer standard could put minority business ownership at risk.

Franchising

The General Counsel's discussion of the BFI case provides a snapshot of how he sees "typical" franchisors and outsourcing arrangements that triangulate employment relationships:

> Franchising (and outsourcing arrangements that triangulate employment relationships) also illustrates how the current joint-employer standard undermines meaningful collective bargaining. In these commercial arrangements, an employer inserts an intermediary between it and the workers and designates the intermediary as the workers' sole "employer."[36] But notwithstanding the creation of an intermediary, franchisors *typically* dictate the terms of franchise agreements and 'can exert significant control over the day-to-day operations of their franchisees.'[37] [Emphasis added]

Therefore, "employees should expect that their bargaining representative be capable of addressing their employment conditions with the entity that realistically has the power to implement those terms."[38] Under this proposed economic and industrial realities standard, then, the NLRB would mandate that the franchisees and franchisors typically be at the collective bargaining table together.

In other words, the federal government would have more power to force more businesses to live by *other* businesses' union contracts. For example, if a local McDonald's franchise were to be unionized and franchisor McDonald's were to be considered a joint employer, then the union would be able to force the parent company to the collective bargaining table. That change would make it much easier to unionize corporate McDonald's, and in turn other franchisees.

Franchise businesses have created jobs faster than other businesses.

The prime advantage of franchising is that it increases small businesses' chances of success by giving small business owners access to established name brands, proven business models, and well-known products.

Such a change would be a decidedly undemocratic example of the tail wagging the dog. To force franchisor McDonald's into a union contract without so much as a vote of any of the workers aside from one franchise location runs counter to equity and fairness.

Trial lawyers would benefit too, because adding the fudge factor of "economic and industrial realities" would allow the NLRB to designate as a joint employer any deep-pocketed party found to play a meaningful role in the employment relationship.[39] Trial lawyers would have more parties to sue and deeper pockets from which to collect.

The General Counsel raises a particular point of concern: "Some scholars have posited that franchisors consider avoidance of unionization and the collective-bargaining process to be the 'prime advantage of franchising.'"[40] In reality the prime advantage of franchising is that it increases small businesses' chances of success by giving small business owners access to established name brands, proven business models, and well-known products. And as noted, many of the entrepreneurs whom the franchise system has helped launch businesses are minorities and women. In effect, the NLRB is arguing that the very aid offered to the franchisee ought to qualify the franchisor as a joint employer.

The fact is that franchisors like corporate McDonald's and individual franchisees are all subject to unionization under precisely the same rules under the National Labor Relations Act. However, unions find organizing franchisees tedious and would prefer to unionize as many people as possible in one fell swoop. The goal of the General Counsel appears to be simply to promote the unions' goal of easier, top-down unionization.

Sourcing and Manufacturing

Business-to-business contracting and subcontracting for goods, known as sourcing, have seen immense growth since the bright-line standard was implemented. These gains also would be threatened by a change in the joint-employer standard.

For example, if a Detroit auto manufacturer were to source integral component parts, such as brakes, from a company in Indiana, it would be outsourcing a manufacturing function integral to its business, since brakes are used in every automobile. Therefore, the economic and industrial reality under the General Counsel's new standard—of "commercial relationships structured so that one entity is in a position to influence the labor relations policies of the other, such as outsourcing of functions integral to the employer's business"—is that the purchaser of brakes has economic power over the purveyor of those brakes.[41]

While the bright-line standard cannot be identified as solely responsible for the proliferation of sourcing and outsourcing, its elimination would dramatically slow or even reverse growth in this sector.[42]

Reversing the bright-line standard would ultimately bring the brake producer in-house at the auto manufacturer and implement "higher wages and benefits that large enterprises typically provide."[43] Competition among several brake suppliers would end, thereby diminishing innovation and quality while raising prices. Small businesses would suffer while making big businesses even bigger.[44]

Totality of the Circumstances"

Nevertheless, the General Counsel proposes to replace this bright-line standard with a new "totality-of-the-circumstances" standard that would enable the NLRB to scrutinize employment conditions, "including how the putative joint employers structured their commercial dealings with each other. Under this test, if one of the entities wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence, joint-employer status would be established."[45]

How would any business know definitively what constitutes sufficient influence? Again, we see the uncertainty inherent in a balancing test. When it is not clear who is and is not covered, judges and prosecutors can get away with all sorts of arbitrary abuses. It would be a constant quest to find the "meaning" in meaningful bargaining.

The totality-of-the-circumstances standard would be nebulous and a compliance nightmare for employers. Many businesses will find it difficult to know whether they are complying or not. They could well end up engaging in unlawful activity they believed to be lawful and forgoing economically productive activity they mistakenly believed might be unlawful. Inevitably, more employers would find themselves charged by the NLRB if the standard were reversed.

Expansive Definition of Joint Employer

The General Counsel's brief directly challenges the controlling NLRB precedents from 1984: *Laerco Transportation* and *TLI, Inc.*, and claims their reversal "would mark a return to the Board's traditional approach prior to *Laerco Transportation* and *TLI, Inc.* and would better effectuate the Act's

Cost-Plus Contracts

Another type of business arrangement that could be threatened under an expansive definition of joint employer is "cost-plus" contracts, a type of contract in which the provider is paid a fixed amount over cost for each unit of production. Cost-plus contracts are common both in the government and private sectors. Both the General Counsel's brief in the BFI case and the Board's decision in the CNN case specifically mention cost-plus contracting, under the reasoning that cost-plus contracts limit employees' pay and would necessitate a change in the contract to increase employees' compensation, and therefore the presence of both parties at the bargaining table is necessary for meaningful negotiations of raising employees' pay.[46] This approach would virtually end cost-plus contracts, creating an unmanageable situation that cannot be beneficial to commerce.

Specificity is a virtue in policy making. But instead of trying to make the definition of joint employer more specific, the General Counsel seeks to return to an older, more expansive standard.

underlying purposes and policies."[47] That belief rests on a misreading of the National Labor Relations Act.

The brief decries the fact that the "Board's current joint-employer standard is significantly narrower than the Board's prior standard."[48] Specificity is a virtue in policy making. But instead of trying to make the definition of joint employer more specific, the General Counsel seeks to return to an older, more expansive standard that would define more businesses as joint employers by using four criteria for determining whether a business could be forced into collective bargaining:

> Prior to 1984, … the Board consistently held, with court approval, that an entity was a joint employer where it exercised direct *or* indirect control over significant terms and conditions of employment of another entity's employees;[49] where it possessed the unexercised potential to control such terms and conditions of employment;[50] or where "industrial realities" otherwise made it an essential party to meaningful collective bargaining.[51, 52]

By that reasoning, a business seeking to obtain lower prices for contract laborers would make that business a joint employer of the staffing company's workers. And if every business that demanded a lower price from a supplier were treated as an employer of the supplier's workforce, essentially every business in the country could be named a joint employer by the NLRB. Market incentives to achieve efficiency would be turned on their head.

The General Counsel's brief also criticizes three other Board precedents: *Goodyear Tire & Rubber Co,.*[53] *Airborne Express*,[54] and *AM Property Holding Corp*.[55]

In 1993, the Board settled in *Goodyear Tire & Rubber Co*. that the analysis must look to "the actual practice of the parties" rather than to "potential" control of workers.

In 2002, the Board determined in *Airborne Express* "that the essential element in its current analysis is 'whether a putative joint employer's control over employment matters is *direct and immediate*.' [Emphasis added]"[56]

In 2007 the Board clarified in *AM Property Holding Corp*. that control must be "substantial" rather than "limited and routine."

In *AM Property Holding Corp*. the Board explained that when contract janitors were told what work—cleaning trash bins, floors, and bathrooms—to perform at night in an office building "but not how to perform the work." The direction and control over the work was "limited and routine," not "substantial." In stark contrast, the NLRB General Counsel would find building owners and managers to be joint employers of the janitors. Commercial real estate property owners, property managers, and even building tenants—who are the ultimate source of payment for these services—should be wary.

The NLRB General Counsel argues that "employer" should be interpreted more broadly, without the above cases' qualifiers: "direct and immediate," "the actual practice of the parties," and "substantial." Reversing *Goodyear Tire & Rubber Co*. would mean abandoning the present standard's fact-based inquiry for an exercise in purely speculative hypotheticals that would be less practical and less predictable.[57]

The real objection, in the General Counsel's own words, seems quite simple: "The Board's current joint-employer standard inhibits meaningful collective bargaining."[58] Making it easier for unions to organize many more businesses by dint of their doing business with a unionized company would amount to a huge political payback to one of the Democratic Party's biggest donors and most powerful constituencies. In any case, clients of unionized companies have reason to worry.

It is worth noting that the Third Circuit's bright-line standard, from the 1982 case *NLRB v. Browning-Ferris Industries*, remains law and has not been overruled by any other court case.[59] The NLRB's emerging interpretation could eventually be overruled in the courts, but that might take years to resolve, by which time several entire industries could be thrown into disarray.

The real objection, in the General Counsel's own words, seems quite simple: "The Board's current joint-employer standard inhibits meaningful collective bargaining."

Temporary Staffing and Outsourcing

As noted, the *AM Property Holding Corp.* case involved outsourcing cleaning functions to contract janitors. The NLRB General Counsel argues that temporary staffing agencies and outsourced contractors and suppliers could be subject to classification as joint employers "in two situations: (1) contingent or temporary employment, including employee leasing; and (2) commercial relationships structured so that one entity is in a position to influence the labor relations policies of the other, such as outsourcing."[60]

The General Counsel's brief suggests that his real goal in seeking to overturn the bright-line standard centers on one reason: to help unions gain more dues-paying members, thereby rewarding one major source of support for the current administration:

> The current joint-employer standard inhibits meaningful collective bargaining under contingent workforce arrangements, because

The NLRB General Counsel's proposal would allow pickets, protests, and boycotts of third parties. These activities often turn violent.

> user firms *typically* have only "limited and routine" direct supervision of the employees (as that term has been defined by the Board since 1984) and only indirect or potential control over other terms and conditions of employment. But a user firm that owes no bargaining obligation can still influence the supplier firm's bargaining posture by threatening to terminate its contract with the supplier firm, and therefore eliminate supplied employees' jobs, if their wages and benefits are not below a certain cost threshold.[61] [Emphasis added]

All businesses are limited in their ability to offer higher wages by concerns that pay increases will affect costs and prices and lead to lower customer demand. Why should these firms be treated differently? If the purchasing business does not directly control the hiring, firing, wages, and job conditions of the workers, it should not be considered an employer.[62]

Pickets and Boycotts

The General Counsel states that "the current joint-employer standard also undermines meaningful bargaining by precluding employees from exerting traditional economic pressure on a company that effectively controls many of their working conditions."[63] "Traditional economic pressure" refers to picketing and boycotts.

The Sherman Antitrust Act[64] and Taft-Hartley Act (as well as the common law) prohibit employers that are neutral in a labor dispute between a union and another employer from being picketed.[65] This prohibition of "secondary boycotts" is now codified as an unfair labor practice (ULP) in Section 8(b)(4) of the NLRA.

Thus, the NLRB General Counsel's proposal would allow pickets, protests, and boycotts of third parties. These activities often turn violent. In fact, over 12,000 incidents of union violence have been reported by American media since 1975.[66, 67] To make matters worse, union violence is currently exempt from prosecution under the federal extortion statute, the Hobbs Act.[68]

The change proposed by the General Counsel would reintroduce secondary picketing and boycotting into the United States, after these practices have long been banned because of their intimidation factor. Furthermore, enabling more boycotts against more employers would actually harm the NLRA's stated goal of protecting interstate commerce.

The General Counsel's brief suggests that the effect of the new standard will help "achiev[e] industrial and labor peace." Yet, the only way that legitimizing the use of pickets, protests, and boycotts can foster peace is as weapons enabling unions to more easily and quickly browbeat businesses into accepting labor peace agreements, which practically always favor the union. Labor peace agreements between unions and employers typically grant organizing concessions to unions in return for unions not deploying their weapons. Typically, businesses agree to card-check recognition of the union (via signatures on cards rather than through secret ballots, a process that exposes workers to intimidation), workplace access (affording outside union organizers access to the business premises), neutrality (whereby the company agrees to refrain from opposing the union organizing campaigns), or any combination of the three.[69]

Giving labor unions these new economic weapons would increase unionization at the expense of third parties who have traditionally been protected from threats of economic harm.

Questionable Legal Authority

The General Counsel's brief centrally and repeatedly relies upon the preamble findings and policy section of the National Labor Relations Act (Wagner Act) of 1935.[70] Specifically, it states on page 2, "The Board should abandon its existing joint-employer standard because it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining."

This statement omits some necessary, logical steps. The referenced National Labor Relations Act policy reads in full:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[71]

Therefore, the actual overarching goal of the Act is to eliminate "certain substantial obstructions to the free flow of commerce." And necessarily so, considering the National Labor Relation Act's wildly unpopular predecessor was struck down by the U.S. Supreme Court as unconstitutional on May 27, 1935, in *Schechter Poultry Corp. v. United States*[72] for violating the Commerce Clause.[73]

To determine whether the NLRB is adhering to the Act's stated purpose, some questions need to be answered:

Giving labor unions new economic weapons would increase unionization at the expense of third parties who have traditionally been protected from threats of economic harm.

At stake is the survival of America's popular franchise system.

- Has the General Counsel demonstrated the presence of a substantial obstruction to the free flow of commerce?
- Has the General Counsel successfully demonstrated that the NLRB's proposed policy change would effectively mitigate and eliminate said obstruction?
- Could the proposed policy change itself become an obstruction?
- Does a lower unionization rate in a state benefit or damage commerce?
- If a substantial portion of workers do not want the union to negotiate on their behalf, is the full freedom of workers' association advanced by forcing all workers into a monopoly empowered to bargain in their stead?

The General Counsel's office has not answered any of these basic questions satisfactorily. Instead, its brief simply asserts that its approach would be beneficial.

Additionally, despite the Act's preamble on which unions frequently rely, Section 7's grant of rights to employees only affirmatively notes employee free choice to choose to be represented by a union or not.

Conclusion

Essential business practices are at stake in the fight over the National Labor Relations Board's proposed joint-employer standard. The NLRB's attack on franchising is an attack on small business. At stake is the survival of America's popular franchise system —with more than 770,000 establishments[74] and 8.5 million employees.[75] Franchising offers entrepreneurs a proven pathway to opening their own businesses—including a well-tested business model that offers brand recognition, operational expertise, and marketing.

Small businesses stand to lose much, as franchisor parent companies may be forced to assume operational control in order to deal with the additional liabilities that joint-employer status entails. Minority ownership of businesses would suffer as the rate of minority ownership is notably higher in the imperiled franchising model.

Also under threat are contingent and temporary staffing agencies and contractors, which "employed an average of 3.15 million temporary and contract workers per week in the second quarter of 2014," according to the American Staffing Association.[76] These jobs are jeopardized by the NLRB's unpredictable "economic and industrial realities," which would make clients reluctant to use staffing services.

Contractors and subcontractors are also at risk. For example, construction trade workers—such as general contractors, plumbers, electricians, glaziers, and others—have particular specialties, often developed over decades of training and apprenticeship. The NLRB General Counsel's theory holds that, in a contracting relationship, a contractors'—and subcontractors'—employees ultimately depend on the contractor's clients for their salaries and benefits.

Sourcing and outsourcing practices would also fall victim to the NLRB's radical proposed redefinition of joint employment. Sourcing is the practice of buying components of a product from an outside supplier.

Unions appear to be banking on a substantial benefit from the ability to unionize multiple businesses jointly, though analogous union initiatives have backfired.[77] Trial lawyers stand to benefit greatly by having more parties to sue and deeper pockets to raid. Economic growth would suffer nationwide, as deadweight loss associated with collective bargaining would be exacerbated by increased unionization.[78]

Innovation and competition would suffer when, as large manufacturers bring in-house the fabrication of component parts that used to be sourced from small businesses. Efficiencies associated with outsourcing business functions would be lost when each such function is brought in-house.

Temporary staffing businesses would dwindle, as clients would fear being named a liable joint employer. Pickets and boycotts would boom as unions would be able to unleash their wrath on third parties.

Temporary staffing businesses would dwindle, as clients would fear being named a liable joint employer.

Congressional action is warranted. Litigation could take years to resolve, by which time several entire industries could be thrown into disarray. Too much business and commerce faces disruption from the BFI, CNN, and McDonald's cases.

Furthermore, the NLRB is using sly means to impose this new definition of joint employer. Rather than utilize the standard rulemaking process, it has issued an invitation to submit briefs in the pending BFI case, indicating that it would outline its new policy in a judicial decision rather than a rule.[79] Yet, as the American Staffing Association brief notes, "A request for briefs is not an adequate substitute for rulemaking."[80] A number of laws such as the Administrative Procedure Act, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Congressional Review Act (CRA) provide transparency as well as checks and balances to administrative rulemaking power. These same protections are not available when an administration changes policies through case decisions. For example, a CRA resolution of disapproval would not be an option. Therefore, Congress should consider authorizing legislation to clarify the definition of employee and joint employee under the NLRA.[81]

Lawmakers could leverage support for the authorizing bill to convince appropriators and leadership that the issue is important enough to merit a funding restriction in the Labor, Health and Human Services, and Education Appropriations bill, in order to prohibit the use of funds for enforcing a change to the 30-plus years of statutory law, case law, and common law defining a joint employer. (The specific language is normally worked out in conjunction with House and Senate Legislative Counsel.)

While litigation is very likely on the issue of joint employers, the economic disruption of long court cases as the decisions are appealed is reason enough for Congress to provide legislative relief to employers and workers who will suffer as a result of this decision.

NOTES

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17 *CNN America, Inc. and Team Video Services*, LLC, 361 NLRB No. 47, slip op. at pages 28, 30 (2014) (Member Miscimarra, dissenting), http://mynlrb.nlrb.gov/link/document.aspx/09031d45818bc15c.

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37 Amicus Brief of the General Counsel, *Browning-Ferris Industries*.

38 Ibid., page 17.

39 Ibid., page 2.

40 Ibid., page 15.

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42 The National Association of Manufacturers (NAM) estimates: "Were the Board to adopt a joint employer standard more expansive than the current one, some or all of such subcontractors could be considered joint employers—a catastrophically unmanageable result that would not only severely impair the manufacturing industry, but generate confusion, interminable litigation, and do violence to labor stability, and employees' Section 7 rights." Brief Amici Curiae of National Association of Manufacturers, National Restaurant Association, and National Waste and Recycling Association in *Browning-Ferris Industries of California, Inc. & FPR-II, LCC v. Sanitary Truck Drivers and Helpers local 350*, Case 32-RC-109684 (2014), Page 16, http://mynlrb.nlrb.gov/link/document.aspx/09031d45817b214e.

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44 U.S. Senate Health, Education, Labor and Pensions Committee Chairman Lamar Alexander (R-Tenn.) assessed the probable effects: “We have several large auto plants in Tennessee. Let’s say one of these has a few thousand employees, but thousands of other workers come in and out of the plantscape every day to provide goods and services. These workers are employed and directly controlled by subcontractors that provide security, *supply auto parts*, and staff the company lunch room. If the NRLB goes down this road, the plant owner could be forced to sit at dozens of bargaining tables and be responsible for another employer’s obligations. So what would the manufacturer do? It will probably take in house as much as it can. But if that move comes at the cost of efficiency and innovation, the plant could be relocated elsewhere. [Emphasis added.]
“If the result of decisions that expand the joint-employer standard is to make the franchisees mere managers of their store, that’s going to be depriving people like Mr. Moore and Mr. Sims of a great American opportunity. And if the result is to cause Ruby Tuesday’s and auto plants that are in our state to bring in house more services, the big guys are going to get bigger and the medium to small guys will have less opportunities.” Opening Statement of Chairman Lamar Alexander, Full hearing of the U.S. Senate on Health, Education, Labor and Pensions, "Who's the Boss? The 'Joint Employer' Standard and Business Owndership (February, 2015), at 21:30 http://www.help.senate.gov/hearings/hearing/?id=22428fa0-5056-a032-5232-293d58c4db10.

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46 Ibid., page 37. Proponents of a reversal of the joint-employer standard, such as Department of Labor Wage and Hour Division Administrator David Weil, see sourcing and outsourcing as evasion of unionization, of higher wages, and of safer workplaces. Weil states, “[T]he lead firms that collectively determine the product market conditions in which wages and conditions are set have become separated from the actual employment of the workers who provide goods.” Weil continues, “The intention to reduce costs—the second element of fissuring—shifts out the production of services or goods to other business enterprises.”

47 Ibid., page 2: The General Counsel indicates that those cases should be overruled, stating such a reversal “would mark a return to the Board’s traditional approach prior to *Laerco Transportation and TLI, Inc.* and would better effectuate the Act’s underlying purposes and policies.”

48 Ibid., page 4, http://www.laborrelationsupdate.com/files/2014/07/GCs-Amicus-Brief-Browning-Ferris.pdf.

49 From General Council brief: See *Indus. Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981) (reasoning that shipper with a cost-plus lease terminable on thirty days’ notice “presumably has some control over [the] wages” that could be paid under any collective-bargaining agreement the lessor negotiated with the union, even absent evidence of direct involvement in the negotiation of that agreement), *enforcing B.F. Goodrich Co.*, 250 NLRB 1139 (1980); *Floyd Epperson*, 202 NLRB 23, 23 (1973) (user firm dairy company had indirect control over employee discipline and wages where it informed the supplier firm trucking company that a particular driver was consistently late to a transport station and thereafter the trucking company removed the employee from that route, and where trucking company increased drivers’ wages when it received an increased contractual rate from the dairy company), *enforced mem*., 491 F.2d 1390 (6th Cir. 1974).

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51 From General Council brief: *Jewell Smokeless Coal Corp*., 170 NLRB 392, 393 (1968) (“industrial realities” made coal company a “necessary party to meaningful collective bargaining,” even though it played no role in hiring, firing, or directing employees, and retained no right under the parties’ oral contract to affect those matters), *enforced mem*., 435 F.2d 1270 (4th Cir. 1970).

52 Amicus Brief of the General Counsel, *Browning-Ferris Industries*.

53 Decision and Order by Chairman Stephens and Members Devaney and Raudabaugh, *The Goodyear Tire & Rubber Company-Beaumont Chemical Plant and Transportation Unlimited, Inc. and The Goodyear Tire & Rubber Company-Beaumont Chemical Plant; Transportation Unlimited, Inc.; and Ryder Truck Rental, Inc., Wholly-Owned Subsidiaries of Ryder System, Inc. and Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers Helpers Local Union No. 920, affiliated with International Brotherhood of Teamsters, AFL–CIO*, Cases 16–CA–14820 and 16–CA–14838 (1993), http://apps.nlrb.gov/link/document.aspx/09031d45800bd7d2.

54 Decision and Order by Members Liebman, Cowen, Bartlett, *Airborne Freight Company d/b/a Airborne Express, and its Joint Employers, Current Carrier Corporation, Agents Transportation Service and Expressman Courier Service Inc. and Teamsters, Chauffeurs, Warehousemen & Helpers, Local 251, a/w International Brotherhood of Teamsters, AFL–CIO*, Case 1–CA–32742 (2002); *Airborne Freight Company d/b/a Airborne Express, and its Joint Employer Enterprise Express, Inc. a/k/a NFW, Inc. d/b/a Enterprise Express, Inc. and Teamsters Local 344, affiliated with the International Brotherhood of Teamsters, AFL–CIO*, Case 1–CA–32767 (2002), http://apps.nlrb.gov/link/document.aspx/09031d45800c0f8c.

55 *AM Property Holding Corp*., 350 NLRB 998 (2007), http://apps.nlrb.gov/link/document.aspx/09031d45801acde9.

56 Amicus Brief of the General Counsel, *Browning-Ferris Industries,* page 8.

57 The brief goes further: "'[E]mployer' expressly was intended to incorporate 'an appreciation of economic realities [and] a recognition of the aims which Congress sought.'" However, the General Counsel is relying on the brief from the Equal Employment Opportunity Commission (EEOC) regarding the interpretation of "employer" under the Civil Rights Act—inapplicable for "employer" under the National Labor Relations Act. The brief of the Driver Employer Council of America (DECA) hits directly back at EEOC, stating, "[T]he EEOC fails to adequately reflect the purposes and goals of the NLRA." DECA alludes to the *Airborne Express* case when accusing the EEOC of "demonstrating a clear bias towards a finding of joint employer relationships without regard to questions of direct and immediate impact on employment.", Amicus Brief of the General Counsel, *Browning-Ferris Industries of California, Inc. & FPR-II, LCC v. Sanitary Truck Drivers and Helpers local 350*, Case 32-RC-109684 (2014), page 10, http://www.laborrelationsupdate.com/files/2014/07/GCs-Amicus-Brief-Browning-Ferris.pdf.

58 Ibid., page 11

59 *NLRB v. Browning-Ferris Indus. of Penn*., 691 F.2d 1117 (3d. Cir. 1982), https://law.resource.org/pub/us/case/reporter/F2/691/691.F2d.1117.82-3022.html.

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61 Amicus Brief of the General Counsel, *Browning-Ferris*, pps.12-13.

62 In referring to temporary staffing and outsourcing, the General Counsel twice cites David Weil, author of the influential book, *The Fissured Workplace—Why Work Became So Bad for So Many and What Can Be Done to Improve It*, in which he developed a theory that is now the rationale for changing the definition of a joint employer. Weil is now Administrator of the Wage and Hour Division in the U.S. Department of Labor. http://www.hup.harvard.edu/catalog.php?isbn=9780674725447.

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68 *Free to Prosper: A Pro-Growth Agenda for the 114th Congress*, "National Labor Relations Board and National Labor Relations Act Reform," Competitive Enterprise Institute (2015), page 44, https://cei.org/sites/default/files/CEI%20Agenda%20for%20the%20114th%20Congress%20-%20Labor%20and%20Employment%20-%20NLRB%20and%20NLRA%20Reform.pdf.

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70 National Labor Relations Act (Wagner Act) of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)), http://legisworks.org/congress/73/publaw-67.pdf.

71 National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169, Public Law 74-198, Section 1 (Findings and Policy), Paragraph 4.

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77 Editorial, "Minimum Wage Backfire," *The Wall Street Journal*, October 22, 2014, http://www.wsj.com/articles/minimum-wage-backfire-1413934569.

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80 Brief for Amicus Curiae the American Staffing Association, *Browning-Ferris Industries of California, Inc. & FPR-II, LCC v. Sanitary Truck Drivers and Helpers local 350*, Case 32-RC-109684 (2014), page 2, http://mynlrb.nlrb.gov/link/document.aspx/09031d45817b0b02. See more at: Aloysius Hogan, *The 8 Amici (Part 1): Review of 4 Briefs Opposing Breach of Joint-Employer*, Workplacechoice, Competitive Enterprise Institute (2014), http://workplacechoice.org/2014/12/15/the-8-amici-part-1-review-of-4-briefs-opposing-breach-of-joint-employer-precedent/#sthash.cTrlthqu.dpuf.

81 Such legislation is a stated goal of the Coalition to Save Local Businesses. A model for such legislation is identified in the American Staffing Association brief, “Turning to the 1947 Taft-Hartley Amendments, the amended definition of ‘employee’ was expressly intended to overrule the Supreme Court’s decision in *NLRB v. Hearst Publishing*, 322 U.S. 111 (1944), a decision which disregarded common law principles of agency to find that ‘independent contractors’ were employees.” While such a bill would almost certainly face a veto by the president, Congress should pursue it as a first action, which would then open other options.

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Aloysius Hogan, Esq. is a senior fellow at the Competitive Enterprise Institute, where he specializes in labor and employment policy.

Previously, Hogan launched a lobbying shop at a world-top-100 law firm, dealing in labor and employment law. Over the course of three years immersed in labor and employment issues, he built a lobbying coalition that included more than 80 associations, secured witness testimony for U.S. Senate hearings, drafted testimony, crafted issue briefs, and passed a model resolution with the American Legislative Exchange Council.

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