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## Redefining Workers out of a Job

National Labor Relations Board's New Joint Employer Standard Expands Liability, Eliminates Jobs

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Federal agencies should be cautious when overturning established policies. Doing so creates uncertainty and frequently generates unintended consequences. Yet under the Obama administration, the National Labor Relations Board (NLRB) has been unrelenting in tossing aside longstanding policy, while displaying indifference to unforeseen negative outcomes, to favor organized labor, a key administration ally.

One policy area the federal labor agency has turned on its head is joint employment—when two employers in a contractual relationship assume joint liability over certain employees. This assumption of liability traditionally occurred when one company, normally the larger one, exercises direct and immediate control over the employees of the smaller company. Now however, the NLRB is extending the assumption of such liability to situations in which the larger company merely stipulates basic conditions like “the place of work, defining the work and how quickly it will need to be done, prescribing the hours when work will need to be performed, setting minimum qualifications for the individuals that the contractor provides,” among other common contract provisions.<sup>1</sup>

The NLRB's new joint employer standard will also create greater uncertainty for businesses already working in a difficult economic environment. Since the NLRB generally sets policy through adjudication, businesses do not receive advanced, detailed notice on potential policy changes. Unlike the formal rulemaking process, setting regulatory policy via adjudication is inherently ambiguous and usually firm-specific. This means the recent NLRB decision that created the new joint employer standard does not address all the potential circumstances in which two or more firms could be considered a joint employer.

The target of the NLRB's policy change are common business-to-business relationships—franchising, contracting, and temporary staffing. The NLRB's action will expose thousands of businesses across the United States to increased costs and liability, and remove incentives to large companies to contract with small businesses, which are responsible for 66 percent of all net new jobs since the 1970s.<sup>2</sup>

Such a broad joint employer standard will mean that employers could be held liable for labor violations against employees not under their direct control. For instance, a businesses may be forced to bargain with a union over work terms and conditions of another company's employees, based merely on a contractual relationship. In fact, basic conditions

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one employer places on a contractor may establish joint employer status under the new NLRB standard. This could even occur when a company requires a supplier to comply with a code of conduct prior to going into business together.

Does anyone benefit from this policy change? Yes. The NLRB's new joint employer standard, along with another recent Board decision overturning precedent, gives organized labor the ability to gain new members—and collect more dues—without having to organize each individual workplace. Worse, it creates the possibility of unions organizing workers without allowing them a say in the matter, simply because their employer is conducting business with a unionized firm.

***NLRB's Joint Employer Standard.*** In August 2015, the NLRB overturned 30 years of precedent by abandoning its longstanding definition of what constitutes a joint employer. In *Browning-Ferris v. NLRB*, the Board crafted a vague, broad definition of joint employer. Under the new standard, a company may be held liable for labor violations by other employers they contract with, by merely exercising *indirect* control or possessing *unexercised potential* control.<sup>3</sup>

The new ambiguous standard established by *Browning-Ferris* stands in stark contrast to the historically used bright-line test, where one company exercised *direct* and *immediate* control over another company's workforce.<sup>4</sup>

Complicating matters further, the NLRB has failed to issue guidance on what demands one employer may place on another employer with which it does business that will trigger a joint employer relationship.<sup>5</sup>

Compounding the problem further yet, the NLRB in *Browning-Ferris* did not adopt a test or rule to determine what contractual relationships establish joint employment. Without a bright-line rule, employers do not know if current business-to-business contracts establish joint employer liability or whether agreements need amendment to avoid responsibility for others' labor violations or bargaining responsibilities. With such a broad standard under *Browning-Ferris*, it will be unpredictable how the new policy will be applied in the future.

One thing is for certain: The NLRB standard makes doing business more difficult. Businesses facing the increased likelihood of being held liable for other businesses' labor violations may bring back in-house functions they currently outsource. This requires a company to hire more workers, which increases costs. Any time a company hires a new employee, it incurs not just the cost of the salary, but employer contributions to payroll and other employment-related taxes, legally mandated benefits, and increased compliance costs deriving from employment regulations such as tracking workers' hours.

The new joint employer standard also could steer companies away from hiring workers via temp agencies. Many types of businesses have peak seasons when they have short-term need for more personnel. Short-term temporary workers allow businesses to scale up during those busy periods without having to take on the costs associated with full-time employees. A reduction in the use of temp agencies also harms worker opportunity. Many individuals use

staffing agencies to reenter the workforce when transitioning from one industry to the next. Placement by a temp firm at a company provides on-the-job training, which provides the individual with marketable skills and a better opportunity to secure full-time employment.

In addition, the new joint employer standard could effectively shut off an avenue for entrepreneurs to launch their own businesses. Many aspiring entrepreneurs may not have the necessary knowledge or resources to strike out on their own, but through hard work, determination, and assistance from the franchisor parent company—including management best practices, branding, and marketing—they have the opportunity to succeed as franchise business owners. Yet, the NLRB's new joint employer standard may encourage franchisors to move toward direct operation of stores, and away from franchising.

This is bad news for the economy at large. In 2016, franchises are projected to contribute \$552 billion to GDP, 9 million jobs, and produce \$944 billion in output.<sup>6</sup> The temporary workforce hit an all-time high of over 2 percent of the total private sector workforce in 2014.<sup>7</sup> During the course of a year, temp staffing firms employ 16 million temp and contract workers.<sup>8</sup> Better yet, 35 percent of these temp staffers are offered a permanent job by a company where they were assigned.<sup>9</sup> While most of this economic activity will still occur, bringing certain functions in-house adds costs, leading to a reduction of some jobs and hindering some entrepreneurs' ability to gain clients as fewer large companies decide to contract with small firms.

***Company Codes of Conduct for Suppliers.*** One of the unanticipated ways the joint employer standard could increase liability for employers that engage with contractors is via Corporate Social Responsibility (CSR) policies, specifically those setting standards on suppliers. Many companies have implemented what is known as supplier codes of conduct, which companies use to place basic conditions on a supplier before contracting with them.

Whether or not CSR policies are actually helpful or simply publicity stunts, they are becoming commonplace among corporate America, as companies increasingly perceive them as a way to contribute to their communities, the environment, and society as a whole.<sup>10</sup> President Obama recently lauded such policies as companies doing the “right” thing.<sup>11</sup> Ironically, though, the same policies the President has endorsed are now under attack by his administration. As a result, the uncertainty created by the NLRB's new definition of joint employer could slow the trend of businesses adopting codes of conduct for their suppliers and contractors.

***Supplier Codes of Conduct May Establish Joint Employer Status.*** One consequence from the *Browning-Ferris* decision most feared by the business community is the uncertainty it would create. Employers have little understanding of what kinds of contracts, business relationships, or conditions may trigger joint employer liability. In other words, the vagueness of the decision means that for many companies, the smallest semblance of indirect control over another firm's employees could establish joint employer liability.

Microsoft articulated its concerns regarding the uncertainty and far-reaching nature of the joint employer standard in an amicus brief in support of *Browning-Ferris*, the respondent in

the recent NLRB decision. Specifically, the brief argues, Microsoft's supplier code of conduct may drag it into a joint employer relationship.

Microsoft's brief, filed in the United States Court of Appeals for the District of Columbia, explains how general standards—like supplier codes of conduct—issued by a contracting company to its vendors and monitored by a third party may establish joint employer status under the new NLRB standard.<sup>12</sup> Microsoft notes the vagueness of the new joint employer standard as a regulation that will discourage wider adoption of supplier conduct policies.<sup>13</sup>

Microsoft's concerns over the new joint employer standard were realized shortly after it announced its supplier code of conduct in March 2015. On October 23, 2015, a union called the Temporary Workers of America (TWA) requested that Microsoft attend a collective bargaining meeting as a joint employer with Lionbridge, a Microsoft supplier. TWA relied on the *Browning-Ferris* decision to argue Microsoft's code of conduct for suppliers, which states that the company only does business with suppliers that offer 15 days of paid leave, makes Microsoft a joint employer "subject to the National Labor Relations Act's collective bargaining requirements."<sup>14</sup>

Microsoft challenged the petition, and the union filed an unfair labor practice charge with the NLRB that is still pending at this writing. Microsoft notes in its brief that its supplier code of conduct has led "to substantial and growing legal expenses and great uncertainty."<sup>15</sup>

In the past, placing eligibility criteria that must be met to qualify as a supplier has not indicated a joint employer relationship and is far removed from the previous standard under which a company needed to exert day-to-day control over operations.<sup>16</sup>

Companies do not implement CSR policies to control a supplier or contractor's workers, but as a qualification a supplier must meet in order to work with the company. This same policy may now make Microsoft liable for workers over whom they have no direct influence.

Microsoft likens its situation to that of a homeowner asking a contractor to use an experienced workforce. That impacts the contractor's budget, staffing requirements, and pay rates, yet no one would consider the homeowner to be responsible as the workers' employer. As the Microsoft brief argues, "even the *BFI* majority indicated that the homeowner would not be exercising the requisite control over the workers' performance of their jobs to be treated as a 'joint employer' of the contractor's workers under the common law."<sup>17</sup> Yet that would be the inescapable implication of treating a company like Microsoft as the joint employer of a supplier's workforce merely because Microsoft demands that suppliers offer their workers certain benefits.

The concept the current NLRB crafted is far broader than a common law standard, which is discussed in-depth by the dissenting NLRB members in *Browning-Ferris*.<sup>18</sup> The NLRB has expanded the joint employer doctrine from one in which an employer assumed liability when it exerted "substantial degree of control over the manner and means" of the employee's work to liability even when an employer merely places the most basic of conditions that indirectly impact a counterparty's employees.<sup>19</sup>

Another argument set forth in Microsoft's brief shows how far reaching the NLRB's joint employer standard is and how many CSR policies could establish joint employer status:

The Board indicates that a user firm that sets broad job parameters through intermediaries and checks that suppliers comply might be labeled a joint employer. Under that approach, unions can be expected to argue that CSR initiatives relating to workers' treatment show a joint employment relationship because they set the broad parameters of the job and take measures to verify compliance.<sup>20</sup>

***More CSR Policies That Could Trigger Joint Employer Status.*** Other companies also could be dragged to the bargaining table or into court, or be subjected to greater liability, because of their own supplier policies.

Facebook, for example, takes Microsoft's policy, which requires suppliers to offer 15 days of paid leave to its employees, and expands it. As of May 2015, Facebook began implementing a "set of standards on benefits for contractors and vendors" that the company works with. The standards call for 15 days of paid leave, a \$15 minimum wage, and a \$4,000 new child benefit for new parents.<sup>21</sup>

Macy's requires its suppliers and their subcontractors to adhere to Macy's Code of Conduct and places the suppliers in charge of enforcement for their subcontractors.<sup>22</sup> In this case, Macy's is not only putting in place workplace requirements for quality assurance, but also applying indirect control on subcontractors via the supplier, a policy that may now fall within the new joint employer standard.

Target places broad standards related to working hours, overtime, and grievance process on its suppliers. Because of the unknown possibilities of the NLRB's joint employer standard, CSR policies like Target's could potentially be considered sufficient to deem a business as a joint employer.<sup>23</sup>

***DOL Settlements May Establish Joint Employer Status.*** As noted, a user firm that "sets broad job parameters through intermediaries and checks that suppliers comply" might indicate joint employer status.<sup>24</sup> Such a wide-ranging standard may establish joint employer status for firms that have entered into certain kinds of settlement agreements with the Department of Labor when accused of Fair Labor Standards Act (FLSA) complaints over minimum wage, employee misclassification, and overtime violations.

An increasingly common settlement provision pushed by the Labor Department is a requirement that the large company put in to place safeguards to ensure future FLSA compliance of contractors and subcontractors. FLSA settlements that require one company to ensure future compliance of contractors and subcontractors could be enough to find joint employment under the *Browning-Ferris* decision.

DOL Wage and Hour Administrator David Weil explains in October 2014 blog post that the strategic enforcement strategy of the agency is to target the top of a supply chain and

hold them responsible for ensuring future compliance with the FLSA of those further down the chain.<sup>25</sup> For example, in a 2014 settlement between Paul Johnson Drywall and the DOL, the settlement terms forced the company to “hire a third-party monitor to ensure compliance by the company and require any drywall subcontractors to conduct regular training of supervisors and employees regarding the requirements under the FLSA.”<sup>26</sup>

DOL settlement agreements where an employer is required to oversee or train a contractor or subcontractor’s supervisors and employees about issues of wages and hours may well establish a finding of joint employer status under the NLRB’s new vague standard.

If such agreements are seen as indirect control of another employer’s workforce, the NLRB’s joint employer standard will simply give larger companies another reason not to contract with smaller firms in the future or enter into settlement agreements to quickly resolve FLSA violations.

***Expanded Standard Unjustly Favors Unionization.*** Implementing such a broad joint employer standard, which can establish joint employer status from codes of conduct for suppliers and DOL settlement agreements, forces employers that would normally have no relation with a union to the bargaining table. When two employers are deemed a joint employer, unions are allowed to engage in certain tactics that would normally be illegal, except when employed in the course of union organizing (an unjust feature of U.S. labor law that is beyond the scope of this paper).

Once joint employer status is found, a union trying to organize a contractor may engage in actions against that contractor that were previously illegal, including protests, boycotts, and pickets.<sup>27</sup> The purpose of these tactics is to browbeat larger, better known employers into accepting so-called neutrality agreements, which give union officials greater access to workers, bypass secret ballot elections, and bar employers from opposing organizing campaigns, in exchange for unions agreeing not to engage in protests or boycotts.<sup>28</sup>

***Miller & Anderson.*** On June 11, 2016, the NLRB, in *Miller & Anderson*,<sup>29</sup> overturned its 2004 *Oakwood* decision, which had required an employer’s consent for employees to organize into mixed bargaining units that include both the lead firm’s full-time employees and joint employees, including temp workers.<sup>30</sup> With the change, bargaining units can include both full-time employees of the user company and jointly employed temp workers, without any need for employer consent.

Without employer consent, corralling full-time and temp workers into a single bargaining unit can create a situation in which employees of one company who wish to unionize could force unionization on another company’s employees. Suppose a company with 50 employees hires 100 workers from a temp staffing agency. If 76 of those temp workers vote to unionize, that makes a majority, even if all 50 employees of the user firm vote against the union. Thus, a union could impose representation on the user firm’s employees, who would have never organized without the change in the joint employment standard.

Under that scenario, some workers are forced to join a union, pay dues, and work under a collective bargaining agreement foisted on them and their employer. The only beneficiaries of overturning *Oakwood* are labor unions that gain more members—and more compulsory dues. A group of employees at one employer should not be forced to accept union representation because of the desires of a different companies' employees.

**Conclusion.** The NLRB's new joint employer standard threatens both worker freedom and employers' flexibility, by tilting the playing field in favor of organized labor, a key Obama administration political ally. With the economy seeing tepid growth,<sup>31</sup> over 94 million workers out of the labor force,<sup>32</sup> and over 40 percent of unemployed workers who have given up looking for work, the NLRB needs to rethink its new joint employer standard, which discourages business formation and job creation.<sup>33</sup>

Large employers should not be exposed to joint employer liability simply for requiring a certain level of quality, as well as compliance with the law, from parties with which they do business. Generally, companies using temp staffing agencies and contractors have little or no control over the latter's hiring or firing decisions, direct employee supervision, or scheduling. The same goes for franchise-franchisee arrangement. Contractors, temp agencies, and franchisees are independent businesses that manage their own workforces and make day-to-day management decisions.

These industries create thousands of jobs annually and generate opportunity for entrepreneurs to start new businesses. The NLRB's new joint employer standard will result in reduced opportunities for entrepreneurs and fewer jobs. Congress has an opportunity to undo the NLRB's joint employer standard, by including an appropriations rider in the reauthorization bill for the Departments of Labor, Health and Human Services, and Education, and related agencies such as the NLRB to defund implementation of the NLRB's joint employer standard.

## Notes

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<sup>1</sup> *Browning-Ferris Industries of California, Inc. and FPR-II, LCC v. Sanitary Truck Drivers and Helpers local 350, International Brotherhood of Teamsters, Case 32-RC-109684 (2015)*, p. 36, <https://www.nlr.gov/case/32-RC-109684>.

<sup>2</sup> "Small Business Trends," Small Business Administration, Data retrieved June 22, 2016, <https://www.sba.gov/managing-business/running-business/energy-efficiency/sustainable-business-practices/small-business-trends>.

<sup>3</sup> *Ibid.*

<sup>4</sup> *TLL, Inc.*, 271 NLRB 798 (1984), <http://apps.nlr.gov/link/document.aspx/09031d45800b8945>; *Laerco Transportation*, 269 NLRB 324 (1984), <http://apps.nlr.gov/link/document.aspx/09031d45800b8820>.

<sup>5</sup> "Main Street in Jeopardy: The Expanding Joint Employer Threat to Small Businesses," Pg. 23, U.S. Chamber of Commerce and International Franchise Association, June, 2016, <https://www.uschamber.com/report/main-street-jeopardy-the-expanding-joint-employer-threat-small-businesses>.

<sup>6</sup> "2016 Franchise Business Economic Outlook," International Franchise Association, January 2016, [http://www.franchise.org/sites/default/files/EconomicOutlookInfographic\\_January2016.pdf](http://www.franchise.org/sites/default/files/EconomicOutlookInfographic_January2016.pdf).

<sup>7</sup> Trey Kovacs, "NLRB's New Joint Employer Standard Threatens Business Formation and Job Creation," Competitive Enterprise Institute, February 2, 2016, <https://cei.org/sites/default/files/Trey%20Kovacs%20-%20NLRB%20New%20Joint%20Employer%20Standard%20Web%20Memo.pdf>.

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<sup>8</sup> “Staffing Industry Statistics,” American Staffing Association, Accessed on June 24, 2016, <https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/>.

<sup>9</sup> Ibid.

<sup>10</sup> See Edward Younkins, “Business and Morality in a Free Society.” November 1, 1997, Foundation for Economic Education, <https://fee.org/articles/business-and-morality-in-a-free-society/>. Younkins argues that business is inherently ethical because it is based on voluntary transactions. Due to this, it is questionable that companies need to develop CSR policies when business already contributes much to society.

<sup>11</sup> President Barack Obama, “Remarks by the President at Greater Boston Labor Council Labor Day Breakfast,” Office of the Press Secretary, The White House, September 8, 2015, <https://www.whitehouse.gov/the-press-office/2015/09/08/remarks-president-greater-boston-labor-council-labor-day-breakfast>.

<sup>12</sup> Amicus Brief of Microsoft Corporation and HR Policy Association, *Browning-Ferris Industries of California, Inc. D/B/A BFI Newby Island Recyclery v. NATIONAL LABOR RELATIONS BOARD and Teamsters Local 350 (2016)*, <https://www.scribd.com/doc/316560525/Microsoft-Brief>.

<sup>13</sup> Obama, pp. 19-37.

<sup>14</sup> Ibid., p. 17.

<sup>15</sup> Ibid., p. 18.

<sup>16</sup> Ibid., p. 31

<sup>17</sup> Ibid., p. 35.

<sup>18</sup> *Browning-Ferris Industries of California*.

<sup>19</sup> *Int’l Chem. Workers Union Local 483 v. NLRB*, 561 F.2d 253, 256 (D.C. Cir. 1977), <https://casetext.com/case/intl-chem-wkrs-u-loc-483-v-nlr>.

<sup>20</sup> Ibid., p. 38.

<sup>21</sup> Sheryl Sandberg, “Improved Benefits for Facebook Contractors,” Facebook Newsroom, May 12, 2015, <http://newsroom.fb.com/news/2015/05/improved-benefits-for-facebook-contractors/>.

<sup>22</sup> “Vendor & Supplier Code of Conduct,” Macy’s Inc., Accessed June 23, 2016, [http://macysinc.com/Assets/docs/policies/minc\\_code\\_of\\_conduct.pdf](http://macysinc.com/Assets/docs/policies/minc_code_of_conduct.pdf).

<sup>23</sup> “Labor and human rights policies,” A component of Target’s Corporate Responsibility Policies, Accessed June 23, 2016, <https://corporate.target.com/corporate-responsibility/responsible-sourcing/social-compliance/labor-and-human-rights>.

<sup>24</sup> Microsoft Corporation and HR Policy Association, p. 26.

<sup>25</sup> David Weil, “Strategic Enforcement to Maximize Impact,” U.S. Department of Labor Blog, October 31, 2014, <https://blog.dol.gov/2014/10/31/strategic-enforcement-to-maximize-impact/>.

<sup>26</sup> “Paul Johnson Drywall Inc. Agrees to Pay \$600,000 In Back Wages, Damages and Penalties Following US Labor Department Investigation, news release, U.S. Department of Labor, May 19, 2014, <https://www.dol.gov/newsroom/releases/whd/whd20140827>.

<sup>27</sup> Microsoft Corporation and HR Policy Association.

<sup>28</sup> Ibid.

<sup>29</sup> *Miller and Anderson, Inc., NLRB, No. 5-RC-79249*,

[https://www.nlr.gov/news-outreach/news-story/board-decides-miller-anderson-returns-sturgis-standard\\_](https://www.nlr.gov/news-outreach/news-story/board-decides-miller-anderson-returns-sturgis-standard_)

<sup>30</sup> *H.S. CARE L.L.C., d/b/a Oakwood Care Center and N&W Agency, Inc. and New York’s Health and Human Service Union, 1199, Service Employees International Union, AFL–CIO, Petitioner. Case 29–RC–10101 (2004)*, <https://www.scribd.com/doc/316560410/Oakwood>.

<sup>31</sup> U.S. GDP saw 1.1 percent growth in the first quarter of 2016, a drop from 1.4 percent from the fourth quarter of 2015. See “Gross Domestic Product: First Quarter 2016 (Third Estimate),” U.S. Department of Commerce Bureau of Economic Analysis, May 27, 2016, <http://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm>.

<sup>32</sup> Susan Jones, “Record 94,708,000 Americans Not in Labor Force; Participation Rate Drops in May,” CSNNews.com, June 3, 2016, <http://www.csnnews.com/news/article/susan-jones/record-94708000-americans-not-labor-force-participation-rate-drops>.

<sup>33</sup> Jeff Cox, “US unemployed have quit looking for jobs at a 'frightening' level: Survey,” CNBC, June, 8, 2016, <http://www.cnbc.com/2016/06/08/us-unemployed-have-quit-looking-for-jobs-at-a-frightening-level-survey.html>.