COMPETITIVE ENTERPRISE INSTITUTE

January 14, 2019

Comments submitted by Trey Kovacs, Competitive Enterprise Institute

Docket ID No. NLRB-2018-0001-0001

Via www.regulations.gov

Introduction

On behalf of the Competitive Enterprise Institute (CEI), I respectfully submit the following comments in response to the National Labor Relations Board's (NLRB) Notice of Proposed Rulemaking (NPRM) on the Standard for Determining Joint-Employer Status, 29 CFR Chapter 1, RIN 3142-AA13, September 13, 2018.

Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy from a pro-market perspective.

NLRB 2018 Proposed Rule, "Standard for Determining Joint-Employer Status"

The Competitive Enterprise Institute applauds the NLRB's proposed rule that seeks to restore the traditional joint employer standard. Under the proposed rule, a joint employer relationship is established when an employer exercises "substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited or routine."

The NLRB's *Browning-Ferris* (2015) decision created an overly broad and vague standard for determining joint-employer status. That standard expanded the criteria for when an employer may assume joint employer liability to include *indirect* control and *unexercised potential* control. Yet, despite expanding the criteria for determining joint employment, the decision in *Browning-Ferris* failed to clearly define when a joint employer relationship would be established. This lack of clarity created by the recent change in the joint employer standard has imposed significant costs on employers, caused unforeseen negative outcomes, and made planning for the future difficult for the regulated community.

CEI's comments seek to establish that:

- Rulemaking is a superior process to create generally applicable policy than adjudication;
- The *Browning-Ferris* joint employer standard imposes significant costs; and
- The *Browning-Ferris* joint employer standard forces employers to withhold assistance from businesses they contract with.

Setting Policy via Rulemaking is Superior to Adjudication

Predictability and transparency are crucial to upholding the rule of law. Regulated parties deserve clear rules that make it obvious what is proscribed or permitted by law. Without a clear

understanding of the rules, it is extremely difficult for the regulated community to plan for the future or know how to act in order to comply with the rules.

The structure of NLRB lends itself to adjudication to establish precedent. An effort to use its rulemaking authority to set policy could lessen the politicization and uncertainty caused by the flip-flopping of precedent via adjudication based on the political leanings of Board members.

Rulemaking is a more inclusive process than adjudication. The entire regulated community—in fact, the entire public—get the opportunity to share their views on the proposed policy prior to its adoption. When the NLRB opts to establish precedent via its adjudicative powers, many times only the immediate parties involved are able to present their views to the agency.[1]

Determining joint employer relationships is a highly contentious and important policy. All affected parties—employers, employees, and labor unions—deserve the opportunity to present their views to the Board. It is imperative to provide interested parties the chance to comment, not only to give them an opportunity to share their views or to provide them with advanced notice of an upcoming policy change, but to inform the Board. It is important for the NLRB to hear from those with both the expertise and real-world experience to provide data or knowledge to the Board. As Washington University emeritus law professor Merton Bernstein notes, by requesting comments from the public the Board receives "as complete a picture about the nature and details of the problem as possible rather than the keyhole view afforded by individual cases."[2]

Institutional inertia, lack of experience, and politics are largely to blame for the NLRB's aversion to rulemaking. As determined in the landmark Supreme Court case, *Chenery II*, it is in the near-exclusive domain of the NLRB and other administrative agencies to set policy by rulemaking or adjudication.[3]

Securities and Exchange Commission v. Chenery Corp. (1947) dealt with a federal water company charged with illegal stock manipulation. In the original case, the Court ruled that the Securities and Exchange Commission's (SEC) rejection of the company's reorganization plan could not be sustained because the company's actions did not meet the common-law definition of fraud. On remand (the case that became known as *Chenery II*), the SEC charged the company on different grounds, based on new standards developed by the SEC itself. The Court then upheld those charges. Ultimately, the Supreme Court decided to allow the SEC—and by extension other federal agencies—to exercise lawmaking powers via adjudication because it is more flexible and can be done on an ad hoc basis.

However, the history of the NLRB's rulemaking via adjudication shows these benefits have not come to pass. In the future, it would benefit the regulated community if the NLRB used its discretion to choose rulemaking over adjudication.

Why does the NLRB, unlike most other agencies with a quasi-judicial role, favor adjudication over rulemaking so much? For example, the American Bar Association explains that one advantage of adjudication, specifically by the NLRB, is to "avoid political conflicts with congressional oversight and other overseers. The premise is that the slow, case-by-case accretion of policy is less dramatic or visible, easier to modify, and yet also more impregnable to political attack."[4]

Yet, this advantage does not apply to the NLRB, where policy changes are rapid and swing like a pendulum. This is due to the Board's political nature. The NLRB is a five-member board, with two Republican members and two Democratic members, with a chairman from the president's party. For decades, NLRB members have differed widely on how to interpret the National Labor Relations Act based on political affiliation. This is largely thanks to the nomination of union or management-side attorneys to sit on the Board.

Moreover, the NLRB's use of adjudication has not resulted in the avoidance of political conflict. When a new majority takes over the NLRB, much of its time is spent reversing precedent set during previous administrations. For instance, the Obama NLRB reversed 4,105 years of Board precedent via adjudication and another 454 collective years of case law when it implemented new union election rules.[5] This shift in policy cannot be considered a "slow, case-by-case accretion of policy."

The NLRB's *Browning-Ferris* decision is a perfect example of the policy oscillation and other problems that can arise from adjudication. Since 2015, the NLRB's standard for determining a joint employer relationship has flip-flopped three times. This politicization of the NLRB and oscillation of Board policy has eroded confidence in the institution, as uncertainty reigns among those regulated by the NLRB.

In addition to allowing the regulated community the opportunity to present their views, the rulemaking process keeps the public abreast of the agency's activities and changes to the law. When an agency chooses to engage in rulemaking, a public notice must be published in the Federal Register and made available to all of the regulated community. In addition, crafting generally applicable and clear rules via rulemaking should reduce litigation because all involved understand what they may or may not do under the formulated policy. In the *Browning-Ferris* decision, the NLRB majority wrote in the opinion that they did not even attempt "to articulate every fact and circumstance that could define the contours of a joint employment relationship."[6]

A rule, as opposed to an adjudicative decision, will provide more certainty to the regulated community because the NLRB will address the issue in a comprehensive manner, provide actual examples of when the new joint employer standard will apply. Unresolved issues can be submitted for court review. All this adds to greater certainty.

In contrast to the decision in *Browning-Ferris*, in which the NLRB failed to adequately express its policy, rulemaking lends itself to the crafting of clear and generally applicable Board policy. Rulemaking forces the agency to submit a policy in full rather than piecemeal as is the result of much of adjudication. As Washington University emeritus law professor Merton Bernstein noted:

The principal advantage of rule making is that is provides a clear articulation of broad agency policy. By contrast, the entire array of the Board's adjudicatory decisions on a subject often gives a diffuse, overly subtle mosaic of current NLRB doctrine. Rule making confronts the agency with the immediate necessity of declaring its policy in full.[7] Last, the NLRB's track record has greatly diminished many of the purported benefits of adjudication over rulemaking.[8]

Impacts on Business Operations from the *Browning-Ferris* Standard

Businesses require certainty in order to invest, expand, and hire new workers. During the Obama administration, the NLRB upended any sense of stability in labor-management relations policy, overturning a cumulative 4,559 years of precedent (as noted, 4,105 years of adjudication precedent and another 454 years of case law precedent via the change of election rules).[9]

In particular, the Board's broad and vague joint employer standard established in *Browning-Ferris* has created immense uncertainty and imposed massive costs on thousands of businesses across the country. A report published by the franchising industry consultancy FranData found that "40,000 businesses operating in 75,000 franchise locations are at risk of failure because of the NLRB ruling and its resulting egregiously high labor and operating costs."[10] In addition, the increased risk of business failures and potential decline in the formation of new franchise businesses could mean that "600,000 jobs may be lost or not created."[11]

These damaging consequences arise, in large part, because of the vague nature of the *Browning-Ferris* joint employer standard. The vagueness on the NLRB standard was on display when the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments in *Browning-Ferris v NLRB*. Browning-Ferris Industries challenged the NLRB's decision on several grounds, including the new joint-employer test being arbitrary, capricious, and contrary to the employment relationships recognized by the Taft-Hartley Act. An exchange during the *Browning-Ferris* oral arguments before the U.S. Court of Appeals for the D.C. Circuit illustrates the ambiguous nature of the current joint employer standard, which also causes businesses difficulties in achieving compliance with the law.

Judges at the *Browning-Ferris* oral arguments posed hypothetical scenarios to NLRB attorneys with the intent of trying to find the line between a company exerting indirect control that establishes a joint employer relationship or simply exerting legitimate economic influence. The NLRB lawyers could not confirm what indirect control means or when such activity would establish a joint employer relationship or adequately define either "indirect control" or when indirect control would establish a joint employer relationship.[12] Judge Patricia Millett said the NLRB had "dropped the ball" in its legal analysis and was concerned about whether the NLRB could police the line between genuine joint employment and contractor relationships.[13]

The expansive standard established by *Browning-Ferris* stands in stark contrast to the historically used bright-line test, where one company exercises *direct* and *immediate* control over another company's workforce.

Complicating matters, 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.

Further, the NLRB's *Browning-Ferris* decision 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 amendments to avoid responsibility for other companies' 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 outcome from the new joint employer standard is an increased risk of protracted and costly litigation. The increased risk of litigation will force employers to hire legal counsel to review contracts with suppliers, contractors, and franchisees in order to avoid costly lawsuits. In addition, employers will need to train employees on how to interact with the employees of contractors or suppliers in order to avoid joint employer liability.

A case currently before the NLRB provides an example of how costly joint employer litigation can become. Since 2015, McDonald's LLC and a number of franchisees have been in a dispute involving the NLRB's joint employer standard. According to a filing, McDonald's LLC has spent over $2 million on discovery alone.[14] Yet, McDonald's is a large corporation that can afford to take on those costs. That is not the case for smaller businesses that cannot afford to have armies of lawyers on retainer.

As Jerry Reese, director of franchise development for the hot dog fast food chain Dat Dog Franchise, LLC, stated in written testimony before the House Education and Workforce Committee:

> Increased joint employer liability comes at a high legal and operational cost to both large and small businesses alike. But make no mistake about it: this policy disproportionally affects small businesses. Big corporations have the resources, the attorneys, and the economies of scale to adapt to joint employer. If they're slapped with a joint employer claim, they can better afford to defend themselves and weather the storm. It's the small employers like Dat Dog that may run out of resources before we even get started.[15]

The resources expended by businesses on joint employer litigation provide no positive return to any stakeholder—employees, businesses, or the economy as a whole. These funds could be better used to invest in job training or creation, on business expansion, or to raise wages.

The new 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.

Bringing more job functions in-house raises costs, limits flexibility, and forces employers to develop resources to non-core business operations. 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. Outsourcing certain job functions also allows companies to stay nimble by giving them the ability to expand or downsize quickly. In addition, employers are better served when they can devote the majority of their time and focus on core business processes, not accounting or IT operations that can easily be outsourced.

Another consequence associated of the *Browning-Ferris* standard is that it may incenvitize companies to either take a more active role in the operations of businesses they contract with or decline to engage in business-to-business relationships. By increasing the odds that two companies are engaged in a joint employer relationship, it inherently reduces the incentive to franchise or to do business with contractors or suppliers. If a company is more likely to be responsible for another employer's workers, the company will be less willing to franchise or contract with a supplier.

This 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 joint employer standard may encourage franchisors to move toward direct operation of stores, and away from franchising.

Research suggests that the new joint employer standard could slow job growth at franchise companies, hitting the hospitality industry especially hard. The private sector would create 1.7 million fewer jobs over the next 10 years if the traditional joint employer standard is not restored, according to an estimate by the American Action Forum. The hospitality industry alone would create 500,000 fewer jobs during the same time period.[16]

Businesses Forced to Withhold Assistance and Benefits to Contractors

Unintended consequences have arisen from the new joint employer standard. Franchisors and employers that contract with suppliers have been forced to reconsider providing assistance or other benefits to companies they do business with.

Historically, franchisors have been permitted to pass along best practices to franchisees. One area where franchisors have long assisted franchisees is in training employees. However, franchisors feel pressure to avoid assisting franchisees under the indirect control standard. In written testimony submitted to the House Education and the Workforce Committee, Mary Kennedy Thompson, chief operating officer of franchise brands at the home services company Dwyer Group, stated:

> Indeed, franchisors like Dwyer Group have been forced to back-off in providing traditional support to franchisees—all out of fear we will be considered a joint employer. Franchisors are cutting back on giving training to technicians, helping franchisees find new employees, and providing the point of sale software to franchises. These have been resources that help attract entrepreneurs to franchising and grow franchises across the country. Franchises are small businesses that have on average 7-10 employees, and they need all the help they can get with recruiting, training, and having a blueprint for operating their business successfully. While we consider our company an educational organization whose job it is to educate our franchisees in best business practices, the new joint employment standards have changed how we train, who we train, and made it considerably harder for us to best support our franchisees.[17]

The *Browning-Ferris* joint employer standard has also restricted the ability of larger companies to set higher standards on suppliers that are intended to help employees. That is because the uncertainty created by the NLRB's new definition of joint employment could slow the trend of businesses adopting codes of conduct for their suppliers and contractors. Many companies implement codes of conduct to place basic conditions on a supplier before contracting with them. President Obama lauded such policies as companies doing the "right" thing.[18] Ironically, the same policies President Obama endorsed are undermined by a broad and vague joint employer standard.

Concerns that applying supplier codes of conduct could trigger a joint employer relationship were realized in a case involving Microsoft. In 2015, the Temporary Workers of America (TWA) requested Microsoft's presence at a collective bargaining meeting as a joint employer with Lionbridge, a supplier of Microsoft. The TWA argued that Microsoft's code of conduct for suppliers, which states the company will only do business with suppliers that offer 15 days of paid leave, makes Microsoft a joint employer under the *Browning-Ferris* standard. Under the direct control standard, placing eligibility criteria on a supplier would not indicate a joint employer relationship because such policies do not show that the lead employer exerts day-to-day control over operations. Further, employers do not implement supplier code of conduct to exert control over the workers of a supplier or contractor, but as a qualification a supplier must meet in order to work with the company.[19]

A top priority of the current administration is to expand of access to apprenticeship and workforce development opportunities. Yet, the current joint employer standard is a looming threat to businesses that offer apprenticeships and job training opportunities.

Many franchise companies offer accredited training and apprenticeship opportunities that allow employees to gain skills, receive promotions, or become future franchise owners. For instance, Jiffy Lube employees complete training at Jiffy Lube University, an Automotive Service Excellence-accredited program that counts toward college credit.[20] Aamco offers training courses through Aamco University. The training provides an opportunity for individuals to work with expert instructors in hundreds of courses covering subjects like vehicle inspection, diagnostics, and safety training.[21]

Under an indirect control standard, a joint employer relationship could be established by something as minor as a franchisor providing employees at franchisees with training or apprenticeship opportunities. Due to the NLRB's vague joint employer standard, every interaction like this becomes a legal question that must be kicked around by human resource professionals and lawyers prior to implementation. Without change in the joint employer standard, companies may rethink whether it is wise to offer these opportunities to their franchisees' employees.

Conclusion

The NLRB's proposed rule is necessary to address the regulatory uncertainty associated with the *Browning-Ferris* decision. Addressing the joint employer issue via rulemaking is a better, less politicized process than adjudication. For instance, the regulated community would receive advance notice of potential policy changes and have the opportunity to comment on the policy prior to implementation. Though the NLRB has historically relied on case-by-case dispute adjudication to set policy precedents, nothing prohibits the agency from issuing rules like any other regulatory agency.

By restoring the *direct* and *immediate* control standard, employers will avoid needless costs that stem from the vague and overly broad joint employer standard imposed by the NLRB's *Browning-Ferris* decision. Further, by implementing a predictable and easily understood joint employer standard will ensure that employers will be able to provide assistance to other businesses they contract with.

Respectfully Submitted,

Trey Kovacs

Policy Analyst

Competitive Enterprise Institute

Trey.Kovacs@cei.org, 202-331-2273

---

[1] In certain cases, the NLRB asks for briefs from interested parties when issuing a decision that will reverse precedent. However, there is no requirement for the Board to request briefs and many in the regulated community are excluded because only attorneys may file briefs.
[2] Merton Bernstein, "The NLRB's Adjudication-Rulemaking Dilemma under the Administrative Procedure Act," *Yale Law Journal*, Vol. 79, No. 4 (March 1970),
[3] The U.S. Supreme Court opinion in *Chenery II* created the general rule that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities and Exchange Commission v. Chenery*, 332 U.S. 194 (1947) (*Chenery II*).
[4] Ibid.
[5] Michael Lotito, Maurice Baskin, and Missy Parry, "Was the Obama NLRB the Most Partisan Board in History?" Coalition for a Democratic Workplace and Littler's Workplace Policy Institute, December 6, 2016, http://myprivateballot.com/wp-content/uploads/2016/12/CDW-NLRB-Precedents-.pdf.
[6] Browning-Ferris Indus. Of Cal., Inc., D/B/A BFI Newby Island Recyclery, 362 NLRB No. 186 (2015).
[7] The NLRB's Adjudication-Rule Making Dilemma under the Administrative Procedure Act.
[8] See the American Bar Association's "A Guide to Federal Agency Rulemaking: Rulemaking or Adjudication for the Setting of Policy" for a summary of the "Advantage of Adjudication," pP. 126-127, http://apps.americanbar.org/abastore/products/books/abstracts/5010073_chap2_abs.pdf.
[9] Lotito et al.
[10] Frandata, "FranData Key Findings and Survey Results: 2015 National Labor Relations Board," February 10, 2016, https://www.frandata.com/wp-content/uploads/2016/03/FRANdata_Joint_Employer_Impact_Study.pdf.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] McDonald's USA, LLC, Request for Special Permission to Appeal to the NLRB, October 9, 2017, https://www.scribd.com/document/368768728/Request-for-Special-Permission-to-Appeal?campaign=VigLink&ad_group=xxc1xx&source=hp_affiliate&medium=affiliate.
[15] United States House of Representatives, Committee on Education and the Workforce, Hearing on Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship, July 12, 2017, statement of Jerry Reese, II, Dat Dog Franchise, https://edworkforce.house.gov/uploadedfiles/reese_-_testimony.pdf.
[16] Ben Gitis, "The NLRB's New Joint Employer Standard, Unions, and the Franchise Business Model," American Action Forum, April 26, 2017, https://www.americanactionforum.org/research/nlrbs-new-joint-employer-standard-unions-franchise-business-model/.
[17] United States House of Representatives, Committee on Education and the Workforce, Hearing on Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship, July 12, 2017, statement of Mary Kennedy Thompson, Dwyer Group, https://edworkforce.house.gov/uploadedfiles/thompson_-_testimony.pdf.
[18] 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-councillabor-day-breakfast.
[19] Trey Kovacs, "Redefining Workers out of a Job," *OnPoint* No. 219, Competitive Enterprise Institute, August 3, 2016, https://cei.org/content/redefining-workers-out-job.
[20] "Jiffy Lube® Technicians," *Jiffy Lube*, accessed website on December 6, 2018, www.jiffylube.com/about/technicians.
[21] "About AAMCO University," AAMCO University, accessed on December 6, 2018, http://aamcouniversity.com/about-aamco-univeristy.html.