***Browning-Ferris Industries of California, Inc.*, (2015) 362 NLRB 186**

Briefing Note on Submissions on Appeal

Case Summary

Factual Background

Browning-Ferris Industries of California Inc. (BFI) operates a recycling facility that receives various mixed materials. Part of BFI's business operation is sorting these materials so they can be resold at the end of the recycling process. BFI employs approximately 60 employees, most of whom work outside the facility to move and prepare materials to be sorted inside the facility (and who are part of a bargaining unit). An additional 240 workers are provided to BFI by a staffing agency (Leadpoint) under a temporary labour services agreement. The Leadpoint employees work inside the facility and either sort materials or provide various cleaning services. This action arose after Teamsters Local 350 sought to represent the 240 Leadpoint workers and more specifically, to require BFI to be at the bargaining table to negotiate with regard to its "shared employees" from Leadpoint.

The Regional Director who issued the initial ruling in this matter concluded that BFI was not a joint employer with Leadpoint because it did not share or "codetermine" essential terms and conditions of employment. The union filed a request for review of the decision on the grounds that (a) the Regional Director ignored significant evidence and reached the wrong conclusion under the existing joint-employer standard; and (b) the National Labour Relations Board (NLRB) should reconsider its standard for evaluating joint employment relationships.

NLRB Decision

On August 27th, 2015, a divided (3-2) NLRB expanded the joint employer standard under the *National Labour Relations Act* (NLRA). The NLRB agreed with the union's second ground for review and reconsidered the standard by which joint employment relationships are evaluated. In the decision, the Majority provided a detailed analysis of the facts related to the relationship between BFI and Leadpoint, including the management structures of the two entities, hiring practises, discipline and termination, wages and benefits, scheduling and hours, work processes, training and safety, and various other contract terms.

After examining the intricacies of the relationship between BFI and Leadpoint, the Majority considered the evolution of its joint employment standard over the last several decades. In particular, the Majority concluded that, over time, the Board had effectively narrowed the joint employment standard without reason. The prior decisions focused on actual exercise of control (instead of just a "right" to control) that had to be direct and immediate to find joint employment. The Majority determined that this narrowing had been contrary to the common law and had to be revisited given the diversity of today's workplaces. The Majority stated that to find otherwise would result in employees being

without protection of the NLRA simply by virtue of the fact that they work in an arrangement with two or more entities.

As a result, the Majority proposed the following new joint employer standard:

> The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, as the Board and the courts have done in the past.

Applying this new standard to the relationship between BFI and Leadpoint, the Majority found that the Union met its burden of proving joint employment.

The two dissenting NLRB members disagreed with the Majority's expansion of the joint employer standard. Specifically, they outlined what they perceived as "five major problems" with the decision of their counterparts:

1. The Majority incorporated theories of "economic realities" and "statutory purpose" that extend the definitions of "employee" and "employer" beyond the common-law limits of agency principles that Congress and the Supreme Court have stated must apply.

2. The Majority's rationale for overhauling the Act's "employer" definition – to protect bargaining from limitations resulting from third-party relationships that indirectly control employment issues – relies in substantial part on the notion that these relationships are unique in the modern economy and represent a radical departure from "simpler" times when labour negotiations were unaffected by the direct employer's commercial dealings with other entities.

3. Courts have afforded the Board deference in this context merely as to the Board's ability to make factual distinctions when applying the common-law agency standard. The Majority has mistakenly interpreted this as a grant of authority to modify the agency standard itself. This type of change is clearly within the jurisdiction of Congress, not the NLRB.

4. The Majority has abandoned a longstanding test that provided certainty and predictability, and has replaced it with an ambiguous standard that could impose bargaining obligations on multiple entities in a wide variety of business relationships, even if this is based solely on a never-exercised "right" to exercise "indirect" control over what a Board majority may later characterize as "essential" employment terms.

5. To the extent the majority seeks to correct a perceived inequality of bargaining leverage resulting from complex business relationships, where some entities are

currently nonparticipants in bargaining, the “inequality” addressed by the majority is the wrong target, and collective bargaining is the wrong remedy. There are contractually “more powerful” business entities and “less powerful” business entities, and all pursue their own interests. The Board needs a clear congressional direction before undertaking an attempt to reshape this aspect of economic reality.

Arguments and Submissions on the Expanded Joint Employer Standard

The remainder of this briefing note summarizes key arguments and submissions made by the appellants and other intervenors to both the NLRB and the United States Court of Appeals – DC Circuit. The decision of the NLRB has been appealed, however the appeal is still in its early stages. Below, the arguments and submissions are organized based on topic, and each submission is preceded by a note citing which party wrote the brief being referenced. All of the briefs referenced below have been taken directly from the NLRB website, and can be found at: https://www.nlrb.gov/ .

The following is a list of all of the appellants and intervenors referenced in this briefing note:

- **Browning-Ferris Industries of California Inc.**
- Coalition for a Democratic Workplace, American Hospital Association, American Hotel and Lodging Association, Associated Builders and Contractors, Associated General Contractors of America, HR Policy Association, Independent Electrical Contractors, International Foodservice Distributors Association, International Franchise Association, National Association of Wholesale-Distributors, National Council of Chain Restaurants, National Federation of Independent Business, National Ready Mixed Concrete Association, National Retail Foundation, Society for Human Resource Management (collectively, the **“Coalition for a Democratic Workplace *et al.*”**)
- **The American Staffing Association**
- **Leadpoint Business Services**
- Associated Builders and Contractors, Associated General Contractors of America, American Hospital Association, American Hotel and Lodging Association, International Franchise Association, National Association of Homebuilders, National Retail Federation (collectively, the **“Associated Builders and Contractors *et al.*”**)

Effect of the New Standard on Collective Bargaining

(a) Brief of Browning-Ferris Industries of California Inc. to the United States Court of Appeals (DC Circuit)

The new joint employer standard is invalid because it fails to satisfy one of the NLRA's most basic tenets: the promotion of stable collective bargaining relationships. In fact, to achieve stability of labour relations was the primary objective of Congress in enacting the Act. If that statutory purpose is to have any meaning, the Act must provide a predictable manner of correctly identifying who is an "employer." Congress' focus on "direct supervision" serves that goal by establishing an understandable line between entities who deliberately and actively inject themselves into an employment relationship and those who do not.

Among the fundamental bargaining instabilities the new test raises but does not resolve are: how to define the appropriate bargaining unit(s); what "employer" participates in Board election proceedings; who does the bargaining; what happens if there are bargaining disagreements between/among the joint employers; how one employer's confidential information is to be treated vis-à-vis the other employer(s); the number of labour contracts; what contract durations; whether the labour contract(s) would govern the service contracts; what would happen when the service provider obtained new clients (who themselves might have union obligations); potential Board jurisdiction over some but not all of the contracting entities; multi-location work assignments among unionized and non-union clients; and responsibility for benefit fund contributions and liabilities.

In the BFI decision, the Board held that a joint employer would be required to bargain only as to such terms and conditions which it has the authority to control. This premise destabilizes the internal dynamics of the negotiations themselves. Bargaining issues typically do not exist discretely in a severable vacuum, but are dependent upon the resolution of a web of connected considerations. Fragmented bargaining is contrary to the fundamental purposes of the NLRA.

If a client has joint-employer status – which it now may attain through a lone strand of indirect control or an unexercised potential right to control – it will have to engage in an indeterminate bargaining process over its very decision to end the entire contractor arrangement. It will have to do so no matter how small or unsophisticated it may be in labour matters, or whether the decision has anything to do with the employees in question. Similarly, if a service provider and client want to change any aspect of their arrangement "affecting" employment terms, or to reallocate their bargaining responsibilities, one or both of them first will have to undertake the complex and uncertain process of negotiating with the union over their plans.

(b) Brief of Amici Curiae the Coalition for a Democratic Workplace et al. to the NLRB

Collective bargaining between only one employer and a union can be challenging enough; the addition of a third party into the mix will almost certainly result in unnecessary confusion and delay. Where a putative joint employer has limited or indirect control over the employees' terms and conditions of employment, the injection of that business into the bargaining process provides no material benefit to the employees. A simple cost-benefit analysis does not counsel expanding the joint employer standard and requiring bargaining over what essentially are market forces.

Broadening the Board's joint employer standard could significantly impede the contractual mobility and healthy competition manifest in the varied business relationships upon which the US economy depends. A broad joint employer standard may impair the ability to enter into or terminate business associations freely, even where the entity's desire to enter into or terminate the relationship has nothing to do with either party's employees or any term or condition of their employment.

Expansion of the joint employer doctrine may also put joint employers with little or no control over the workplace in the position of needing to justify economic decisions, including by providing supporting documentation to unions representing the employees of its business associates. It is not difficult to envision a union requesting that a joint employer justify its decision to reimburse only a certain amount of wages, and to supply information supporting that position. Yet such information may have nothing to do with any employment issues, and may involve business competitive strategies, trends in the marketplace, overall profit margins, decisions by corporate Boards and other factors that are wholly independent of any workplace issues.

(c) Brief of Amicus Curiae The American Staffing Association to the NLRB

The predictability of the current test aids in the administration of the NLRA and promotes the collective bargaining process. The current common law agency test allows the NLRB to achieve its goal of more promptly processing representation (and unfair labour practice) cases. Any economic or industrial realities test will require a lengthy, fact-intensive, and often subjective inquiry not only into the relationship between the two nominal joint employers and the employees, but also the relationship between the so-called employers. Rather than permitting employees to expeditiously decide whether or not to be represented by a labour organization, representation hearings will be prolonged, develop lengthy records based on not only the relationship of the purported employees to their "employers" but also on those between the "employers" themselves, and require hearing officers, Regional Directors, and the Board to sift through these complex and individual situations.

(d) Brief of Leadpoint Business Services to the NLRB

Bargaining inherently involves parties exchanging concessions in one area for gains in another. The give-and-take essential for bargaining demands that the employer operate

from a position of unified economic control, or at least, in the case of joint employers, a common base balanced to reflect the respective roles of the joint employers. Alleged joint employers bring different interests to the bargaining table, especially when one of the putative joint employers does not meaningfully participate in matters such as hiring, firing, discipline, supervision, and direction. With that being the case, the alleged joint employers may have different goals and demands with respect to bargaining. The putative joint employers' disparate motivations and desires can stand in the way of the parties reaching a collective bargaining agreement.

In light of the obstacles that would undoubtedly arise under such scenarios, the Board has – in the past - wisely determined that joint employers under the Act must actually share or codetermine those matters governing the essential terms and conditions of the employees at issue. If two entities share or codetermine such matters, their interests at the bargaining table are far more likely to be aligned and the parties involved in negotiations will be able to effectively bargain over the employees' terms and conditions.

Effect of the New Standard on Third-Party Business Relationships

(a) Brief of Amici Curiae the Coalition for a Democratic Workplace et al. to the NLRB

The breadth of industries potentially impacted by a broadened joint employer standard is demonstrated by the number and diversity of the Amici submitting this brief (Coalition for a Democratic Workplace et al.). Businesses in virtually every industry maintain associations and business relationships that establish the economic background for bargaining, and that thus indirectly touch on the economic terms and conditions of employment of employees of separate businesses without allowing one business to establish the terms and conditions of employment for other businesses.

Cost-plus contracts and other types of outsourcing relationships are currently and have historically been an integral feature of business operations in this country. So too are leased employee or agency relationships. These types of business arrangements allow companies to access specialized talent, focus on core business activities, and increase business flexibility. Strategic outsourcing allows smaller businesses to utilize specialized expertise from industrial giants such as IBM to handle tasks ranging from human resources and complex benefits issues to sophisticated informational technology systems. At the same time, many employers have come to rely upon staffing agencies for highly skilled workers who are essential to their operations. These include many hospitals throughout the country, who rely upon staffing agencies to supply trained nurses to deal with shortages in qualified personnel.

Adoption of an overbroad joint employer standard could have a particularly destabilizing impact on well-settled subcontracting practices in the construction industry. The complexity and specialized skills demanded on many construction projects requires the

general contractor or construction manager to be able to use and direct multiple subcontractors without taking on joint employer responsibility. The existing Board test has provided a clear standard that has allowed the independence of such subcontracting relationships to be maintained, so long as the prime contractor does not exercise control of the subcontractor's employment relationships through hiring, firing, discipline, supervision, and excessive direction of the work.

These business relationships are essential to American industry and economic prosperity. The NLRB should not alter the legal landscape for those relationships absent the most significant of justifications.

(b) Brief of Amici Curiae the Associated Builders and Contractors et al. to the United States Court of Appeals (DC Circuit)

The proposed standard's emphasis on reserved and indirect control threatens to completely upend the business of temporary staffing, harming many of the amici and their members:

> **Construction:** The construction industry has a severe workforce shortage that is making it harder than ever for general and specialty contractors to meet their contractual obligations and regularly forcing them to juggle their workers, and particularly their craft workers. Under current circumstances, temporary staffing companies often play a critical role. Should arm's-length arrangements with these companies result in joint employer status, the increased costs associated with that relationship will create financial hardships, particularly for the small businesses that comprise a substantial portion of the American construction industry.
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> **Healthcare:** The proposed standard's impact on temporary labour services will also impact the healthcare field, which routinely wrestles with a shortage of professionals, including nurses. Temporary staffing agencies supply employees – many of whom prefer the flexibility offered by temporary work in a high-demand profession – to fill in the gaps created by temporary workforce shortages and to accommodate the evolving demands of patient care.

The new joint employer standard will also cause problems in industries that have traditionally subcontracted and outsourced certain services, no matter how well established those patterns may be:

> **Commercial Construction:** Construction jobsites are multiemployer worksites and it falls to the general contractor to schedule and coordinate the work that many subcontractors, often in multiple tiers, have to perform simultaneously or in sequence. A general contractor must exercise a certain amount of control over its subcontractors and their employees simply to ensure the safe and efficient performance of the work. These construction industry practices, rooted in the economic reality that many small businesses contribute to large projects, may create joint employment where none is intended. The burden of joint employer

status in this industry will fall more heavily on smaller employers with fewer resources.

Hospitality/Lodging: A full-service lodging experience for customers can include some or all of the following: parking garages, laundry services, restaurant and bar service, tourist/sightseeing services, car rentals, beauty salons, spas, and shopping. Joint employer relationships with those businesses, with attendant costs and unpredictable permutations of bargaining obligations, would disrupt this business model. Eliminating or in-sourcing some of these services could be a real-world consequence of the new joint employer standard.

Retail: Retailers routinely engage logistics operators to manage their warehouses efficiently, to make deliveries, or to contract with service vendors to work in their facilities. They also do business with landscape, snow removal, maintenance and other similar contractors on a regular basis, both to keep their properties in a safe condition and to comply with federal and state laws regarding access for individuals with disabilities. However, in order to protect their brand they must have some opportunity to control the quality of the products and services offered by these contractors or lessees. This type of interest, together with routine instructions associated with the coordination of these services, should not be cause of concern about joint employer liability.

Home Building: The new standard leaves residential contractors uncertain about what level of necessary oversight and coordination will trigger joint employer liability. And what of homeowners, who control access to the job site, working hours, and many day-to-day conditions of employment, and who retain the ability to fire any contractor with which they are dissatisfied? Under the vague new standard, they meet the definition of joint employers as well. If residential homebuilders are “hamstrung” in their ability to manage projects in the manner that is traditional in their industry, they will become less flexible and less competitive.

Effect of the New Standard on Franchise Relationships

(a) Brief of Amici Curiae the Coalition for a Democratic Workplace et al. to the NLRB

An expansion of the joint employer standard could have a damaging impact on franchising relationships in the United States. Franchising is a method of marketing goods and services in which a franchisee pays a franchisor for the right to do business under the franchisor’s trademark or trade name. Franchised businesses account for a large segment of the US economy, operating, as of 2007, more than 828,000 establishments and directly providing more than 9.1 million jobs (6.2 percent of all private non-farm jobs), and indirectly providing 17.4 million jobs (11.8 percent of all private non-farm jobs).

In the typical business format franchising relationship, the franchisor circumscribes certain aspects of the franchisee's operations in order to protect its brand, trade name and trademarks. Those restrictions may indirectly affect some of the employees' terms and conditions of employment; for example, franchisor standards may require employees to wear uniforms or to interact with customers in a particular way. But aside from this type of background criteria, the franchisor is not involved in the day-to-day operations of the franchise and does not control critical aspects of the employment relationships such as hiring, firing, disciplining, supervising or directing. Under existing law, franchisors have generally not been considered joint employers.

If the Board were to broaden the joint employer standards to include entities that indirectly exert any control over the employees' terms and conditions of employment, business format franchisor relationships might be swept into the definition. For large franchisors with thousands of separate franchise establishments, such an expansion of the joint employer standard could put franchisors in the untenable position of having to manage labour practices and engage in collective bargaining in thousands of separate units all over the country. Franchisors would face the impossible choice of risking economic or operational demise because of the enormously magnified labour law exposure or withdrawing from any involvement in the franchisees operations and risking degradation of a carefully developed brand. Under either scenario franchisors would be forced to charge a higher fee thereby pricing out some percentage of potential new franchisees.

(b) Brief of Amici Curiae the Associated Builders and Contractors et al. to the United States Court of Appeals (DC Circuit)

Brand standardization is the key to most franchise systems. Consistent product quality, appearance and layout of structures, marketing materials, logos, and other business identifiers allow consumers to make informed choices about goods and services. To that end, franchisors must convey the operational principles of their business models to their franchisees and ensure that newly-established franchise businesses are properly developed, launched, and maintained. In turn, franchisees obtain assistance in best management and operational practices from the franchisor, which both protect the franchisor's brand and enhance the franchisee's likelihood of success.

At the same time, the vast majority of franchisees operate their businesses autonomously by, among other things: determining their own staffing needs; hiring, firing, disciplining, scheduling, supervising and setting performance metrics for employees; setting wage and compensation schedules; selecting employee benefits; choosing local vendors; pricing products; acquiring insurance and financing; determining zoning constraints; working with the community to provide opportunities to disadvantaged populations; and making business decisions based on local market conditions and local laws and regulations. They accept the corresponding legal responsibility for such decisions, which may include liability for employment-related conflicts over compensation, violations of equal employment opportunity laws, and the obligations to bargain collectively with duly-elected employee representatives under the NLRA.

The new standard upends this balance by potentially converting the hallmarks of brand protection and franchisee oversight and assistance into indicia of joint employment. Franchisors can no longer be certain whether the commercial efforts they undertake to maintain brand identity and protection will turn them into joint employers under this new test. Any of the standard commercial brand-protection activities described above could be characterized by the NLRB as “indirect control” over, or the “unexercised reserved right to control,” a franchisee’s operations.

Furthermore, the steps to best protect against these new risks could curtail business opportunities for local business owners and deprive local communities of needed jobs. Franchisors might choose to repurchase franchises upon expiration of the franchise agreement, allowing them to consolidate and control all labour practices. Similarly, they may be disinclined to expand the number of franchises they license. Or, they might consolidate franchises by arranging for larger franchise operators (with more resources and perhaps an internal human resources infrastructure) to buy out other franchisees. As a result, only those who can afford to purchase multiple businesses will remain in business as franchisees, denying business opportunities to small and independent owners.

Alternatively, even if franchisors continue to license many small franchises, they may decide that prudence requires expanded oversight over activities such as franchisee hiring and employee relations practices. These increased overhead expenses will be passed along to franchisees in the form of higher licensing fees and royalties.

The other options for franchisors – reducing or eliminating support of, and control over, franchisees in order to avoid the indicia of indirect control – carries the obvious risk of devaluing the brand. Moreover, even considering this option places franchisors in the legally untenable position of having to decide between maintaining brand protections or risking labour and employment liability for the actions of franchisees.

Even if franchisors could legally and practically justify reducing oversight over franchisees, doing so would add greater burdens on the franchisees themselves. They would be forced to incur new expenses associated with training, information technology, and legal and administrative services. The potential reduction in profit would put many businesses at risk.