Main Street in Jeopardy

The Expanding Joint Employer Threat to Small Businesses

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ABSTRACT

The concept of joint employment, that is, where two separate employers share responsibility and liability for the same employee, has long been recognized under multiple federal statutes, including the National Labor Relations Act (NLRA). For nearly three decades, the National Labor Relations Board (NLRB or Board), which enforces the NLRA, used a simple and clear standard for determining joint employer status, one that relied on "direct and immediate" control over fundamental terms and conditions of employment. This bright line test allowed for the expansion of successful business models, such as franchising and subcontracting, that have encouraged flexibility, specialization, and job growth. In 2015, however, the NLRB overturned its well-established standard, replacing it with a vague and sweeping new test that has caused turmoil and uncertainty for a wide range of employers. Unfortunately, the interest in expanding joint employer liability has spread to other federal agencies as well as state and local governments. Essentially, businesses across multiple industries may now find themselves liable for workplaces they don't control and workers they don't employ. Congress can, and must, take action to restore common-sense to this aspect of labor law.

I. INTRODUCTION

On August 27, 2015, the NLRB issued a decision in a case known as *Browning-Ferris Industries (BFI)*. Despite the Board's assurance that it had merely "refined" its standard for determining joint employment under the NLRA by applying "long-established principles," employers knew that the decision represented a significant policy change with potentially serious economic consequences. In replacing the time-tested "direct and immediate control" standard with a sweeping and vague test based on "indirect" and "potential" control over fundamental terms and conditions of employment, the NLRB had suddenly exposed a broad range of businesses to liability for workplaces they don't control and workers they don't employ.

In replacing the time-tested "direct and immediate control" standard with a sweeping and vague test based on "indirect" and "potential" control over fundamental terms and conditions of employment, the NLRB had suddenly exposed a broad range of businesses to liability for workplaces they don't control and workers they don't employ.

The Board's decision only reinforced the anxiety created by the NLRB's General Counsel, Richard Griffin, who several months prior had filed unfair labor practice charges against McDonald's as a joint employer with several McDonald's franchise owners. These charges were based on complaints filed by Service Employees International Union (SEIU)-funded worker centers as part of the union's campaign to organize fast food restaurants.

The NLRB's actions, alarming enough on their own, raised additional fears within the business community that other regulatory agencies would start applying expansive standards to find joint employment status under their respective statutes. Those fears have proved well founded, as both the Occupational Safety and Health Administration (OSHA) and the Wage and Hour Division (WHD) at the U.S. Department of Labor (DOL) have indicated their intentions to heavily scrutinize situations that may give rise to joint employer liability. Moreover, several state and local governments have picked up on the concept and begun to apply their own expansive views of joint employment.

In 2015, the U.S. Chamber of Commerce released a report on the joint employer issue titled "Opportunity at Risk." The report examined the history of the franchising and subcontracting business models, the historical treatment of franchising and subcontracting under several different statutes, and efforts by the NLRB to undermine those models. The report was released five months before *BFI* was issued.

This report, produced by the U.S. Chamber of Commerce and the International Franchise Association (IFA), picks up where "Opportunity at Risk" left off. It first examines the roots of the campaign against the franchising and subcontracting business models. This includes the writings of WHD Administrator David Weil and the "Fight for $15" protests, which are the public relations face of the SEIU's campaign to unionize the fast food industry. It then highlights the actions of the NLRB, the WHD, and OSHA, with regard to joint employment. While it is too early to compile hard economic data, the report includes descriptions of how some businesses are dealing with the fallout of the *BFI* and *McDonald's* cases. Finally, it examines how state and local governments are approaching the issue.

In essence, what was once viewed simply as a labor issue is now a local small business and jobs issue. Congress can, and must, take action to return common sense to this aspect of labor law, either through an appropriations rider or stand-alone legislation.

While an expansive view of joint employment may have been conceived by a small group of activists and union leaders, it now influences government policy at the federal, state, and local levels. Unfortunately, the consequences of these ongoing policy changes are likely to spread far beyond the narrow organizing objectives of the SEIU and harm businesses of all shapes and sizes — as well as their employees. In essence, what was once viewed simply as a labor issue is now a local small business and jobs issue. Congress can, and must, take action to return common sense to this aspect of labor law, either through an appropriations rider or stand-alone legislation. Left unchecked, the new liabilities created by the NLRB, and increasingly by other government entities, will be to the detriment of workers, employers, and the economy.

II. ORIGINS OF THE EXPANDED DEFINITION OF JOINT EMPLOYER

A. The Writings of David Weil

A significant contributor to the philosophical underpinnings of expanded joint employment is David Weil, previously a professor at Boston University and now Administrator of the WHD.[1] In 2010, while still a professor, Weil wrote an enforcement manual for the WHD that emphasized the term "fissured workplace."[2] In that manual, Weil claimed:

> The relationship between worker and employer has become more and more complex as employers have contracted out, outsourced, subcontracted, and devolved many functions that once were done in house. Like rocks weakened and split apart by the passage of time, employment relationships have

> become deeply "fissured" in many sectors that employ large numbers of vulnerable workers.[3]

According to Weil, this so-called "fissuring" is responsible for increased violations of labor and employment laws and higher levels of economic inequality. Weil's solution is to go after the employer with the deepest pockets by linking that business to the employer alleged to have actually committed the violation:

> WHD should pursue strategies that focus at the top of industry structures, on the companies that affect how markets operate and many of the incentives that ultimately affect compliance. This starts with having a clear "map" of how priority industries operate and how that results in employer behavior. It then requires putting in place coordinated investigation procedures built around related business entities rather than individual workplaces and using those regulatory tools (from persuasion and education to the use of penalties, hot goods provisions, and other legal tools) to craft comprehensive agreements.[4]

Weil reinforced this theory in a 2011 article advocating enforcement targeted at "higher-level, seemingly more removed business entities."[5] In 2014, he authored his most comprehensive work on the issue, a book entitled: "The Fissured Workplace: Why Work Became so Bad for so Many and What Can be Done to Improve It."

"The Fissured Workplace" calls for targeting certain industries, such as franchising, hospitality, and construction. Weil considers these industries the predominant drivers of the alleged abuses featured in his book (although he gives little credit to franchising and subcontracting for the jobs, economic growth and entrepreneurial opportunities those business models create). "The Fissured Workplace" suggests that dramatic and radical changes to the law are needed to increase liability for employers. Weil states that, "[I]nnovative solutions could be created by reestablishing that lead companies have some shared responsibility for the conditions arising in the network of workplaces they influence through their activities."[6]

It should come as no surprise that Weil's suggested solution for the alleged problems associated with "fissured workplaces" are almost identical to those used to justify an expanded joint employer standard. Indeed, some in the labor and employment law community have called Weil the "Godfather" of the campaign described in this report.

B. Unions and the Franchise Industry

While Administrator Weil looked at business models like franchising and subcontracting from an academic and enforcement perspective, organized labor had a much more outcome-based approach to the joint employer issue.

As observers of labor policy know, membership in labor unions has been in a steady decline for 60 years. Union membership peaked in 1955, when 35 percent of the workforce was unionized, but in 2015 just 11.1 percent of workers belonged to unions.[7] Moreover, according to the Bureau of Labor Statistics (BLS) only 6.7 percent of the private sector workforce is unionized.[8] This seemingly inexorable decline is a major challenge to union leaders.

Responding to that challenge has involved a myriad of different strategies including calls to dedicate a fixed percentage of revenues to organizing, developing "corporate campaign" tactics to harass employers, engaging in shareholder activism, setting up the "Change to Win" federation as an entity distinct from the AFL-CIO, and pushing for legislative changes to the NLRA such as the Employee Free Choice Act (EFCA).

None of these efforts have been particularly successful. However, the last of them deserves special mention, not because EFCA was a viable piece of legislation, but because it involved the method unions see as the most promising for long-term success — getting government to change the rules of the game. And with regard to the question of joint employment, one union in particular has pushed this approach the furthest.

The SEIU is one of the largest and most aggressive unions in the country. In recent years, it has embarked on a highly ambitious campaign to unionize the fast food industry. This would

appear to be a lucrative target. BLS data reveal that in the broadly-defined "food services and drinking places" category, which employs 8.5 million individuals and includes many franchise restaurants, only 1.5 percent of workers belong to unions.[9] Thus, there is vast, untapped potential amongst this pool of employees. An impediment to unionizing many of these workers, however, is the franchise system.

Franchising has been a way of providing products and services to customers in the United States since the mid-19th century, when Isaac Singer invented the sewing machine and created franchises to distribute them. A franchisee is typically a small business owner who operates one or more local businesses under the brand name of the franchisor. The franchisor, by contrast, is a larger enterprise that focuses on product development, brand management and marketing.

The major advantage of operating a franchise is the ability to utilize the franchisor's established brand name, which reduces the need for a small business owner to spend resources establishing their own market identity, something that is especially helpful in highly competitive industries.[10] For the franchisor, the financial benefit comes from the trademark, royalties, and service fees paid by the franchisee. The key is that the franchisor and its franchisees are legally separate businesses.

As unions have found over the years, organizing in the fast food industry is challenging. First, many workers view their employment in that industry as temporary, so the idea of union representation and paying dues may be of little interest. Second, turnover in the industry is high, in some cases as high as 75% annually.[11] What this means for unions is that an organizing campaign at an individual location must be in almost perpetual operation, a potentially expensive proposition, as by the time a majority of a workplace has been convinced to vote for representation (already a difficult task for the first reason mentioned above), most of those recruits are likely to have moved on to other employers and the process must start again.

However, these challenges are compounded by the franchise model. First, even if a union does manage to win an election at a franchised fast food restaurant, it will have made no inroads into businesses operating under the same banner as they themselves are independently owned and operated establishments. Second, because the franchisor does not own or manage franchisees, there is no obligation for the brand name company to come to the bargaining table. Thus, the union will have spent a great deal of time and money for a handful of employees, and seemingly reached a dead end.

To make the proposition more viable, what the SEIU needs is a way to break down the legal separation between a brand name company and its franchise owners. In other words, it needs

a way to make them joint employers under the NLRA. Once joint employment is established, organizing even one restaurant at one location becomes a pathway to other restaurants and, more importantly, the means to force the brand name company to the bargaining table. As part of contract negotiations, the SEIU can then ratchet up pressure on the brand name and seek a nationwide agreement on organizing concessions, such as allowing franchisees to be organized by card check. With concessions in hand, the SEIU could rapidly pick off restaurants around the country, giving it leverage for even more concessions. These might include a region-wide organizing agreement, under which an employer essentially surrenders facilities in a given region to a union in exchange for the union refraining from organizing in other regions.

Put simply, what may have started as a labor issue has become a local small business and jobs issue.

While in past years, such a scheme stood little chance of success, the SEIU has found a willing co-conspirator in the NLRB and other government agencies. As this report will demonstrate, the fallout from basing broad-reaching policy decisions on the narrow interests of one union will extend far beyond fast food. Put simply, what may have started as a labor issue has become a local small business and jobs issue.

C. "Fight for $15" (and a Union)

The SEIU's fast food campaign has taken place on several fronts. Perhaps the most visible of these is the series of "Fight for $15" protests that have taken place in a number of cities over the past four years.

After several months of planning by approximately 40 organizers, the first protests took place in late November 2012 and involved several small demonstrations at McDonald's, KFC and Burger King locations in New York City.[12] Among them were demonstrations by 14 workers from a midtown Manhattan McDonald's and 40 protesters outside of a Burger King near Penn Station. Despite their modest size, they garnered a fair amount of media attention, and *The New York Times* called the demonstrations "the biggest wave of job actions in the history of America's fast-food industry."[13]

The protests resumed in April 2013, with demonstrations in New York and Chicago.[14] Over the summer of 2013, the "Fight for $15" campaign continued with demonstrations in additional cities such as Detroit, St. Louis, Milwaukee, Seattle, and Kansas City.[15] Few actual employees may have walked off the job,[16] but that was never really the point, and the media narrative that thousands of workers were going on strike all around the country made such technicalities irrelevant.[17]

The "Fight for $15" continued the following March (2014) when events were planned in 30 cities including Boston, Chicago, Detroit, Los Angeles, Memphis, and Milwaukee. Despite the fiery rhetoric and publicity stunts, the protests once again didn't seem to amount to much, with just a few dozen individuals chanting in New York, Boston and Los Angeles.[18] In May 2014, "Fight for $15" ramped up the rhetoric, and claimed that a massive protest would take place in 150 U.S. cities and more than 30 countries, which was reportedly "the biggest fast-food workers' protest ever organized."[19] Again, however, actual results on the ground fell far short of that.[20]

Additional "Fight for $15" protests have taken place since that time, with the latest having occurred on April 14, 2016. For the most part, these have followed the usual script — a press release announcing an ever larger number of targeted cities, a media blitz in the days leading up to the protests, and participation on the specified date that doesn't quite match the hype. There have, however, been some efforts to mix things up a bit — for example, inclusion in the protests of adjunct professors and home care and airport workers, and the targeting of McDonald's shareholder meetings.

The protests have sometimes been accompanied by the release of studies intended to provoke criticism of fast food restaurants. The timing of these studies have often been coordinated with sympathetic politicians. For example, a report called "New York's Hidden Crime Wave: Wage Theft and NYC's Fast Food Workers" accused fast food employers of essentially stealing wages and a variety of other labor violations.[21] On the day the study was released, New York Attorney General Eric Schneiderman announced that his office was opening an investigation into these accusations.[22]

However, the higher minimum wage has simply been a collateral outcome — the real point of the protests has been to ramp up pressure on McDonald's and other businesses and prod the federal government to ease the path to unionization.

Thus far, the SEIU has spent at least $55 million on the campaign, which is a conservative estimate based on what can be conclusively determined from financial disclosure reports filed with the U.S. Department of Labor.[23] The real total is certainly higher. In one sense, the SEIU has gotten what it paid for, and this expenditure has undoubtedly had an impact on the minimum wage debate. A number of cities, such as Seattle, San Francisco, Los Angeles, and Washington, DC have enacted laws that will raise their minimum wage to $15 an hour, as have the states of California and New York.

However, the higher minimum wage has simply been a collateral outcome — the real point of the protests has been to ramp up pressure on McDonald's and other businesses and prod the

federal government to ease the path to unionization. In the second of these objectives, the SEIU has made considerable headway.

III. THE FEDERAL GOVERNMENT AND JOINT EMPLOYER

Over the past three years, the federal government has made considerable changes to the way it approaches joint employer issues. The most active agencies thus far have been the NLRB, the WHD, and OSHA.

A. The NLRB Weighs In

1. The Traditional View of Joint Employer

The franchising and subcontracting business models have evolved as a practical response to real world conditions. In a highly competitive global economy, employers must make decisions on a daily basis to adapt, change and find unique advantages over their competitors. As part of this decision-making, companies often find that certain functions of the workplace — such as logistics, information technology, human resources, etc. — can be more efficiently performed by an outside vendor. Often, these synergistic relationships result in the intermingling of employees of different employers. Think, for example, of a security company that might provide guards for a client in the banking industry, which at the same time brings in contractors to run its IT systems, one of a myriad of possible relationships involving vendors, subcontractors, temporary workers and the like. In these situations, because of the significant legal rules and obligations that come with being an "employer," federal labor law has traditionally utilized an easily-understood test in order to determine which business is the employer of certain employees.

Until 2015, the NLRB found two separate and independent business entities to be "joint employers" *only* if they were to "share or codetermine those matters governing the essential terms and conditions of employment."[24] In practice, the Board examined whether a putative joint employer exercised "direct and immediate" control over the employees at issue.[25] This direct control was generally understood to include the ability to hire, fire, discipline, supervise and direct.

So, for example, a factory owner would be considered the "joint employer" of contracted janitorial workers only if the factory owner participated in the hiring, firing and discipline of the janitors, and directed and supervised the work to be performed. While the test was very fact-intensive with no one factor being more compelling or persuasive than another, it was generally easy for businesses to follow.

This test, which the Board applied for over 30 years, and which had been endorsed by reviewing federal courts of appeal, made perfect sense. It ensured that a putative joint employer was actually involved in matters that fell within the Board's purview, to wit, the employment relationship. It also ensured that such companies would not be improperly embroiled in labor negotiations or disputes involving employees and workplaces over which they had little or no control. This was particularly important because a large company may have contractual relationships with hundreds or even thousands of franchisees, vendors, and subcontractors. Indeed, it made sense to impute liability only in those cases in which an employer was realistically in a position to investigate and remedy unlawful actions.

2. Changing the Rules

Over the years, some Board Members signaled a desire to blur this bright line test.[26] In 2014, after establishing new standards to allow unions to cherry pick the scope of bargaining units[27] and feeling secure in the promulgation of its "ambush" election rule (which would go into effect early in 2015), the NLRB began taking steps to finally establish a looser, more ambiguous joint employer standard. This involved three separate cases: *CNN*, *McDonald's*, and *BFI*.

The three cases in question were not chosen by accident. *CNN* had been an ongoing joint employer case that enabled the NLRB to lay the groundwork for future policy changes. The *McDonald's* case involved a high profile franchisor directly in the crosshairs of an organizing campaign. And *BFI* was a representation case, as opposed to unfair labor practice cases like *CNN* and *McDonald's*, thus giving the Board a separate procedural track. Moreover, as a representation case, *BFI* could not be directly appealed to a federal court. Thus, like a gambler spreading the odds, the NLRB had a trifecta of options in play.

a. The *CNN* Case

As a first step, the Board brought to a conclusion a nearly two decade-old case involving CNN. Though subsequent cases have rightly garnered more attention, the NLRB used *CNN* to lay the groundwork for upending the long-established joint employer standard.

CNN is a very fact-intensive and complicated case, and its genesis goes back to 1997, when CNN's Washington and New York bureaus had contracts with a unionized company — Team Video Services (TVS) — to provide them with camera and technical services.[28] The agreements, which expressly noted that TVS employees were not employees of CNN and which reserved to TVS the hiring, firing and compensation of these workers, expired in 2003 when CNN made the decision to move the camera and technical work in-house.

Although most of the TVS employees were subsequently offered positions at CNN as a result

of this reshuffling, in 2004, the union representing TVS employees filed unfair labor practice charges (ULPs or charges) against CNN. The charges alleged that CNN was a joint employer along with TVS and that, among other allegations, it had made unilateral changes to the contracts in violation of the NLRA.

In *CNN*, the NLRB changed the joint employer test by including "indirect" elements of control as determinative of joint employer status. In other words, the Board went beyond factors relating to direct control (hiring, firing, supervision, etc), and relied on additional — and irrelevant — factors to establish CNN as a joint employer.

In 2014, the NLRB affirmed a 2008 administrative law judge decision finding CNN a joint employer and ordered reinstatement and backpay for TVS employees, even those who were hired by CNN more than a decade ago. As of the date of this publication, the case is still on appeal with the D.C. Circuit Court of Appeals.

In *CNN*, the NLRB changed the joint employer test by including "indirect" elements of control as determinative of joint employer status. In other words, the Board went beyond factors relating to direct control (hiring, firing, supervision, etc), and relied on additional — and irrelevant — factors to establish CNN as a joint employer. These included the facts that TVS employees worked in CNN facilities, used CNN equipment, and performed work at the core of CNN's business. However, the NLRB provided no justification for inserting the new "indirect" elements into the test for joint employer, nor did it provide notice to the stakeholder community of its abrupt change in policy. Thus, with *CNN*, the Board succeeded in broadening — but not completely overhauling — the joint employer test. The NLRB's goals in *McDonald's* and *BFI* would be far more ambitious.

b. *McDonald's*

In July 2014, the NLRB's General Counsel, Richard Griffin, announced the authorization of complaints against McDonald's USA, LLC for the employment decisions of individually owned-and-operated franchise restaurants. The underlying ULPs were filed by worker centers backed by the SEIU and alleged that McDonald's workers' rights were violated when they were disciplined for participating in minimum wage protests orchestrated by those same worker centers. While the charges were filed against the individually-owned McDonald's franchisees, they also named McDonald's USA, LLC as a joint employer. The decision to authorize the complaints represented a dramatic change in the way the NLRB viewed franchising.

The case against McDonald's involves 61 ULPs against McDonald's USA, LLC and 30 of its

franchisees spread across six NLRB regions. These have been consolidated into one case, which is being heard in the New York Region. The case is expected to take years before it is ultimately resolved, and many legal experts describe it as even more complicated than *CNN*.

What is particularly concerning about the *McDonald's* case is that the NLRB has traditionally not looked at franchisors as joint employers. Moreover, General Counsel Griffin has acknowledged that well-established Board law allows franchisors a certain amount of control over operations of franchisees in order to preserve the integrity of their brands without subjecting themselves to joint employer liability. Or at least, it used to.

By prosecuting McDonald's, the NLRB has, at best, created uncertainty in the law that is likely to have a chilling effect on the franchise industry, which, of course includes many different types of businesses other than fast food. And because myriad liabilities and obligations — including the duty to bargain — attach to a finding of joint employer liability, franchisors will need to consider making significant changes to their business models.

Some franchisors may determine that if they are going to be held liable for the actions of franchisees they must exert more control over day-to-day operations, including such issues as hiring/firing, compensation, training, and labor costs. Even if this were physically possible for certain franchisors, the costs of exerting this control would be exorbitant. Franchisees in such a circumstance would become little more than junior partners (if not simply employees) of a business that they thought they owned.[29] Ultimately, this would discourage both existing companies and entrepreneurs from participating in franchising. By contrast, other franchisors may decide to essentially cut off their franchisees, and stop offering valuable services to them to avoid any indicia of joint employment.[30] Finally, some firms may simply decide to stop offering new franchises at all, opting for corporate-owned locations instead. Entrepreneurs looking to start a new business, who often are recent immigrants, would lose

opportunities to do so. Simply put, the *McDonald's* case is a grave threat to the franchise model and to those who want to start new small businesses in their community.

c. The *Browning-Ferris* Decision

Even as the proceedings in *McDonald's* got underway, the NLRB moved forward on its third front, a case known as *BFI*. It is this case that has the broadest ramifications for businesses and the economy.

At issue in the case was whether Browning-Ferris, which operated a waste disposal facility in California, was a joint employer with Leadpoint Business Services, which was contracted to supply workers to the facility. At the first stage of the proceedings, an NLRB Acting Regional Director applied the Board's longstanding joint employer test based on direct and immediate control and correctly determined that Leadpoint was the sole employer of the workers at issue. As such, he ruled that Browning-Ferris had no obligation to bargain with the union representing Leadpoint's employees. The union then appealed to the Board, claiming that Browning-Ferris and Leadpoint *were* joint employers under the current standard, and that if they were not, the Board should reconsider the standard.

Discarding the clear, bright-line joint employer test, which focused on direct and immediate control, *BFI* adopted an amorphous, ill-defined test that will find joint employment status based on *indirect* or *potential* control over the terms and conditions of employment of another company's workers.

After soliciting briefs from the public, in August 2015 the NLRB issued a decision. It ruled that Browning-Ferris was a joint employer of Leadpoint employees and had an obligation to participate in collective bargaining over a contract for those workers. In so doing, the Board overturned long-standing precedent. Discarding the clear, bright-line joint employer test, which focused on direct and immediate control, *BFI* adopted an amorphous, ill-defined test that will find joint employment status based on *indirect* or *potential* control over the terms and conditions of employment of another company's workers. Moreover, the Board expanded its definition of "control." In addition to the traditional indicators — e.g. hiring, firing, and supervising, the Board announced it would also look to include factors such as specifying the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance.

The expansive new standard articulated in *BFI* is simply unmoored from the realities of the modern workplace. Indeed, the very nature of a contractual relationship presupposes

at least *some* control over the services, results or product agreed to. For example, surely a company that contracts with a food service business to provide cafeteria services will retain a modicum of indirect control to ensure that the food quality, prices and speed of delivery are what it bargained for in the contract. Likewise, a business that brings a subcontractor onto its property will likely retain ultimate control over which of the subcontractor's employees are actually allowed on the worksite so that it may deny access, for example, to someone carrying guns, selling drugs, or drinking on the job.

These types of contractual relationships are myriad and commonplace. As noted in the dissent to *BFI*, "the number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited."[31] Of course, what remains unanswered in *BFI* is just how much reserved or indirect control is needed for the Board to consider an entity a joint employer.

Indeed, the open-ended and multi-factor test articulated in *BFI* provides absolutely no guidance to employers on how to structure their relationships so as to limit joint employer liability. The new test sets a rather low bar for finding joint employer status and, as the dissent stated, may "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have."[32]

The NLRB claims that the application of *BFI* is limited in scope — that it is to be applied on a case-by-case basis and "does not govern joint-employer determinations" under other labor and employment statutes.[33] But this is mere lip service to an employer community that finds itself at the mercy of one of the most controversial and politically-motivated Boards in history. Indeed, by changing its joint employer standard in *BFI*, the Board has opened up a Pandora's Box of problems that may entangle almost any employer who enters into a contract for services with another business. And while the impetus behind changing the joint employer standard may have been to help one union organize the fast food industry, the collateral damage will spread much further, significantly expanding the universe of employers who can be targeted by the NLRB and the plaintiffs' bar. Many of these problems were set forth in various U.S. Chamber letters to Congress, as well as in the Chamber's previous joint employer report. However, it is worth reiterating some of the negative results of the *BFI* decision:

1. **Corporate Campaigns.** Being able to characterize large, well-known businesses, including franchisors, as the "employer" of a targeted group of workers who are employed by smaller, lesser-known businesses, will encourage unions to launch very public organizing campaigns in hopes that the larger employer will bend to public pressure and recognize a union.

2. **Liability under the NLRA.** Because joint employers are liable for each other's acts and

omissions, expanding the pool of joint employers will result in increased labor law liability for employers, even in cases in which they exert little or no control over the workers involved.

3. **Collective Bargaining.** If the direct employer is organized, the "indirect employer" would have to participate in collective bargaining. Depending on the circumstances, the "indirect employer" could be dragged into bargaining relationships with hundreds of entities over whose day-to-day operations they have no control. Whether the indirect employer could be liable in such a situation for poorly funded multi-employer pension plans is an open question, the answer to which could have very serious financial repercussions.

4. **Secondary boycotts.** The NLRA's prohibition on secondary boycotts means that if a union has a dispute with one employer (e.g., a janitorial services company), it cannot entangle other employers in the dispute (e.g., the factory owner that contracts with the janitorial services company). This distinction would no longer exist under a joint employer finding, and unions could picket and demonstrate against both entities.

Worse, the plaintiffs' bar and other enforcement agencies may attempt to import the new *BFI* standard into other areas of employment law such as:

1. **Threshold employer coverage.** Many statutes, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, have small business exemptions and only apply if an employer has a certain number of employees. By loosening the joint employer standard, employer coverage under such statutes could rise sharply. This would essentially eliminate carefully-negotiated small business exemptions in these federal statutes.

2. **Discrimination law.** *BFI*'s new joint employer standard may encourage both the Equal Employment Opportunity Commission (EEOC) and the plaintiffs' bar to stretch the bounds of the law in an effort to entangle more employers in discrimination lawsuits.[34] Importantly, compensatory damages are capped under Title VII, and the caps generally increase as the number of employees increases. Thus, the plaintiffs' bar will be encouraged to establish joint employer status because doing so would boost the number of employees involved in a lawsuit — multiplying the amount of available damages.

3. **Wage and Hour issues.** Employers who use subcontractors may be liable for the subcontractor's wage-and-hour violations if it is determined they are joint employers. Moreover, the WHD and plaintiffs' bar will undoubtedly look for additional ways to take advantage of *BFI*. As previously noted, it is no secret that Administrator Weil has a strong distaste for alternative workplace arrangements, and indeed, the Administrator has already

issued a new interpretive letter on joint employment, which will be discussed below.

4. **Occupational Safety and Health Administration (OSHA) issues.** *BFI* may also provide an opportunity for OSHA to ratchet up fines against a business for repeated violations committed by subcontractors or franchisees deemed to be joint employers. For example, if the same safety violation occurs at several different franchisees, OSHA could charge a franchisor deemed a joint employer with repeat violations (which comes with a commensurate increase in penalties). As with its colleagues in the WHD, OSHA has already waded deeper into the joint employer pool by issuing an enforcement directive to its field personnel instructing them to look for indicators of joint employer status during inspections of franchise establishments.[35]

5. **Affordable Care Act (ACA) Issues.** Under *BFI*, individual companies that are exempt from the employer mandate could wind up facing ACA compliance issues if they are found to be joint employers with a larger company or with subcontractors. This could be the case even if workers are only part time since the definition of "full time" in the ACA is 30 hours per week.

d. *Miller and Anderson*

Not content to rest on its laurels, the NLRB has been pursuing additional joint employer angles in the wake of *BFI*. One of these is a case called *Miller and Anderson*, which involves the formation of joint bargaining units of regular employees and contractors, including temporary, part-time, and contingent workers.[36]

Under current law, a union can only organize a bargaining unit composed of regular employees and contract workers when both the employer and contractor agree. This makes sense, as both the regular employees and contract workers likely have divergent interests, as do their respective employers. Forcing them all to bargain together would be unproductive, and possibly unworkable. However, in May 2015 the Board solicited briefs from the public on whether it should overturn this practical standard and permit unions to organize regular employees and contract employees without the consent of the employer and contractor. The solicitation of briefs has become an ominous sign with the current Board, and a reliable indicator that a further reversal of precedent is in store.

However, in May 2015 the Board solicited briefs from the public on whether it should overturn this practical standard and permit unions to organize regular employees and contract employees without the consent of the employer and contractor.

Should this change materialize, unions will have a new path to organizing employers, and workers may find themselves involuntarily forced into a collective bargaining agreement. Take, for example, a business with 100 employees, 80 of whom do not favor unionizing. If that employer has contractual relationships involving 61 temporary, part-time or contingent workers, all of whom support organizing, a union could then establish a majority. Suddenly, the *actual* employees of a business, 80 percent of whom oppose unionization, could find themselves forced into a bargaining unit they did not want, required to work under terms and conditions of a union contract they did not ask for, and possibly forced to pay union dues or fees they did not wish to pay. Such an outcome could occur in the absence of a *BFI*-type joint employer finding, although it is likely that such a finding would soon follow.

e. The *Green JobWorks* Case

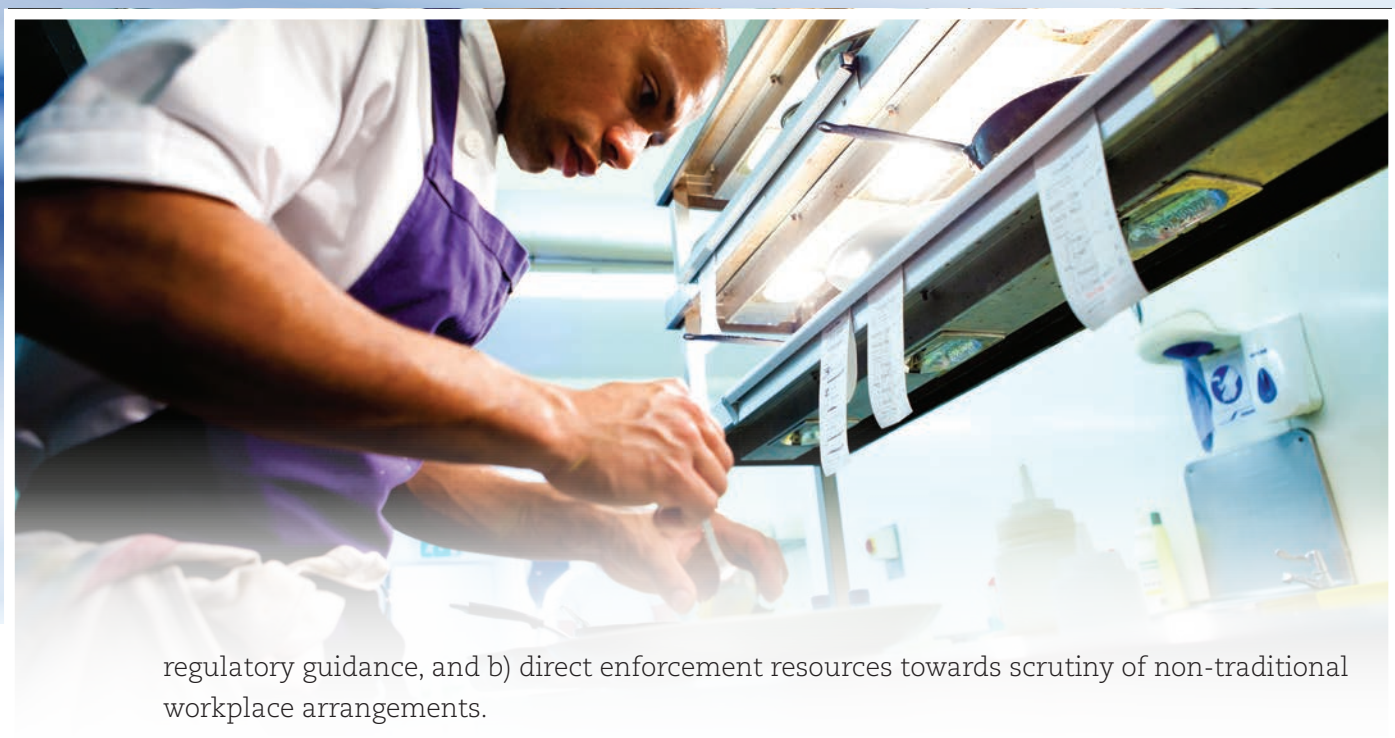
It is expected that the NLRB will issue additional decisions relying on the logic of *BFI*, which will give some indication as to just how broadly it will be applied (if *Specialty Healthcare* is any indicator the answer is quite broadly; see endnote 33). The first such decision may not be long in coming.

In October 2015, in a union representation case, an NLRB Regional Director determined that ACECO, a demolition contractor, was *not* a joint employer of workers supplied to it by its vendor, Green JobWorks (GJW). This was the correct determination. Indeed, ACECO itself was a subcontractor of larger general contractors and accordingly did not set work hours for GJW employees, reserved all supervision of GJW employees to GJW foremen, retained only a limited right to remove GJW employees, and set no limitations on what GJW employees could be paid, among other factors.[37]

However, in line with the dissent's premonition in *BFI* that "the number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited," the Board granted a union's request for review of the Regional Director's decision on March 8, 2016.[38] As of this writing, the Board has not issued a ruling, but regardless of when or how the case is decided it is likely to be the first of many.

B. WHD's Administrative Interpretation

As noted above, one of the dangers of the *BFI* case is its potential influence on the enforcement efforts of *other* federal agencies (as well as the plaintiffs' bar). As if on cue, less than six months after the *BFI* decision, the WHD issued an "Administrator's Interpretation" (AI) explaining how the concept of joint employer should be applied under the Fair Labor Standards Act (FLSA).[39] Although federal courts already utilize a joint employer analysis for FLSA cases, the AI is evidence that the WHD wants to: a) fortify and expand that analysis with



regulatory guidance, and b) direct enforcement resources towards scrutiny of non-traditional workplace arrangements.

The AI attempts to integrate the concept of "vertical" joint employment into the FLSA regulations. Vertical joint employment, the AI explains, may exist where "there is likely a contract or other arrangement — but not necessarily an employment relationship — between the intermediary employer and the potential joint employer."[40] The intermediary in a vertical joint employment relationship could be "a staffing agency, farm labor contractor, subcontractor, or other labor provider, supplier, or broker."[41] It goes on to say that the potential joint employer "could be a parent corporation, farm owner, higher-tier contractor, or client of the staffing agency or labor provider, supplier, or broker."[42]

However, the concept of vertical joint employment is actually set forth in a regulation under the Migrant and Seasonal Agricultural Workers Protection Act (MSPA) rather than in FLSA regulations. To gloss over this inconvenient fact, the AI casually states that "the MSPA joint employment regulation and its economic realities factors are *useful guidance* in an FLSA case."[43] In practical terms, this statement seems intended to convert a mere interpretative document into a de facto regulation without going through the standard notice and comment process under the Administrative Procedure Act.

The WHD undoubtedly hopes that courts will defer to the AI in FLSA litigation. In addition, the AI is intended to provide an enforcement roadmap for WHD investigators. For starters, it forecasts which industries will be be the favorite targets of WHD enforcement officials. These include "the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries."[44] The AI then instructs that within these industries, deep-pocketed defendants are preferable:

> [W]here joint employment exists one employer may also be larger and more established with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance.[45]

MSPA, as its name would suggest, covers only agricultural employment. However, by importing its regulatory language into the FLSA, which has economy-wide application, the WHD has dramatically expanded the range of employers who may be subject to a joint employer finding. It has also validated the fears of those who warned that *CNN*, *McDonald's* and *BFI* were only the start of a broader joint employer push by the administration.

Significantly, the joint employer standard set forth in the OSHA memorandum mirrors the standard established in *BFI*. For example, OSHA's directive states that "a joint employer standard may apply where the corporate entity exercises direct *or indirect* control over working conditions, has the *unexercised potential* to control working conditions or based on the economic realities."

Further evidence of the WHD's punitive approach to joint employer issues can be found in the agency's FY 2017 congressional budget justification. It states that the agency intends to hire an additional 300 full time enforcement staff to conduct "planned enforcement" (as opposed to investigations based on complaints).[46] Listed as the number one "key enforcement objective" for the WHD is "addressing the fissured workplace," which, the document says is "characterized by a high degree of subcontracting, use of temporary labor providers, and other third-party managers."[47] Overall, the WHD requested a staggering 22 percent funding increase over FY 2016.[48]

C. OSHA Memorandum

Not to be outdone by its partner office at DOL, OSHA is also threatening to exploit the new joint employer standard within the statute it enforces. OSHA's timing is curious. Literally days before the *BFI* decision was issued in August 2015, IFA received and the press reported on what appears to be a leaked memorandum from the OSHA solicitor's office regarding joint employment in the franchise industry.[49] Specifically, the memorandum includes a checklist of instructions and questions for OSHA investigators to consult during investigations of franchises.

Significantly, the joint employer standard set forth in the OSHA memorandum mirrors the standard established in *BFI*. For example, OSHA's directive states that "a joint employer standard

may apply where the corporate entity exercises direct *or indirect* control over working conditions, has the *unexercised potential* to control working conditions or based on the economic realities."[50]

The memorandum's instructions for OSHA inspectors and the questions they should ask include the following:

- Does corporate have any investment in equipment
- Obtain a complete list of any and all manuals and written policies/procedures corporate provides to franchise
- Does corporate provide hiring manual and policies
- Is corporate involved in decisions regarding store layout, store hours, staffing requirements, number of employees per shift; positions of employees; number of managers; responsibilities of managers; job descriptions
- Is corporate involved in setting of work hours; pay scales; determining overtime; leave policies — vacation days — sick leave; workers compensation

Of course, one may wonder how such information actually helps investigators determine whether there has been a health or safety violation at a particular workplace. Rather, many view the memorandum as evidence that OSHA has been "deputized" as yet another enforcer of joint employer liability.

On August 26, 2015, IFA filed a Freedom of Information Act (FOIA) request with OSHA administrator David Michaels asking for background on the OSHA memorandum, the rationale behind questions OSHA inspectors appear to be asking franchise owners, and any correspondence between DOL and OSHA officials and the NLRB and SEIU. OSHA did not respond. A second FOIA, filed on October 5, 2015, also went unanswered.

As evidenced by the actions of the WHD and OSHA, businesses and their employees are seeing a proliferation of expanded joint employer enforcement, just as as critics of the NLRB had warned. This is likely to continue during the remainder of the Obama administration, and potentially beyond 2016.

IV. RHETORIC VS. REALITY

As the business community began to raise concerns about the new joint employer standard, those supportive of the NLRB's approach responded with a number of arguments downplaying

the impact of *BFI* and other cases. These arguments, however, do not stand up to serious analysis.

A. *BFI* Does Not Return to Any Pre-existing Standard

One of the arguments used to minimize concerns about *BFI* is that all the decision did was return the Board to the standard that existed prior to 1984.[51] If businesses succeeded back then, this assertion goes, why can't they succeed under the same standard now?

The reality is that the NLRB did not have a consistent joint employer standard prior to 1984, so there is no "standard" to which *BFI* can return. For evidence, one need look no further than Teamsters Local 350's initial Request for Review in *BFI*.[52] In its brief, the union argued to the Board that it could find Browning-Ferris to be a joint employer under the then-existing standard, and also under multiple "broader formations" of the standard. Tellingly, the union did not encourage the Board to return to an allegedly consistent, rock-steady formulation of the joint employer test that existed prior to 1984. Instead, the union's brief reads like a smorgasbord of various NLRB joint employer standards espoused over the years from which the Board could choose. Thus, the union urged the Board to adopt any of these joint employer tests with supporting cases:

- "Indirect control." *Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966).
- "Unexercised" or potential control. *Jewel Tea Co.*, 162 NLRB 508 (1966).
- "Industrial realities." *Jewell Smokeless Coal,* 170 NLRB 392 (1968), enfd. 435 F.2d 1270 (4th Cir. 1970).

However, in addition to these formulations, the Board had also employed the "direct control" test.[53] Moreover, other pre-1984 cases expressly denounced the "indirect control" standard.[54] Adding to the confusion, prior to 1984, the Board sometimes conflated its "joint employer" test with its test for "single employer."[55]

In sum, prior to 1984, the Board did not have a consistently applied joint employer test. It examined cases under the direct control test, the indirect control test, the unexercised control test, the industrial realties test and other tests. Sometimes, the Board applied the wrong test altogether. It was not until *TLI* and *Laerco* in 1984 that a consistent and cogent joint employer test emerged.

B. The Freshii Memorandum is Irrelevant

On April 28, 2015, the NLRB's Division of Advice issued a memorandum regarding whether

a company called Freshii Development, LLC (a franchisor) should be responsible as a joint employer for the alleged ULPs committed by Nutritionality, Inc. (its franchisee). The memorandum concluded that Freshii and Nutritionality were *not* joint employers. Some argue that this memorandum should provide comfort to the business community because there was no joint employer finding. This argument, quite simply, is wrong.

Indeed, while the finding in the memorandum was likely welcome news for both Freshii and Nutritionality, it has no broad application to the employer community in general. This is because the Board makes policy through its jurisprudence, not through internal advice memoranda. According to the NLRB, "advice memoranda do not constitute Board law."[56]

Furthermore, even if the Freshii memorandum carried legal weight (which it does not), it was issued *before BFI*. Since *BFI* is the more recent, and more sweeping, pronouncement from the Board, it is the pertinent policy statement on the joint employer issue. Thus, any attempt to elevate the significance of the Freshii memorandum and downplay the significance of *BFI* misses the mark.[57]

Moreover, Freshii had a rather loose policy with regard to its franchisees, elements of which other firms may view as inconsistent with their obligation to oversee brand quality and consistency. For example, the memorandum notes that "after Freshii updated its logo and tagline, it did not require any franchises to update their materials."[58] The memorandum also states that while Freshii provides a sample employee handbook, it "does not require franchisees to use the handbook and policies," and that with regard to the point-of-sales system, "new franchises use one system while older franchisees use another without having to upgrade."[59] When an inspection showed that Nutritionality was failing to meet brand standards, the memorandum notes that "there is no evidence that Freshii attempted to end Nutritionality's franchise agreement or otherwise take action against Nutritionality, other than send a few letters."[60] Thus, the specific circumstances of Freshii may not be widely applicable.

C. *BFI* Provides No Guidance to Employers

A final line of argument is that *BFI* does not establish a *per se* rule applying to any and all contractual relationships, but instead will only be applied on a "case-by-case" basis. That argument is almost irrelevant as investigators, attorneys and judges generally apply the facts of a case to the law, so a "case-by-case" enforcement posture is the norm, not the exception. Second, "case-by-case" applications of standards as broad as that in *BFI* can be unpredictable. The very uncertainty of how the new criteria *could* be applied will raise serious concerns in the business community about how future contractual relationships between two or more employers should be structured. Certainly no employer is going to invest energy, time and capital to risk becoming the Board's next guinea pig. Moreover, since the Board does not issue

advisory opinions or letters as some other agencies do to clarify the application of regulations or statutes, there is no way for an employer to inquire in good-faith as to whether a certain contract or relationship will result in a joint employer finding.

V. REAL WORLD IMPACTS

With the *McDonald's* case still in proceedings, and *CNN* and *BFI* the only applicable joint employer cases on record, many employers are still weighing options in terms of how to respond. Is the best way to manage the risk associated with joint employer liability to extend ever greater control over franchisees or instead to pull back on services provided to them? Should businesses stop offering new franchises altogether? Should subcontracted services be brought back in house (and at what cost)? And how much additional litigation will result from the new joint employer standard? Businesses are still struggling with the answers to these questions, thus it is far too early to quantify the precise economic impact of the expanded definition of joint employer. Yet anecdotal evidence indicates negative fallout from the NLRB's actions.

Some franchisors, for example, have decided that they must pull back on the services they offer franchisees. The general counsel at a personnel services company said that the company used to provide franchisees with valuable advice on how to respond to litigation. "Franchisees used to contact us and say 'I just received an EEOC charge, what do I do?' Our HR department used to provide counsel to help franchisees in such situations. But we cannot do that anymore, and joint employer is the reason."[61] A health care provider indicated that its franchisees often call the franchisor for assistance on a host of issues, including labor and employment matters. In the wake of *BFI,* those franchisees are now told "Sorry, we can't help you," out of concern that providing such guidance could be considered indicia of joint employment.

In some cases, local franchise business owners are being required to pay for employment-related products that they used to receive from the franchisor … Other businesses are simply deciding to hold off on opening new franchise locations.

In some cases, local franchise business owners are being required to pay for employment-related products that they used to receive from the franchisor. For example, the health care franchisor described in the previous paragraph formerly provided franchisees with services such as an applicant tracking software product and a payroll platform free of charge. Now, however, franchisees must pay for such services themselves, an expense of roughly half a million dollars annually. Such withdrawal of services has led to tension within the franchise system. As one franchisor put it, "Franchisees are asking: 'Where are my royalties going? What am I paying for?'"

Unfortunately, local franchise business owners are losing guidance at a pivotal time when they are being barraged by countless federal, state, and municipal regulations on employers. Michael Lotito, a Shareholder at the law firm of Littler Mendelson predicts that the recently released DOL revision to the FLSA's overtime standards may be a moment when small businesses feel the pain of new joint employer liability. "Franchisees will ask for all sorts of guidance on how to comply with the new overtime rule, and the expanded joint employer standard will discourage any franchisor from providing that badly needed advice."

Other businesses are simply deciding to hold off on opening new franchise locations. For example, Gerald Moore, a multi-unit owner and operator of The Little Gym franchises based in Knoxville, Tennessee, testified before the U.S. Senate Committee on Health, Education, Labor, and Pensions in February 2015 that uncertainty on the joint employer issue has put his plans to open new locations "on hold."

For example, since General Counsel Griffin first issued complaints against McDonald's, there have been nearly 350 new ULPs alleging joint employer status against both franchise and non-franchise businesses. These have included employers in the fast food, hotel, and janitorial sectors, among others.

Aside from restructuring, there is also the cost of litigation to consider. A senior counsel at a restaurant franchisor indicated that he has seen a spike in litigation naming the brand name as a joint employer with franchisees, even in non-employment cases. Traditionally, such claims have easily been dismissed, but courts now seem to be taking a closer look at these issues. In one particular case, a plaintiff has asserted that the company should have taken greater charge of franchise operations to ensure a franchisee was acting responsibly. This obviously creates something of a Catch 22, as doing so to avoid liability in one case would create new joint employer liabilities under the NLRA.

Kerry Bundy is a partner at Faegre Baker Daniels in Minneapolis, and she says the NLRA isn't the only statute where she has seen joint employer claims spike. Her firm is dealing with multiple workers' compensation, wage and hour and discrimination cases against franchisees that also name the franchisor as a respondent. As she attests, these cases can be very expensive and harmful for everyone involved.

Finally, Littler Mendelson notes that there has been a significant uptick in joint employer litigation for its clients. For example, since General Counsel Griffin first issued complaints against McDonald's, there have been nearly 350 new ULPs alleging joint employer status against both franchise and non-franchise businesses. These have included employers in the fast food, hotel, and janitorial sectors, among others.[62]

VI. BRAND PROTECTION, THE FTC, AND THE LANHAM ACT

One aspect of litigation that has received little public attention is brand protection, which centers around the Federal Trade Commission's (FTC) Franchise Rule and the Lanham Act. Indeed, the NLRB, by making it more treacherous for brand names to involve themselves too closely in managing franchisees, has created a complicated situation for franchisors.

The FTC issued its first Franchise Rule in 1979. It effectively moved the regulation of the sale of franchises from the states to the FTC based on its authority to regulate interstate commerce. The Franchise rule is a disclosure regime that, among other things, provides prospective franchisees with the material information necessary to make an informed decision about a franchise investment.

The Franchise Rule defines a franchise as "any continuing commercial relationship or arrangement … in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark [and] (2) The franchisor will exert or has authority to exert a *significant degree of control* over the franchisee's method of operation, or provide *significant assistance* in the franchisee's method of operation[.][63] According to the FTC's franchise rule compliance guide, *significant control* includes "personnel policies" and *significant assistance* includes "personnel advice," "furnishing system wide networks," and "furnishing a detailed operating manual" — all activities that now raise eyebrows at the NLRB.[64]

Lee Plave is founder and partner at the Plave Koch law firm in Reston, VA, and a former FTC attorney. He believes the Franchise Rule requires that a franchisor protect its trademark

and brand standards even to the point of providing guidance and counsel on labor and employment matters. However, the new joint employer standard creates significant tension between the NLRA and the Franchise Rule. As Plave puts it, franchisors "are damned if they do and damned if they don't."

The FTC Franchise Rule is dependent in some respects on the federal Lanham Act (also known as the Trademark Act). The Lanham Act was enacted in 1946 and is grounded in the federal Commerce Clause power. Congress believed the Lanham Act was necessary because prior trademark statutes posed many problems both for trademark holders and for those seeking to prevent unfair business practices. In contrast to preceding statutes, the Lanham Act included a cause of action for false advertising and created a substantive federal law of unfair competition in interstate commerce.

Section 1125(a) of the Lanham Act creates a civil right of action against any person whose use of words, names or symbols of an established brand "is likely to cause confusion" about the "origin, sponsorship, or approval" of particular goods or services. Thus, the Lanham Act imposes a duty on the trademark owner to police and control the quality of the products and services manufactured and sold by third-party licensees in order to maintain brand consistency.

As the Seventh Circuit has noted, one of the underlying reasons for trademark law is to ensure that all products offered pursuant to a particular mark are of uniform quality.[65] Further, the "right to control the quality" of the goods associated with a trademark is "[o]ne of the most valuable and important protections afforded by the Lanham Act."[66] Thus, an action by a federal agency like the NLRB that limits the ability of a franchise business to protect its brand standards not only undermines the value of the owner's trademark, it also interferes with the company's ability to comply with the FTC's Franchise Rule and the Lanham Act.

VII. STATE AND LOCAL DEVELOPMENTS

The theory of expanded joint employer liability has not been the exclusive preserve of the federal government. State and local governments have also taken up the cause, although in different ways. Specific examples of this can be found in the State of California; Seattle, Washington; New York State; and Cook County, Illinois. By contrast, a number of states have passed franchise reform laws that attempt to limit the liability of local franchise business owners and brand name companies.

A. California and AB 1897

The State of California provided an early example of how states have attempted to expand joint employer liability. On September 28, 2014, California Governor Jerry Brown signed into

law Assembly Bill 1897. Under the law "client employers" now share civil liability with "labor contractors" for failure to pay proper wages or secure workers' compensation coverage.[67] This liability applies "without consideration for whether the business had knowledge about the purported violations."[68] AB 1897 applies to businesses with 25 or more employees that obtain the services of at least six temporary workers at any given time. In simple terms, the bill means that one employer can now be held liable for the violations of another legally separate employer.

Not surprisingly, AB 1897's primary supporters were unions, including the California Labor Federation, AFL-CIO, the California Teamsters Public Affairs Council, and the United Food and Commercial Workers union.[69] These advocates claimed that "reliance on labor contractors undermines the enforcement of labor laws and erodes working conditions in key industries."[70] In particular they argued that "a company can only be held responsible if a worker can prove joint employer status."[71] In other words, since it was difficult to establish joint employer liability under existing law, unions sought to establish a new and much broader way to extend such liability to deeper pockets.

Opponents of the law noted that AB 1897 "holds an innocent third party individual or business liable for the employment obligations of another employer."[72] A similar statement could easily be applied to the *BFI* decision.

B. Seattle's Minimum Wage Ordinance

The city of Seattle, Washington, has been a hotbed of local labor regulation highlighted by paid sick leave policies[73] and efforts to promote the unionization of drivers who use sharing economy platforms.[74] In June 2014, Seattle also became one of the first cities to approve a $15 an hour minimum wage.[75]

Seattle's minimum wage ordinance phases in the $15 wage over a period of several years, but includes two different schedules based on the size of a business. "Schedule 1" employers, those with more than 500 employees, were given 3-4 years, depending on whether workers were also offered medical benefits.[76] "Schedule 2" employers, those with 500 or fewer workers, were given a period of 5-7 years to reach $15 an hour, depending on the treatment of tips and medical benefits.[77]

Significantly, however, Seattle's ordinance considers independently owned and operated franchise restaurants to be "large" employers if their franchise brand's network as a whole employs more than 500 workers nationwide. The definition of a Schedule 1 employer states that such employers include "all franchisees associated with a franchisor or a network of franchises with franchisees that employ more than 500 employees in aggregate in the United States."[78] Likewise, the definition of a Schedule 2 employer states that such employers "do not

include franchisees associated with a franchisor or a network of franchises with franchisees that employ more than 500 employees in aggregate in the United States[.]"[79]

This treatment of franchisees as de facto joint employers is a logical outgrowth of the theory posed in Administrator Weil's book, and is consistent with the NLRB's actions in *BFI* and *McDonald's*. However, the Seattle ordinance does not even attempt to demonstrate a relationship between franchisors and franchisees sufficient to justify their disparate treatment under the statute.

Seattle's ordinance was quickly challenged in a lawsuit filed by IFA, which argued that it "arbitrarily and illegally discriminates against franchisees and significantly increases their labor costs[.]"[80] The case ultimately made its way to the 9th Circuit, which, perhaps unsurprisingly given its reputation, upheld the ordinance.[81]

C. New York State

The State of New York has weighed in on the joint employer issue in a couple of ways. First, following the lead of Seattle, the governor commissioned a Wage Board, a unique feature of New York state law. A Wage Board is empowered to examine the wages paid in a particular industry, determine if those wages are appropriate, and essentially set a new minimum wage, thus bypassing the legislature.

The Wage Board was empaneled on May 7, 2015, with a mandate to look at wages paid in the fast food industry.[82] Oddly enough, considering its remit, the Wage Board did not include a representative from that industry. Given Governor Cuomo's longstanding close relationship with the SEIU and the appointment of an SEIU official to the three member Board, it came as little surprise that after 10 weeks of deliberation, the Wage Board recommended that wages

in the fast food industry be set at $15.00 an hour, phased in by December 31, 2018, in New York City, and July 1, 2021, for the rest of the state.[83]

Along with setting higher wages, however, the Wage Board also included a clause in its recommendation that implicated joint employer questions. The Board's recommendation defined a fast food establishment as one that is, among other things, "an establishment operated pursuant to a franchise where the Franchisor and the Franchisee(s) of such Franchisor own and operate thirty (30) or more establishments in the aggregate nationally."[84] Thus, by singling out franchising and treating franchisors and franchisees as a seamless enterprise (while exempting other small businesses) the Board simply disregarded the fact that they are separate legal entities.

There were numerous criticisms of the Wage Board's decision, including an argument that the singling out of franchises based on their affiliation with out-of-state entities and interstate business networks was a "paradigmatic example of a law discriminating against interstate commerce."[85] Nonetheless, the state is moving forward with the new wage.

Second, on May 24, Attorney General Schneiderman filed a lawsuit against Domino's Pizza, alleging that the company was a joint employer with several franchisees.[86] Under the lawsuit, according to a Schneiderman press release, "For the first time, we will prove that the Domino's corporate franchisor is legally responsible [for the conduct of franchisees]."[87] However, as Domino's noted the day the lawsuit was filed, the suit "disregards the nature of franchising and demeans the role of small business owners…franchising is a tremendous source of economic opportunity in this country in general and in New York State in particular."[88]

D. Cook County's Responsible Business Act

In October 2015, Cook County, Illinois councilman Robert Steele introduced the Cook County Responsible Business Act.[89] It would require businesses that employ at least 750 workers in Cook County to pay a "living wage" as defined by the county or face a per-employee penalty of $750 for each dollar that their wage falls short of the specified wage. The Act also creates a rebuttable presumption that any action to classify an employee as an independent contractor or temporary worker, or to lay off an employee within 60 days of the annual determination of whether an employer is covered by the ordinance, shall be deemed to have occurred in an attempt to avoid coverage.[90]

Under the proposed ordinance, franchisors and franchisees are lumped together despite being legally separate employers. The Act states that a "covered employer" shall include "any franchisor who employs at least 750 employees in Cook County or whose franchisees, collectively, employ at least 750 employees in Cook County."[91]

As of this writing, the Act has been held in the Finance Committee. Nonetheless, it serves as yet another marker that state and local governments are active participants in the campaign to break down the legal separation between individual employers.

E. State Franchise Reform Laws

In response to the *McDonald's* and *Browning-Ferris* cases, a number of states have passed legislation clarifying how state agencies should view franchises with regard to joint employment. These franchise reform laws do not supersede the NLRB, which observes its own precedent and has strong preemption authority under the NLRA. However, they do ensure that state enforcement agencies do not adopt the NLRB's broad view of joint employment and that local governments do not discriminate against franchise businesses, important considerations in light of the examples above.

In 2015, four states passed franchise reform bills. These included Tennessee, Texas, Louisiana, and Michigan. Tennessee's law, which was signed by Governor Bill Haslam on April 10, 2015, is perhaps the most straightforward of these. It states that "neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose."[92] Michigan, by contrast passed multiple bills (including additional legislation in 2016) amending numerous existing laws.[93]

These franchise reform laws do not supersede the NLRB, which observes its own precedent and has strong preemption authority under the NLRA. However, they do ensure that state enforcement agencies do not adopt the NLRB's broad view of joint employment and that local governments do not discriminate against franchise businesses

In 2016, additional states joined these four. Utah passed HB 116 on March 4. It states that "a franchisor is not considered to be an employer of a franchisee or a franchisee's employee."[94] Just days earlier, Wisconsin Governor Scott Walker signed Act 203, which states that a franchisor is not considered to be an employer of a franchisee's employees unless the franchisor has agreed in writing to assume that role or has "exercised a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand."[95] At the same time, the Indiana legislature approved HB 1218, which says that a franchisor is not the employer of a franchise's workers unless the franchisor agrees to such a role in writing.[96] Finally, on May 3, the Georgia legislature passed SB 277, which amends Chapter 1 of Title 34 of the Georgia code to declare that "Notwithstanding any order issued by the federal government or any agreement entered

into with the federal government by a franchisor or a franchisee, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose."[97]

As mentioned, these bills cannot overturn *Browning-Ferris* or prevent the NLRB from enforcing its new joint employer standard. However, they signify broad disagreement with the Board's decision and provide franchisors and franchisees assurance that, at least for purposes of state enforcement, the NLRB's expanded definition of joint employer will not apply. As one example, the general counsel of a cleaning services franchisor stated that in New York state, the company is facing an ongoing and lengthy joint employer case involving an unemployment insurance claim, which has already cost the franchisee and franchisor hundreds of thousands of dollars. In Texas, however, the franchisor was quickly released from a joint employer style audit of a franchisee by the state workforce commission. [98]

VIII. CONCLUSION

The concept of expanding the definition of joint employment may have been conceived by a small group of activists, including those primarily interested in organizing franchised fast food restaurants. However, this theory of joint employer liability now stretches across multiple agencies and levels of government. Thus, what was once viewed simply as a labor issue has since become a local small business and jobs issue.

The expanded definition of joint employer poses a significant hazard to businesses in numerous industries — enterprises that employ millions of workers. The feasibility of business models that have allowed for specialization, flexibility, and ultimately growth, such as franchising and subcontracting, is at risk.

Congress can, and must, take action to return common sense to this aspect of labor law either through an appropriations rider or stand-alone legislation. Left unchecked, the new liabilities created by the NLRB, and now other government agencies as well, will be to the detriment of workers, employers, and the economy.

ENDNOTES

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4 *Id.* at 3.

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14 *MSNBC.com*, "Historic fast food strike draws lessons from MLK's last campaign," by Ned Resnikoff; April 4, 2013, http://www.msnbc.com/all-in/historic-fast-food-strike-draws-lessons.

15 *The New York Times*, "A Day's Strike Seeks to Raise Fast-Food Pay," note *supra*.

16 For example, according the *The New York Times* story above, just 11 actual employees participated in protests compared to 100 other individuals who showed up.

17 *Fox News*, "Fast-food workers strike nationwide in protest against wages," August 29, 2013, http://www.foxnews.com/us/2013/08/29/fast-food-workers-to-strike-nationwide-over-wages.html.

18 *Associated Press*, "Fast-Food Protests Shift Focus to 'Wage Theft'," by Candice Choi; March 18, 2014, http://finance.yahoo.com/news/fast-food-protests-shift-focus-wage-theft-171820006--finance.html.

19 *Business Insider*, "Fast-Food Workers Plan Massive Global Protest," by Hayley Peterson; May 7, 2014, http://www.businessinsider.com/fast-food-workers-plan-global-protest-2014-5#!KrxGT. See also *Mother Jones*, "Fast-Food Strikes Go Global," By Erika Eichelberger; May 15, 2014, http://www.motherjones.com/mojo/2014/05/fast-food-strikes-international-minimum-wage.

20 *KCRA News*, "Mixed Messages Sent at Sacramento Fast Food Protest, May 15, 2014, http://www.kcra.com/news/mixed-messages-at-sacramento-fastfood-protest/25993916.

21 Fast Food Forward, "New York's Hidden Crime Wave: Wage Theft and NYC's Fast Food Workers," https://www.scribd.com/doc/141919700/Wage-Theft-Report.

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23 U.S. Department of Labor, Office of Labor Management Standards, SEIU International LM-2 financial disclosure reports, www.unionreports.gov.

24 *Laerco Transportation*, 269 NLRB 324, 325 (1984).

25 For purposes of this document, the phrase "putative joint employer" shall refer to the employer that is alleged to meet the legal standards of constituting a joint employer.

26 *See Airborne Express, 338 NLRB 597 (2002).*

27 See *Specialty Healthcare, 357 NLRB No. 83 (2011)*.

28 *CNN America, Inc. and Team Video Services, LLC* (05-CA-031828 and 033125; 361 NLRB No. 47) Washington, DC, September 15, 2014.

29 *See* testimony of Jagruti Panwala, Hotel Owner and Operator. "*Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators*?" House Committee on Education and the Workforce; Health, Education, Labor & Pensions Subcommittee, September 9, 2014.

30 As will be explained later, this could lead to concerns about brand protection under the Lanham Act.

31 *Browning-Ferris Industries of California*, 362 NLRB No. 186, slip op. at 21 (2015).

32 *Id*.

33 Such language is similar to that which appeared in the *Specialty Healthcare* decision dealing with micro-unions. In that case, the Board stated that it had merely "clarified" an existing standard for unit determinations and definitively had not established a "new criteria for determining appropriate bargaining units outside of health care facilities." In fact, *Specialty Healthcare* has been widely applied in industry after industry. (*Specialty Healthcare*, 357 NLRB No. 83).

34 *See, e.g., Little v. TMI Hospitality, Inc*., et al. 2:15-cv-02204 (C.D. Ill., September 18, 2015)(in a complaint claiming sexual harassment and race discrimination, the plaintiff cites to *BFI* and has alleged that the hotel owner and the corporate brand are joint employers).

35 *Bloomberg BNA Daily Labor Report*, "OSHA Memo Shows Joint Employer Questions," 8/28/15.

36 *Miller and Anderson, Inc.*, NLRB, No. 5-RC-79249, Member Miscimarra dissenting.

37 Case 05-RC-154596.

38 *Id*.

39 Administrator's Interpretation No. 2016-1, "Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act," January 20, 2016.

40 *Id*.

41 *Id*.

42 *Id*.

43 *Id*. Emphasis added.

44 *Id*.

45 *Id*.

46 FY 2017 Congressional Budget Justification, Wage and Hour Division, U.S. Department of Labor.

47 *Id*.

48 *Id*.

49 See Politico Morning Shift, "OSHA Probes Franchises on Joint Employment" August 26, 2015.

50 *Id*. Emphasis added.

51 *TLI* and *Laerco Transportation*, 269 NLRB 324 (1984).

52 Teamsters Local 350 is the union that filed the initial representation petition in *BFI*.

53 *See O'Sullivan, Muckle, Kron Mortuary*, 246 NLRB 164, 165 (1979) (funeral home was not joint employer with company who provided it with driving services, because service provider was "solely responsible for hiring, disciplining, and discharging its drivers").

54 *See Walter B. Cooke*, 262 NLRB 626, 641 (1982)(finding "such indirect control over wages and hours to be insufficient to establish a joint employer relationship.").

55 *See Parklane Hosiery Co.*, 203 NLRB 597, amended 207 NLRB 991 (1973). "Single employer" is a similar but different labor law term of art which addresses the question of whether two supposedly separate employers are actually one employer. The test for determining whether two entities are actually the same, "single employer" involves an analysis of the following factors: (1) inter-relation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *See, e.g., NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982).

56 *Kysor/Cadillac*, 307 NLRB 598, 603 (1992).

57 While the Advice Memorandum concludes that even under a new standard advocated by the General Counsel in a brief he submitted in *BFI*, the two companies still would not be joint employers, that was not the standard the Board ultimately adopted in *BFI*.

58 General Counsel Advice Memorandum, Nutritionality, Inc. d/b/a Freshii Cases 13-CA-134294, 13-CA-138293, and 13-CA-142297, August 28, 2015.

59 *Id*.

60 *Id*.

61 Most of the employers discussed in this section have requested anonymity for legal and other reasons.

62 Analysis provided by Littler Mendelson Workplace Policy Institute.

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Who Use Labor Contractors," April 15, 2016.

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83 Order of Acting Commissioner of Labor Mario J. Musolino, September 10, 2015.

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85 Brief of *Amicus Curiae*, National Federation of Independent Business and International Franchise Association, New York State Supreme Court, Appellate Division, Third Department, Case No. 522160 (2016), citing *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

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87 *Id*.

88 *Id*.

89 Cook County Responsible Business Act, Cook County Board of Commissioners, File #15-5825.

90 *Id*.

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