CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA
1615 H STREET, N.W.
WASHINGTON, D.C. 20062

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION, &
EMPLOYEE BENEFITS

JAMES PLUNKETT
DIRECTOR
LABOR LAW POLICY

October 20, 2015

Hon. Lamar Alexander, Chairman
Committee on Health, Education, Labor & Pensions
United States Senate
Washington, DC 20515

Dear Chairman Alexander:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates this opportunity to provide a statement for the record as part of the Committee's October 6, 2015 hearing entitled, "Stealing the American Dream of Business Ownership: The NLRB's Joint Employer Decision." The Chamber supports S. 2015, "Protecting Local Business Opportunity Act" (S. 2015 or PLBOA) as a commonsense solution to restore the longstanding and unambiguous "joint employer" standard under the National Labor Relations Act, which has allowed employers to develop business models that have led to increased flexibility, competitiveness, and growth. We look forward to working with you and your colleagues to pass this critical legislation.

I. The Browning-Ferris Decision

A. *The Joint Employer Standard Existing Prior to BFI Provided Clarity and Certainty*

PLBOA is, of course, necessary because of the National Labor Relations Board's (NLRB or Board) controversial 3-2 ruling in *Browning-Ferris Industries* (*BFI*) on August 27, 2015. In *BFI*, the NLRB upended decades of precedent to change its standard for determining whether two businesses are "joint employers" of certain workers. For over 30 years prior to *BFI*, the Board maintained a clear test for determining whether two separate companies were joint employers: does the alleged joint employer exercise direct and immediate control over the workers at issue? This direct control was generally understood to include the ability to hire, fire, discipline, supervise and direct. *TLI, Inc.* 271 NLRB 798 (1984), enforced 772 F.2d 894 (3d Cir. 1985).

This test made perfect sense. It ensured that the putative joint employer was actually involved in matters that fall within the Board's purview, to wit, the employment relationship. It also ensured that such companies would not be 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 thousands of franchisees, vendors and subcontractors. Indeed, it made sense to impute liability – as the now-previous standard did – only in those cases in which an employer was in a position to investigate and remedy unlawful actions. It is no surprise that prior to the decision in *BFI* this standard had been in existence for over 30 years and had been endorsed by reviewing federal courts of appeal. [1]

B. *BFI's Joint Employer Standard is Ambiguous, Uncertain and Provides no Guidance for Employers*

In *BFI*, the Board overturned this clear bright-line test in favor of an amorphous, ill-defined test which will find joint employment even where one company only has the right to exert indirect or potential control over the terms and conditions of another company's employees. This confusing, multi-factor test provides absolutely no guidance to employers on how to structure their relationships so as to avoid joint employer liability. Quite clearly, this new test is both uncertain and seemingly easy to meet, and will therefore "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have." *Browning-Ferris Industries of California*, 362 NLRB No. 186, slip op. at 21 (2015).

The new *BFI* standard is unmoored from the realities of the modern workplace, as the very nature of a contractual relationship presupposes at least *some* type of control over the services, results or product agreed to. Surely a company (or perhaps the U.S. House of Representatives[2]) that contracts with a food service business to provide cafeteria services will retain a modicum of indirect control to ensure that food quality, prices and speed of delivery are what it bargained for in the contract for services. Under *BFI*, this type of reserved and indirect control may be sufficient to establish a joint employer relationship between the two parties to the contract. *See id.*, at 25-26. As one can easily imagine, these types of contractual relationships are myriad and commonplace. According to the dissent, "the number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited." *Id.*, at 37.

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[1] *TLI* and *AM Prop. Holding Corp.*, 350 NLRB 998 (2007) were affirmed by the Third Circuit and Second Circuit, respectively.

[2] WASHINGTON POST, June 9, 2015 "Capitol Hill to Run on Dunkin…at Least on the House Side" available at http://www.washingtonpost.com/blogs/in-the-loop/wp/2015/06/09/capitol-hill-to-run-on-dunkin-at-least-on-the-house-side/

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. But this is mere lip service to an employer community which finds itself at the mercy of one of the most controversial and politically-motivated Boards in history. For example:

- This is an NLRB which lacked a constitutional quorum, yet continued to issue decisions until being stopped by the Supreme Court in a 9-0 decision. *National Labor Relations Board v. Noel Canning*, 573 U.S. ___ (2014).[3]

- This is an NLRB that has promulgated regulations to speed up the union election process, unfairly limiting employers' abilities to communicate with employees about the pros and cons of unionization. The Board issued this regulation despite the fact that prior to issuance, 94% of all elections were conducted in 56 days and unions won about two-thirds of all elections.[4]

- This is an NLRB which blatantly attempted to force employers to post biased workplace notices about unionization, despite having no statutory authority to do so. *See Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152 (4th Cir. 2013).

- This is an NLRB which is willing to overturn decades of precedent in significant cases in order to, among other things: limit employees' abilities to decertify an unwanted union; require employers to remit employees' union dues to unions even upon expiration of a collective bargaining agreement, thereby providing unions with greater leverage at the bargaining table; permit union organizing on employer-owned email systems; award itself a second bite at the apple when it does not like the decision of an arbitrator; and require employers to disclose to union officials confidential witness statements made during the course of workplace investigations.[5]

- This is a Board whose *Specialty Healthcare* decision – another case overturning Board precedent – purportedly only made "modest" changes to the law, but has been applied to, among other workplaces, dog training facilities and department stores. [6]

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[3] The U.S. Chamber Litigation Center represented Noel Canning, a member of the Chamber, in the Supreme Court, and served as co-counsel to Noel Canning alongside the law firm Jones Day.
[4] *See* U.S. Chamber comments, April 7, 2014, available at https://www.uschamber.com/sites/default/files/documents/files/NLRB%202011%200002%20US%20Chamber%20of%20Commerce.pdf
[5] *See*, respectively, *Lamons Gasket Co.*, 357 NLRB No. 72 (2011); *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012); *Purple Communications*, Inc., 361 NLRB No. 126 (2014); *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014); *American Baptist Homes of the West d/b/a Piedmont Gardens ("Piedmont Gardens")*, 362 NLRB 139 (2015).
[6] *Guide Dogs for the Blind,* 359 NLRB No. 151 (2013); *Macy's, Inc.,* 361 NLRB No. 4 (2014).

Time and time again, the Board has stretched its legal authority in order to advance policy goals that are simply driven by the agenda of organized labor. Why should this time be any different? Clearly, the time has come to enact legislation that will reign in an out-of-control Board, and PLBOA is a vital first step.

II. *BFI*s Impact on Employers

By changing its joint employer standard in *BFI*, the Board has opened up a Pandora's Box of problems that may now potentially befall almost any employer who enters into a contract for services with another business. Indeed, this new standard is really about expanding the universe of potential employers who can be targeted by the NLRB, unions, and plaintiffs' bar. Many of these problems were set forth in our letter to you dated February 12, 2015, as well as in the Chamber's Workforce Freedom Initiative's report "Opportunity at Risk."[7] However, it is worth reiterating that some negative results of this new decision include the following:

1. Corporate Campaigns. Being able to characterize large, well-known businesses 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 the union.

2. Liability under the National Labor Relations Act. 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.

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

[7] The WFI report is available here: http://www.workforcefreedom.com/sites/default/files/Joint%20Employer%20Standard%20Final_0.pdf. In conjunction with this report, on March 20, 2015, the Chamber hosted a conference entitled, "The NLRB and the Joint-Employer Standard." The conference featured commentary from two former NLRB members, Andy Puzder (CEO of CKE Restaurants, Inc.), and several small business owners. Additionally, after *BFI* was issued the Chamber hosted a briefing call on September 9, 2015. Approximately 150 Chamber members dialed-in, which is indicative of the significance of this issue.

owner that contracts with the janitorial services company). This distinction will likely be eviscerated under *BFI*'s new standard, allowing unions to 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[8] such as:

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

2. Discrimination law. *BFI*'s new joint-employer standard will encourage both the EEOC and the plaintiffs' bar to stretch the bounds of the law in an effort to entangle more employers in discrimination lawsuits.[9] Importantly, compensatory damages are capped under Title VII, and the caps generally increase as the number of employees increases. Thus, the plaintiff's bar will be encouraged to establish joint employer status because doing so could increase the number of employees, thereby increasing 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 a joint employer of the employee. The Wage & Hour Division and the plaintiffs' bar will likely look to see how they may take advantage of *BFI*. It is no secret that the current Wage and Hour Administrator, David Weil, has a strong distaste for alternative workplace arrangements.

4. Occupational Safety and Health Administration (OSHA) issues. *BFI* may also provide an opportunity for OSHA to ratchet up fines against a parent company for repeated violations. For example, the same safety violation occurring at several different franchisees could be considered repeat violations if the franchisor is considered to be a joint employer with each of the franchisees. Moreover, a recently released internal OSHA memorandum reveals that the agency is looking at the potential for a joint-employment relationship between franchisors and franchisees when investigating workplace safety.

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[8] Note that most employment laws have damages, enforced through both agency action and private court action, which exceed those under the National Labor Relations Act, some including punitive and compensatory damages with jury trials. Hence, there is a built-in incentive for the plaintiffs bar to push the envelope in this area of the law, relying on the reasoning in *BFI*.

[9] *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).

5. Affordable Care Act Issues. Under *BFI*, individual companies falling well below the employer mandate threshold and small businesses that depend on independent contractors or temporary workers could soon have to comply with the employer mandate's requirements. The franchise and temporary worker/subcontractor communities will be particularly hit hard since they use high numbers of part-time workers that might now be considered "full-time" under the new definition of full-time work in the ACA as 30 hours per week.

III. Correcting the Record of the October 6th Hearing

A. BFI Does Not Return to Any Pre-Existing Standard Because Prior to 1984, There Was No Standard At All

There was some discussion at the hearing that *BFI* is simply a return to the NLRB's joint employer standard that existed prior to the decisions in *TLI* and *Laerco Transportation,* 269 NLRB 324 (1984). In reality though, there was no consistent NLRB joint employer standard prior to these two decisions. It is notable that in his written testimony, Mr. Rubin does not cite to a Board case which established this alleged prior standard.[10] He cannot because there is no such case. In fact, a brief examination of NLRB decisions prior to *TLI* and *Laerco* reveals that the Board had no joint employer standard at all.

One need look no further than the Teamsters Local 350's (the union) initial Request for Review in *BFI* for evidence that the Board did not maintain a consistent joint employer standard prior to 1984. In its brief, the union argued to the Board that it could find *BFI* 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 announced in some prominent Board decision. 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).

[10] Mr. Rubin cites to *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) and *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d. Cir. 1982), as "fairly consistent" precedents that existed prior to *TLI* and *Laerco*, but neither of these cases sets forth a two-part multifactor test – which relies on indirect or potential control – to which *BFI* supposedly returns. Moreover, use of the modifier "fairly" indicates that the law at the time was unsettled.

- "Industrial realities." *Jewell Smokeless Coal,* 170 NLRB 392 (1968), enfd. 435 F.2d 1270 (4th Cir. 1970).

In addition to these formulations, the Board also employed the "direct control" test in some cases. *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"). Moreover, other pre-1984 cases expressly denounced the "indirect control" standard. *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."). Adding to the confusion, prior to 1984, the Board sometimes conflated its "joint employer" test with its test for "single employer." *See Parklane Hosiery Co.*, 203 NLRB 597, amended 207 NLRB 991 (1973).[11]

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* that a consistent and cogent joint employer test emerged. Enactment of PLBOA is necessary to return to this consistent and coherent standard.

B. The Freshii Memorandum Carries No Legal Weight

On April 28, 2015, the NLRB's Division of Advice issued a memorandum to Region 13 regarding whether Freshii (a franchisor) should be responsible as a joint employer for the alleged unfair labor practice committed by Nutritionality (its franchisee). The memorandum concluded that Freshii and Nutritionality were not joint employers. While this was likely welcomed news for both Freshii and Nutritionality, the memorandum 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. Simply put, "advice memoranda do not constitute Board law." *Kysor/Cadillac*, 307 NLRB 598, 603 (1992). Thus, attempts during the hearing to elevate the significance of the Freshii memorandum and downplay the significance of *BFI* were misplaced.

C. BFI Provides No Guidance to Employers

There was some patronizing comments made during the hearing that employers should not be so concerned about *BFI* because: (1) the ruling will only be applied on a

[11] "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).

case-by-case basis; and (2) it only involved "contracting", so franchisors and franchisees should have nothing to worry about. First, "case-by-case" applications of rules are inherently unpredictable. This very uncertainty of how the new criteria *could* be applied will raise serious concerns in the business community about how future workplace contractual relationships between two or more employers should be structured. And no employer is going to risk energy, time and capitol to volunteer as the Board's next guinea pig.[12]

Second, both Senator Franken and Senator Casey mistakenly claimed that the franchising industry is not impacted by *BFI*. Specifically, Senator Casey stated, "I don't think this decision is directed at franchises in any way." One would think that it should go without saying, but evidently it must be said: the franchise relationship is a contractual relationship. Therefore, franchisors and franchisees – just like any employer entities that enter into service agreements – have a great deal to be concerned about the uncertainty raised in *BFI*. *See BFI* slip op., at 45 ("Of the thousands of business entities with different contracting arrangements that may suddenly find themselves to be joint employers, franchisors stand out.").

IV. The *BFI* Decision is the Latest Attack on Alternative Workplace Arrangements

The need for PLBOA becomes even more apparent when one considers other simultaneous efforts by the Board, Department of Labor (DOL) and state and local regulators to attack employers whose workforce structures do not fit into their ideal world view. Some of these efforts include:

- The NLRB has ignored instructions from federal courts of appeals in an attempt to expand its jurisdiction over independent contractors.[13]

- DOL's proposed changes to regulations regarding eligibility for overtime (RIN 1235-AA11).

- DOL's Administrator's Interpretation (No. 2015-1, July 15, 2015) regarding Independent Contractor classification, which downplays the "control" factor.

- Proposed legislation in Seattle that would permit labor unions to organize independent contractors in certain transportation industries. [14]

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[12] The Board does not issue advisory opinions or letters, so there is no way for an employer to inquire in good-faith as to whether a certain contract or relationship makes it a joint employer.
[13] 361 NLRB No. 55 (September 30, 2014); 362 NLRB No. 29 (March 16, 2015).
[14] http://seattle.legistar.com/ViewReport.ashx?M=R&N=Text&GID=393&ID=2296991&GUID=A1841B13-CF4F-4E5A-9409-A613DC6B2B15&Title=Legislation+Text

Rather than adapting the law to keep pace with modern competitive workplaces, these regulators are trying to force companies to change their business models and strategies in order to make workplaces look the way they did in the 1930s: every worker is an employee who punches in at 9 AM and punches out at 5 PM and never checks their email outside of work. This model – which ultimately increases employer costs – will undoubtedly stifle competitiveness and result in stagnant economic growth. It also ignores the benefits of such structures for the parties involved. In particular, the independent contractor model can result in workers who "have more control over their economic destiny."[15] While PLBOA obviously does not address these other efforts, it would be a positive step forward for employers whose successful business models are under constant regulatory threat.

V. Conclusion

For the foregoing reasons, the U.S. Chamber supports PLBOA as a modest and reasonable solution to the problems created by the NLRB's *BFI* decision. As noted above, plaintiffs' attorneys and other enforcement agencies, such as OSHA, are already looking to take advantage of the new, broader joint employer standard. And there is no doubt that the Board's General Counsel will attempt to apply this new standard to the franchising industry in pending litigation.

We wish to thank you for taking the time to hold this important hearing on PLBOA. Please do not hesitate to contact us if we may be of assistance in this matter.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

James Plunkett
Director
Labor Law Policy

[15] Steven Cohen and William B. Eimicke, *Independent Contracting Policy and Management Analysis*, Columbia School of International Affairs, at 16 (August 2013).