Opportunity at Risk

A New Joint-Employer Standard and the Threat to Small Business

U.S. CHAMBER OF COMMERCE
Workforce Freedom Initiative

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I. INTRODUCTION

As our country continues to climb out of the largest economic downturn since the Great Depression, policy makers at multiple levels of government are pursuing a regulatory campaign that threatens a pillar of our economic growth—small business. Numerous regulatory changes, frequently pursued outside of the legislative arena by political appointees, seek to upend well-settled law and redefine those businesses that should be deemed "joint employers."

In the most generic terms, a joint-employment relationship exists when two legally separate businesses are deemed jointly liable for employment-related claims. This occurs when they both exercise significant control over a particular group of employees.[1] A well-established body of law governs these joint-employer relationships,[2] and this stability has enabled the growth of successful business models, in particular franchising and subcontracting, that have helped many small businesses start up, expand, and create jobs.[3] Franchising, for example, now accounts for 770,000 businesses, generating nearly 8.5 million direct jobs and $844 billion in output.[4] With regard to subcontracting, between 1982 and 2006, the portion of gross domestic product (GDP) provided by U.S.-based providers of subcontracted services increased from 7% to nearly 12%.[5] Unfortunately, the regulatory stability that has facilitated this growth is in jeopardy.[6]

In large part, the campaign to rewrite the joint-employer standard is being driven by organized labor. This is because the legal separation between employers under franchising and subcontracting relationships has been an impediment to union organizing efforts. What unions would prefer is a new model under which numerous disparate employers could legally be bound together—ties that would expand the reach and scope of organizing efforts.[7]

The campaign to redefine a joint employer is taking place at the federal, state, and local levels. At the federal level, the primary actor is the National Labor Relations Board (NLRB), although the Department of Labor's (DOL's) Wage and Hour Division (WHD) appears to have a significant interest in reexamining the joint-employer issue, and the Equal Employment Opportunity Commission (EEOC) has urged the NLRB to alter its standard.[8] At the state and local level, efforts have been made to hold businesses liable for the actions of subcontractors and to tie local franchise business owners to larger national brands for purposes of wage payment laws.[9]

Should this campaign succeed, the opportunities offered by the franchising and subcontracting business models will be considerably reduced. A broadened joint-employer standard will result in the comprehensive restructuring of many business relationships, likely resulting in higher costs, fewer new businesses, less growth, and fewer new jobs. And unfortunately, the fallout from the potential policy changes under consideration would extend far beyond the immediate organizing objectives of the unions and impact numerous employers across multiple sectors of the economy.

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This paper will discuss the history and economic benefits of franchising and subcontracting,[10] examine the roots of the regulatory campaign to undermine these business models,[11] describe the current state of the law regarding joint-employment relationships,[12] and highlight the potentially significant policy changes being contemplated.[13] It will conclude with a brief look at state and local government actions related to joint-employer status that also threaten small businesses.[14]

II SMALL BUSINESS AND FRANCHISING AND SUBCONTRACTING

Given the potential to harm small businesses, the efforts to redefine the joint-employer standard are surprising. Not only are small businesses looked upon favorably by the public, they also provide jobs and income to millions of American workers. According to the Small Business Administration (SBA), small businesses[15] currently create 7 of every 10 new jobs and employ over half the country's private-sector workforce.[16] Indeed, small businesses account for an incredible 64% of net new jobs created over the past 15 years.[17] Small businesses also are a vehicle through which independent business owners, entrepreneurs, and recent immigrants stake their claims in the broader economy.

Developing and sustaining a small business carries substantial risks and costs.[18] Although 89% of employers in the United States have fewer than 20 employees, small businesses

spend 36% more per employee for regulatory compliance than do larger businesses.[19] Partly as a result of these added costs, business models such as franchising and subcontracting have emerged to help businesses specialize in their core areas of expertise, increase efficiency, lower barriers to entry, and control overall costs.

The franchise model offers a turnkey solution for entrepreneurs who wish to start their own business with a limited out-of-pocket investment and reduced risk.[20] Not only can an individual strike out on his or her own, but he or she also can do so with the benefit and support of an established brand company's platform and proven strategies. As has often been opined: "Owning a franchise allows you to go into business for yourself, but not by yourself."[21]

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The practice of subcontracting allows a firm to hand over ancillary tasks to another business that specializes in those specific functions. This not only frees employers to focus on their core areas of expertise, but also creates opportunities for other small businesses. In particular, subcontracting offers a way to accomplish the multiple tasks needed to operate a complete business at a manageable cost. This model is not just limited to the private sector—the federal government is actually the nation's largest contractor.[22]

A. History and Background of the Franchising Model

Franchising is a method of marketing goods and services in which one entity, the franchisee, pays another entity, the brand-name company or franchisor, for the right to do business under the franchisor's trademark or trade name, typically in a certain location or for a certain period of time.[23] The Federal Trade Commission, the federal agency in the United States with jurisdiction over disclosure requirements for franchisors, defines a franchise as a commercial relationship where the franchisor "exerts or has the authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan, or business affairs."[24] Many states maintain similar definitions.[25]

Commercial franchising can be traced back to the mid-1800s and the distribution of the Singer sewing machine.[26] However, the modern franchise method of distribution began to take hold only in the 1950s and 1960s.[27] Franchising grew because of an increasingly mobile consumer public and the fact that it provided a less capital-intensive way for a business to operate on a national or even international scale.[28] The franchise system allows the brand-name company to create a self-motivated network of vendors of its products and services without the substantial expense of developing company-owned outlets.[29]

Under this system, both the brand-name company and the local franchise business owner benefit. It offers an entrepreneur or other small-business owner the expertise, stability, and marketing that might otherwise be unavailable and is usually reserved for larger enterprises.[30] In other words, this business model was premised upon the idea that there could be a symbiotic relationship between the brand-name company, which would seek to expand into markets it otherwise might not pursue, and the local franchise business owner, who would own his or her own business and benefit from his or her individual efforts.

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The two basic forms of franchise arrangements include the product-distribution and business-format systems.[31] Examples of product-distribution franchising models in the United States include automobile dealerships and soft-drink bottlers.[32] Product distribution franchises are, in essence, supplier-dealer relationships.[33] In product distribution franchising, the brand-name company licenses its trademark and logo to the franchisees.[34] The product distribution franchisor typically provides only its products and intellectual property, and does not provide franchisees with a model for running their business.[35]

The second basic franchise form is the business-format franchise. Like the product-distribution franchise, the business-format franchisee sells the brand-name company's product or service. However, unlike the product-distribution franchise, in the typical business-format franchise the local franchise business owner agrees to meet minimum standards set by the franchisor to protect its brand, trade name, and trademarks.[36] Those standards may have a minimal impact on the employees' terms and conditions of employment, such as requiring uniforms or interacting with customers in a particular way.[37]

In the past few decades, the business-format franchise model has experienced greater growth than has the traditional product-distribution franchise model.[38] The most well-

known business-format franchise examples include "chain" restaurants, such as McDonald's, Burger King, and Dunkin' Donuts.[39] However, this model is far more widespread than is sometimes realized. Business-format franchises can be found in a wide variety of business sectors including automobile repair (Midas), construction contracting (Restore 24/7 and Precision Concrete Cutting), business services (H&R Block and UPS Store), lodging (Comfort Inn and Embassy Suites), health and beauty (Jenny Craig Weight Loss and Great Clips), and maintenance services (Roto-Rooter and Stanley Steemer).[40]

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One common and "core concept" in both basic franchising models is the uniformity of products and services.[41] Customers expect to receive the same product or service from every franchisee regardless of location. A business-format franchisor's minimum system-wide standards are, therefore, designed to meet the customer's expectations by maintaining uniform specifications with regard to a number of operational issues.

Further, because a franchise necessarily involves the use of a brand-name company's trademarks, federal trademark law also governs certain structural aspects of the relationship between franchisor and franchisee. The Lanham Act, the federal statute that regulates franchisors within the context of trademark protection, requires a franchisor to "control" how its trademarks are used.[42] Failure to do so can result in a loss of its ownership rights in those marks.[43] Moreover, a trademark or trade name may be abandoned if the franchisor does not retain the right to control the use of the mark and the consistency of the goods or services provided thereunder.[44] Suffice it to say, a certain, limited degree of control is required for the franchise arrangement to even legally exist.

B. The Significance of Franchising on the Economy

There are a number of reasons for the rise of the franchising business model. First, it allows a business to expand quickly and economically.[45] Franchises rely on a number of local franchise business owners instead of a single corporate entity. This spreads the risks and rewards more broadly. Second, it reduces the local franchise business owner's barriers to entry into a particular market or business segment, as compared with the barriers that exist when setting up an independent business.[46]

The franchise business model has proved to be a very successful method of job creation. In 2014, America's approximately 770,000 franchised establishments generated nearly 8.5 million direct jobs and $844 billion of output, and constituted 3% ($495 billion) of GDP.[47] Those numbers are expected to grow to approximately 782,000 establishments, 8.9 million direct jobs, $889 billion in output, and $521 billion in GDP in 2015.[48] Not only does franchising have a huge impact upon our economy, but its impact is expected to regularly increase into the foreseeable future.

The numbers above, however significant, reveal just one small aspect of how critical franchising is to the American economy. Not only does franchising create jobs, it also provides individuals the opportunity to own and grow their own businesses. One illustrative example among the tens of thousands of local franchise business owners across the country is Jagruti Panwala, one of nearly 13,000 small-business-owner members of the Asian American Hotel Owners Association.[49] Panwala, in her own words, was unable to profitably run an independent hotel with her husband.[50]

> In order to succeed as hoteliers, we realized it was not enough to simply run the operations efficiently, but we needed to attract more customers. We found that we could do so by affiliating with a nationally recognized brand. … Ultimately, franchising appealed to us because we still controlled our own business. We identified the property, secured the financing, undertook all of the risk, determined how many staff people were necessary, established wages, hours, schedules, promotion and bonus criteria, eligibility for overtime, hiring, firing, and all of the daily operations and functions necessary to operate a successful business.[51]

Today, Panwala owns and operates "four franchised hotels in Pennsylvania and [is] in the process of building a fifth. … Among these properties, we employ over 200 people and maintain a very closely-knit relationship with them."[52] Panwala's story is a prime example of how the franchise model creates jobs and opportunity.

C. Background on Subcontracting Relationships and Their Role in the Economy

Just as franchising is an important business model and job creator for the U.S. economy, so too is the long-standing practice of subcontracting. Firms nationwide routinely contract with third parties to provide a broad spectrum of services. Such subcontracted services include payroll, record-keeping and tax compliance, construction, delivery, logistics, staffing, information technology, janitorial services, and security.[53] Like franchising, subcontracting arrangements benefit both parties. The party seeking to contract out ancillary portions of its operations benefits by being able to focus on core business functions and to specialize in

what it does best.[54] This promotes efficiencies and reduces costs, freeing up capital for more investment and potential job creation.[55] One of the best examples of this is in the information technology sector, where the contracting party receives the expertise and support of information technology professionals without having to directly employ individuals whose skills are not the focal point of its business. The party receiving the contracted work also benefits by being able to efficiently provide specialized services to multiple clients.

To understand that subcontracting is a critical piece of our economy, one need look no further than the federal government. Nearly every government agency relies upon subcontractors. For example, in 2008, approximately 100 of the top Department of Defense (DOD) prime contractors were awarded $369 billion in contracts, of which $160.7 billion was awarded to small business.[56] Many non-DOD government contractors are also small businesses, and a large segment of the government contracting market is set aside for companies owned by minorities and women.[57]

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As with the franchise model, subcontracting is also expanding and comprises a significant portion of economic output, job creation, and GDP. In fact, a 2008 study by the U.S. Bureau of Economic Analysis found that between 1982 and 2006, the portion of GDP created by U.S.-based providers of subcontracted services increased from 7% to nearly 12%.[58] Another study published in December 2013 by University of California, Berkeley and the Massachusetts Institute of Technology examined the impact of subcontracting relationships on the U.S. economy.[59] The study found that in 2010, 48% of U.S. employers subcontracted work to contractors and suppliers domestically.[60] It also found that roughly one-third of full-time employees worked at organizations that had at least some domestic subcontracting costs for functions like facilities maintenance (34.1%), information technology services (33.9%), and transportation services (30.2%).[61]

As with franchising arrangements, subcontracting plays a key role in our economy. It offers benefits to both employers and workers. And yet both long-standing business models have come under unjustified scrutiny by government regulators. The possible motivation for this hostility deserves critical analysis.

III. UNIONS AND THE JOINT-EMPLOYER STANDARD

While the growth of small businesses through franchising and subcontracting has been an economic success, these business models present an impediment to one group: organized labor. Indeed, as discussed below, tying numerous employers together under an expanded joint-employer standard greatly simplifies organized labor's efforts to enlist new union members.

Since the 1950s, unions' share of the workforce has plunged from more than 35% to 11.1% (and 6.6% in the private sector).[62] Many reasons have been suggested for this decline, but regardless of the cause, organized labor has been looking for a cure. One particularly harmful strategy has been the increased use of the corporate campaign.

The corporate campaign, made famous by Jarol Manheim in his book *The Death of a Thousand Cuts*, involves a union ratcheting up pressure on an employer through multiple leverage points until the employer grants organizing concessions to the union. These concessions frequently include card check, which allows unions to win representation without a secret ballot election, and neutrality, where an employer agrees not to criticize a union or engage in campaign activities.[63]

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These organizing concessions are only effective, however, if the employer that grants them can actually apply them at all the locations where unions wish to organize. In the case of franchising and subcontracting arrangements, that ability has historically been limited. For purposes of the National Labor Relations Act (NLRA), subcontractors and local franchise business owners have, after all, been deemed legally separate. Thus, were a national brand to sign a card-check agreement, it would apply to only company-owned stores. Local franchise business owners would be free to ignore the agreement.

However, if the legal divide between these separate businesses is removed, at least for purposes of the NLRA, unions would have an efficient and easy path toward organizing large numbers of employees, in some cases nationally. First, a broader joint-employer standard would give unions new tools for more aggressive corporate campaigns—tools that current law does not permit. For example, unions could apply significant pressure through demands for joint responsibility for unfair labor practice charges and potential liability for back wages. They could resort to what has heretofore been considered illegal secondary activity,[64] and could launch pickets, protests, and other actions against entities previously considered legally

separate employers. Second, card-check or neutrality agreements between a brand-name company and a union could serve to capture the company's entire network of operations. A union could then rapidly and efficiently secure representation at individual franchises across the country through card-check certifications.

Overall, the potential benefits to unions are substantial and not limited to making organizing easier. For example, high turnover has provided a disincentive to organizing in the fast-food industry, because a constant flow of new workers requires an essentially permanent (and costly) campaign apparatus if a union hopes to win an election. But if organizing can be accomplished quickly under a company-wide card-check agreement, the high turnover that was once a problem actually becomes a benefit. New workers would have to pay an initiation fee, but given the short duration spent on the job, would require few actual services from a union. Yet, with each new employee would come a new initiation fee. Of course, regardless of how long an employee spent working at a restaurant, monthly dues would also be collected. This may explain why certain labor organizations have spent tens of millions of dollars[65] to create front groups called "worker centers" that protest at franchises and then file unfair labor practice charges alleging joint-employer status.

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In its effort to rewrite the joint-employer standard to its benefit, organized labor has found government to be a willing partner.[66] First, and most critically, the long-standing separation of employers under the NLRA is in danger of being significantly weakened by efforts to redefine what it means to be a joint employer. Second, some policy makers at the state level are attempting to make contracting companies liable for the wages and benefits paid by the independent businesses with which they subcontract. Finally, local governments are pursuing policies that will disproportionately increase wage costs for local franchise business owners simply because of their affiliation with a brand-name company, increasing the relative cost of doing business for these franchisees and undermining their competitiveness within a market without any principled justification.

IV. HISTORICAL LEGAL TREATMENT OF FRANCHISEES AND SUBCONTRACTORS

As discussed, unions see the current legal treatment of franchising and subcontracting as a hindrance to organizing. Altering this dynamic, however, would mean rewriting a well-established body of law that governs these relationships. Under this existing body of law, a franchisor or a firm that retains subcontractors is not considered the employer of a franchisee's or subcontractor's employees unless it has significant control over the employment relationship as indicated by things such as hiring, firing, discipline, the provision of benefits, and scheduling.[67] Courts will generally find a joint-employment relationship to exist only where there is actual control over the employment relationship or the day-to-day operations of the primary employer by another employer.[68] The body of law that governs these principles is well-understood and has existed without substantial variation for many years.

A. Under the NLRA, a Joint Employer Must Exercise Direct and Immediate Control Over Employees' Essential Terms of Employment

Section 2(2) of the NLRA defines an employer as "any person acting as an agent of an employer, directly or indirectly … ."[69] This definition became part of the NLRA under the 1947 Taft-Hartley Act amendments and was expressly intended to overrule the Supreme Court's decision in *NLRB v. Hearst Publishing*,[70] which found that "independent contractors" were employees. The Taft-Hartley Act mandated application of the "ordinary rules [of the] common law of agency" in the labor relations setting.[71] The common-law test originated in tort law and was used to determine the basis for recovery from the master for torts committed by his or her servant during the course of the servant's employment.[72] The master would not be liable for the actions of independent contractors. The Taft-Hartley Act also redefined an "employee" to encompass only individuals who are "acting as an agent of an employer," a narrower test than the NLRA's prior definition of any individual "acting in the interest of any employer."[73]

Despite the Taft-Hartley Act and Congress's explicit intent to limit the number of entities deemed to be an employer under the NLRA, the standard for joint-employer status was inconsistent, and joint-employer status was sometimes found using a variety of indicia including: "indirect control" over wages and discipline;[74] contractual authority to control employment conditions (even when that authority was never exercised);[75] the industrial realities of the relationship between the parties, which made the user employer essential to meaningful collective bargaining;[76] and whether a party "was the ultimate source of any wage increases … that might be negotiated with a union."[77] This so-called indirect control "doctrine" was so vague that it made it difficult for businesses to determine how to comply with governing legal standards.

In 1982, in *NLRB v. Browning-Ferris Industries, Inc.*, the Third Circuit first discussed the inconsistencies present in the NLRB's previous decisions and outlined the differences between the similar but distinct concepts of "single" and "joint" employers. Specifically, the Court stated:

> A "single employer" relationship exists where two nominally separate entities are part of a single integrated enterprise so that, for all purposes, there is in fact a "single employer." … Thus, the "single employer" standard is relevant to the determination that "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise." … In contrast, the "joint employer" concept does not depend upon the existence of a single integrated enterprise. … Rather, a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be"—independent legal entities that have merely "historically chosen to handle jointly … important aspects of their employer-employee relationship."[78]

The Third Circuit held that, in order to be joint employers, the two entities must "share or co-determine those matters governing the essential terms and conditions of employment."[79] This joint-employer standard was later adopted by the Board in *TLI* and *Laerco*, and the Board expanded upon what it means for joint employers to "share or co-determine" matters that govern the essential terms and conditions of employment. "To establish joint-employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."[80] Further, the control over these employment matters must be "direct and immediate."[81]

Specifically, TLI leased drivers to another company, Crown Zellerbach ("Crown"). An NLRB administrative law judge (ALJ) initially found that there was a joint-employer relationship. However, the Board reversed, and held that "[a]lthough Crown may have exercised some control over the drivers, Crown did not affect the terms and conditions of employment to

such a degree that it may be deemed a joint employer."[82] Therefore, the Board found "that the supervision and direction exercised by Crown on a day-to-day basis is both limited and routine, and considered with its lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint-employer finding."[83] Relying upon this rule of law, the Board has consistently held that "where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work but not how to perform the work," this constitutes minimal and routine direction that does not result in a joint-employer finding under the NLRA.[84] Conversely, where entities do exercise direct and immediate control over the essential terms of employment, a joint-employer relationship has routinely been found.[85]

Given these legal principles, the Board has typically found that franchising and subcontracting relationships do not result in joint-employer status.

Given these legal principles, the Board has typically found that franchising and subcontracting relationships *do not* result in joint-employer status. Instead, the Board requires that the putative joint employer exert a sufficient level of control over the day-to-day functions of the primary employer's business.[86] The Board's formulation in *TLI* has also been adopted by various Circuit Courts of Appeal.[87] Thus, the NLRB's existing standard is clear and well-understood, and has given businesses the certainty to expand and create jobs.

B. Under the Fair Labor Standards Act, Joint Employers Must Exert Direct Control Over a Franchisee/Subcontractor's Employees' Day-to-Day Activities

The Fair Labor Standards Act (FLSA), enforced by the DOL, provides a framework similar to that of the NLRA. The regulations interpreting the Act provide that "[a] single individual may stand in the relation of an employee to two or more employers at the same time."[88]

When determining whether two entities may be joint employers under the FLSA, courts consider the specific facts of the relationship and apply a multifactor test known as the "economic realities" test. While different courts rely upon slightly different versions of the test, a determination of whether a joint-employment relationship exists is always a fact-intensive inquiry that focuses on the actual degree of control between each employer and the employee.[89] When applied to the typical franchising relationship, this test has reliably resulted in findings that the necessary and routine control inherent in such a relationship does not create joint employment under the FLSA.[90] Where courts have found joint-employer liability, each employer has had significant involvement in day-to-day employee management.[91]

For example, in Singh v. *7-Eleven, Inc.*, an employee sought to hold a franchisor liable for FLSA violations by a franchisee.[92] The court held that the franchisor was not a joint employer because, pursuant to the franchise agreement, the franchisee had the "exclusive right and responsibility to control the hiring and firing decision."[93] Further, the franchisor did not compensate employees or exercise control over the terms of employment.[94]

Thus, to be considered a joint employer under the FLSA, both employers must have a meaningful ability to "control" the employees in question. Indeed, the DOL's formulation recognizes that the "economic realities" of business do not dictate that franchisors and subcontractors are joint employers.[95]

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C. Under Title VII, the ADA, and the ADEA, Joint Employers Must Exert Direct Control Over Employees' Day-to-Day Activities

The joint-employer analysis under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) is similar, if not identical to, the historically applied FLSA standard. In general, the EEOC and the courts appear to rely on some variation of the following three factors when making this determination: (1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) day-to-day supervision of employees, including employee discipline; and (3) control of employee records, including payroll, insurance, taxes, and the like.[96] "No single factor is dispositive, and a weak showing on one factor may be offset by a strong showing on the other two."[97] Moreover, "[t]he parties' beliefs and expectations regarding the relationship between the plaintiff and defendant are also relevant."[98] Under this test, separate employers are held liable to employees when sufficient control is exercised over their employment.[99]

In light of the reach of this doctrine under Title VII, the ADA, and the ADEA, some courts have imposed a safeguard that requires a plaintiff to show "that the joint employer knew or should have known of the [discriminatory] conduct and failed to take corrective measures within its control" in order to be liable for discriminatory conduct, *even if* a joint-employment relationship exists.[100]

Thus the EEOC, DOL, the courts, and the NLRB have all established joint-employer tests under which the limited controls over employees in franchising and subcontracting relationships are typically not sufficient to find joint-employment status. These long-standing maxims stand in stark contrast to the efforts being made to undermine successful business models.

V. CURRENT EFFORTS TO UNDERMINE THE FRANCHISING AND SUBCONTRACTING MODELS

A. The NLRB Takes on the Joint-Employer Standard

Notwithstanding the well-settled and well-understood joint-employer tests that currently exist,[101] some policy makers seem sympathetic to the union argument that the current standards are too narrow.[102] Leading the charge for a much broader standard is the NLRB, which has taken significant steps toward discarding its current test in favor of a sweeping new interpretation that threatens to undermine many existing business relationships and to cause numerous firms to unexpectedly become joint employers.[103] This effort is taking place on two tracks: first, through the NLRB General Counsel's administrative complaints against McDonald's; second, through the Board's consideration of the *Browning-Ferris* case (not to be confused with the 1982 case by the same name).

1. The General Counsel Files Complaints Against McDonald's, USA, LLC

On July 29, 2014, General Counsel Richard Griffin announced the authorization of complaints against McDonald's, USA, LLC ("McDonald's") and several of its local franchise business owners as joint employers for alleged unfair labor practices committed by the franchisees. These unfair labor practice charges were filed by SEIU-backed worker centers in the wake of numerous workplace protests referred to as "strikes" by protest organizers. Under the traditional joint-employer test, franchisors like McDonald's are typically not held liable for such violations.[104] These complaints were subsequently issued by the General Counsel on December 19, 2014.

Leading the charge for a much broader standard is the NLRB, which has taken significant steps toward discarding its current test in favor of a sweeping new interpretation that threatens to undermine many existing business relationships and to cause numerous firms to unexpectedly become joint employers.

The complaints claim that "McDonald's workers across the county were fired or intimidated for participating in union organizing and in a national protest movement calling for higher wages."[105] In the words of the International Franchise Association (IFA), these complaints pose a major threat to the franchising industry because "[t]he Board has effectively legislated a change to the definition of who an employer is, which will impact hundreds of thousands of businesses. … Unelected government bureaucrats, let alone one prosecutor, should not have such power."[106] According to the IFA, "[i]n the three months since the NLRB disclosed the complaints against McDonald's, 61 new charges have been filed against 27 other franchise brands, with a number of those raising the joint-employer claim."[107]

This troubling trend is not in the best interests of American workers, business owners, or the broader economy. Indeed, even one of the NLRB's own ALJ's has made clear that interpreting the NLRA to hold companies with a subcontracting relationship as joint employers will "significantly disrupt thousands" of similar relationships."[108]

2. The NLRB Requests Briefs in *Browning-Ferris*

On May 12, 2014, the Board issued a Notice and Invitation to File Briefs in *Browning-Ferris Industries of California*. *Browning-Ferris* is a representation case filed by the Teamsters union alleging that BFI should be considered a joint employer with a subcontractor, Leadpoint. In its notice, the NLRB asked interested parties to address the following three issues:

These questions have made it obvious the Board is engaged in a serious effort to establish a new joint-employer test, one that would have applicability well beyond the fast-food franchises targeted by worker centers and the General Counsel.

1. Under the Board's current joint-employer standard, as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984), is Leadpoint Business Services the sole employer of the petitioned-for employees?

2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?

3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?[109]

These questions have made it obvious the Board is engaged in a serious effort to establish a new joint-employer test, one that would have applicability well beyond the fast-food franchises targeted by worker centers and the General Counsel. Given the NLRB's actions over the past six years, it is likely that a new standard will be substantially broader than existing law—and unions have filed numerous briefs encouraging exactly that.[110]

3. The Board Has Already Shown a Willingness to Expand Its Joint-Employer Test

Some indication of where the Board could be headed comes from a September 15, 2014, decision in *CNN America Inc.*, a case that had been languishing on the NLRB's docket for years.

The decision is a clear indicator that the Board considers "indirect" as opposed to "direct" control as sufficient to establish joint-employer status.[111] It is telling that the Board chose this particular moment to decide the case, given that the ALJ's decision in *CNN* occurred more than 6 years ago and it had been more than 10 years since the filing of the original charges.[112]

The majority in *CNN* found that, as a joint employer, CNN violated sections 8(a)(5) and (1) of the NLRA by canceling service contracts to avoid its obligation under a contractor's collective bargaining agreements, failing to bargain with unions over the termination of the contracts and the effects thereof, making unilateral changes in the terms and conditions of employment when it operated with a new workforce, and failing to recognize and bargain with unions on new collective bargaining agreements. In affirming the ALJ's decision, the Board determined CNN was a joint employer with Team Video Services, LLC ("TVS") because it allegedly had indirect control over TVS employees based on CNN's commercial contract for labor services.[113]

According to the Board, CNN purportedly controlled the "hiring, supervision and direction" of the subcontractor's employees by setting terms in its labor agreement for staffing levels, reimbursements, and training costs.[114] Although the subcontractor set the salaries for employees, the Board pointed to the fact that CNN was the sole source of funding for TVS' workers' compensation. In addition, despite the fact that CNN was not a party to negotiations and never present during collective bargaining sessions, the Board argued that the subcontractor consulted with CNN regarding wage proposals during such sessions.[115] Based on these facts, the Board concluded that "CNN both possessed and exercised meaningful control over the wage rates of the TVS employees" and was thus a joint employer.[116]

Under this "meaningful bargaining" test, the mere potential ability of one business to impact the terms and conditions of employees of another entity could create a joint-employment relationship. Thus, joint-employer status could be found not just in franchising or subcontracting arrangements, but also between businesses and their vendors and suppliers.

This result depended not just on the application of the traditional joint-employer standard, but also on additional factors requiring minimal day-to-day involvement in the employees' employment.[117] The majority accordingly concluded that CNN and TVS were joint employers, and ordered CNN to offer employment to 100 former contract employees and to make whole 300 other workers for loss of earnings and other benefits.[118] CNN has since filed both a Motion for Reconsideration with the NLRB and a petition for review of the Board's Order with

the D.C. Circuit Court of Appeals, which is being held in abeyance pending the decision from the NLRB.[119] Given its reliance on atypical factors, as discussed above, to determine joint-employer status, the CNN decision may portend the Board's direction in *Browning-Ferris*.

4. The General Counsel's Brief in *Browning-Ferris*

An even stronger indication of what a new joint-employer standard could look like was provided by the General Counsel in an *amicus* brief filed in *Browning-Ferris*.[120] In his brief, the General Counsel argued that the Board should adopt a joint-employer standard that "would make no distinction between *direct, indirect, and potential* control over working conditions and would find joint-employer status where 'industrial realities' make an entity essential for meaningful bargaining."[121] Under this "meaningful bargaining" test, the mere *potential* ability of one business to impact the terms and conditions of employees of another entity could create a joint-employment relationship.[122] Thus, joint-employer status could be found not just in franchising or subcontracting arrangements, but also between businesses and their vendors and suppliers.

A firm that decides to exercise some oversight of the labor practices of businesses within its supply chain could easily be labeled as a joint employer on the grounds that it "indirectly" controlled the terms and conditions of employment despite a lack of contractual relationships.

Perhaps most importantly for franchisors and subcontractors, the General Counsel believes that direct, indirect, and potential control over "work instructions relating to the means and manner to accomplish a job or task; [and/or] training employees or establishing employee training requirements" would be sufficient to create a joint-employment relationship.[123] This reasoning appears to place a vast number of business-to-business relationships within the purview of the General Counsel's proffered joint-employer test. Moreover, the reach of the General Counsel's test does not appear to be limited by requirements of contractual privity, and a joint-employment relationship could span an entire supply chain. Thus, a firm that decides to exercise some oversight of the labor practices of businesses within its supply chain could easily be labeled as a joint employer on the grounds that it "indirectly" controlled the terms and conditions of employment despite a lack of contractual relationships. In fact, the General Counsel has indicated that "voluntary" agreements with the DOL to monitor supply chains would be used to support a finding of joint-employer status.[124] Likewise a firm that requires subcontractors on a particular contract to meet certain labor standards could also be found to have established a joint-employment relationship.

Alarmingly, the impact of the General Counsel's desired formulation of the joint-employer test appears to create significant challenges for employers who rely upon settled Board law to operate their businesses. Perhaps the best example of the far-reaching effects of the joint employer test argued for by the General Counsel in *Browning-Ferris*, and which appears to be applied in the McDonald's complaints, is in the construction industry.[125] If the General Counsel's test is adopted by the Board, "meaningful bargaining" could dictate that the owner and the prime contractor of a construction project would be a joint employer of every employee of every subcontractor on the project, including those with which the owner and prime contractor have no commercial relationship. This status would be established by virtue of their roles in determining the work to be performed, the schedule of work, and overall management of the entire project.[126]

Suffice it to say, if adopted, the General Counsel's preferred joint-employer test would have significant repercussions for the American economy. It could easily undermine the legal relationships between a great number of businesses and upend the commonly understood rights and responsibilities of those businesses.

A construction site would, therefore, be considered to have one primary employer rather than multiple employers. Among many other harmful effects, unions could target prime contractors or the owners of the property with pickets and other activities that are currently considered secondary conduct prohibited by the NLRA.[127] As such, prime contractors could no longer manage construction projects by using reserved gates[128] and other long-standing practices necessary to reduce the impact of a subcontractor's labor disputes on the overall project. These systems were established to ensure a balance between the rights of labor unions and the free flow of commerce.[129] The Board's decades-long precedent applicable to these situations would be rendered nearly meaningless by the contemplated expansion of the joint-employer test.[130]

Suffice it to say, if adopted, the General Counsel's preferred joint-employer test would have significant repercussions for the American economy. It could easily undermine the legal relationships between a great number of businesses and upend the commonly understood rights and responsibilities of those businesses. This would result in increased operating costs for these firms as well as a vaguely defined redistribution of responsibility for many employment and business decisions. This climate of uncertainty and shifting legal liability would do little to promote business growth and job creation.

B. The U.S. DOL and EEOC's Joint-Employer Activity

The NLRB is not the only agency to have examined revisions to the existing joint-employer standard. The WHD has become interested in a new approach, and the EEOC filed a brief in the *Browning-Ferris* case.

In May 2014, Professor David Weil, Ph.D., was confirmed by the Senate as the new WHD administrator at DOL.[131] Prior to his confirmation, Weil was the principal author of a May 2010 report for the agency, "Improving Workplace Conditions Through Strategic Enforcement: Report to the Wage and Hour Division."[132] In his report, Weil stated that "changes in the structure of the economy and in the complexity of employment relationships, as well as the decline in unionization together render the traditional, workplace-focused approach to enforcement less and less effective. … As a result, traditional approaches to enforcement are no longer sufficient."[133] The report takes direct aim at employers with franchising and subcontracting relationships:

> The employment relationship in many sectors with high concentrations of vulnerable workers has become complicated as major companies have shifted the direct employment of workers to other business entities that often operate under extremely competitive conditions. This "fissuring" or splintering of employment increases the incentives for employers at lower levels of industry structures to violate workplace policies, including the FLSA. *Fissuring means that enforcement policies must act on higher levels of industry structures in order to change behavior at lower levels, where violations are most likely to occur*.[134]

In Weil's view, "employment fissuring arises from a desire to shift labor costs and liabilities to smaller business entities or to third-party labor intermediaries."[135] Additionally, the first "clear strategy" for strategic enforcement identified by the report is to focus "regulatory pressure on the lead firms in these industry structures. … If the [Wage and Hour Division] is to have sustainable and systemic effects on key sectors, *it must experiment with sector-level strategies in priority areas*."[136]

Since becoming WHD administrator, Weil has taken aim at the "fissuring" identified in his report. For instance, on June 20, 2014, the WHD issued guidance on its application of the FLSA to domestic service workers, which specifically addresses joint employment for these individuals.[137] In fact, Weil's 2010 report identified the home health care services industry as a priority industry for strategic enforcement.[138]

For its part, the EEOC has also weighed in on this debate. On June 14, 2014, P. David Lopez, the general counsel of the EEOC, filed an *amicus* brief in *Browning-Ferris* claiming that the Board needed to adopt a broader joint-employer test.

> The EEOC's joint employer definition is intentionally flexible. … As [former] Board Member [Wilma] Liebman has observed, "workplace relationships are becoming more varied as domestic industries continue to seek flexibility and … the increasing contracting-out of work is blurring … distinctions between employer and client contractor." *Airborne Freight*, 338 NLRB 597, at *4 (Member Liebman, concurring). A flexible definition of joint employers addresses this changing reality.[139]

Thus, three significant federal agencies have made clear their interest in expanding the traditional definition of a joint employer. Many employers are now being forced to predict how changes in the legal landscape will affect their ability to function without clear guidance or any assurance that potential changes will allow existing business structures to remain intact.

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C. The Plaintiff's Bar Has Already Followed the Lead of the NLRB

In the wake of the above-described governmental actions, plaintiffs' attorneys have begun asking courts to find franchisors liable for the actions of franchisees. For example, in a lengthy Complaint filed on January 22, 2015, in the U.S. District Court in the Western District of Virginia, 10 former employees of Soweva Co., a franchisee of McDonald's, filed a complaint alleging discrimination. These individuals filed suit against not only Soweva Co. and its owner, Michael Simon, but also against McDonald's Corporation and McDonald's USA, LLC.

The Complaint does not allege any discriminatory or harassing conduct on the part of any McDonald's Corporation or McDonald's USA, LLC employee. However, similar to the complaints issued by the NLRB against McDonald's, the Complaint alleges that McDonald's should be liable for the alleged misconduct of its franchisees because it requires franchisees to meet quality, service, and cleanliness standards.[140] Complaints like this evidence how

the NLRB's contemplated action is likely to reverberate beyond the Board alone, and demonstrates yet another attack on the franchise model.

D. State and Local Changes

In addition to targeting franchising and subcontracting relationships at the federal level, organized labor and other groups have also turned to state legislatures in an attempt to hold employers liable for the actions of independent businesses with whom they have relationships. Thus, we see state and local governments, with the strong backing of unions, implementing changes to business structures upon which huge portions of our economy rely.

1. California Changes Liability for Contractors

On September 28, 2014, California Governor Jerry Brown signed into law Assembly Bill (AB) 1897, which requires an employer to "share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for the payment of wages and the failure to obtain valid workers' compensation coverage."[141]

The new law, which went into effect January 1, 2015, does not merely shift the burden of proof from the plaintiff to the employer. It actually eliminates any burden whatsoever on a plaintiff to prove joint-employer status by codifying that companies are presumptively responsible for the actions of subcontractors in wage and workers' compensation cases. The new Labor Code section will make a "client employer" civilly liable for a "labor contractor's" (1) failure to pay wages and (2) failure to secure valid workers' compensation coverage for work performed at the client employer's premises or worksites in the usual course of the client employer's business.[142] The new section contains limited exceptions and a provision regarding workplace safety that may further broaden its impact.[143]

In addition to targeting franchising and subcontracting relationships at the federal level, organized labor and other groups have also turned to state legislatures in an attempt to hold employers liable for the actions of independent businesses with whom they have relationships.

The law targets businesses that obtain or are provided "workers to perform labor within its usual course of business from a labor contractor."[144] Although it may appear as though this targets solely staffing companies, the law is, in fact, much broader, and could apply to any subcontracting relationship because the "usual course of business" is left unclear.[145] Moreover,

there also appears to be no requirement of contractual privity for the apportionment of liability, and, as a result, an entity could be liable for its subcontractor's failure to pay wages. According to Ruben Guerra, chairman of the Board and CEO/president of the Latin Business Association,

> [t]he only thing Assembly Bill 1897 will accomplish is to discourage the use of contractors and their employees—essentially crushing future job creation in California. What's more, Assembly Bill 1897 will not protect California's workforce, nor will it prevent labor violations from happening. It will, however, allow bad-actor employers to shift liability to a company that did not create the violation, know of the violation or have the ability to prevent the violation. And nearly every industry will be impacted, including construction, agriculture, hospitals, restaurants, newspapers, retailers, food processors and banks, among many others.[146]

The law is also controversial because it imposes liability on employers without consideration for whether the business had knowledge about the purported wage or workers compensation violations, and irrespective of whether the client employer and labor contractor are *actually* joint employers.[147] Moreover, the statute expressly provides that it does not limit any other theories of liability or requirements established by other statutes or common law.[148] The law became organized labor's No. 1 priority during the 2014 legislative session.

AB 1897 is an "about face" from the current joint-employer test used in California courts, under which a third party can be liable for certain labor obligations based on the traditional common-law theory of joint employment. The current test, articulated in *Borello & Sons, Inc. v. Department of Industrial Relations*,149 follows the common-law tradition and establishes that the test for "an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." More recently, in *Martinez v. Combs*,[150] the California Supreme Court articulated a three-part test for employer status under California's wage-hour statutes, which provided that a company may be deemed an employer only if it has: (1) exercised control over the plaintiffs' hours, wages, or working conditions; (2) suffered or permitted plaintiffs to work; or (3) "engaged" plaintiffs, thereby creating a common-law employment relationship. "'Control over wages' means that a person or entity has the power or authority to negotiate and set an employee's rate of pay, and not that a person or entity is physically involved in the preparation of an employee's paycheck."[151] Thus, under California state law, the plaintiff would have the burden to prove the defendant was his or her employer by virtue of exerting any control over the terms and conditions of the plaintiff's employment.

Under AB 1897, however, the joint-employment relationship is defined by the new statute. It is a significant change because it extends liability to an innocent third party that did not

commit any violations and does not control working conditions, the manner of payment, employees' schedules, or the work environment.[152] This approach is sharply at odds with the California Supreme Court's ruling in *Martinez*.

From the comments of AB 1897's sponsors, it is apparent that the objective of the law is to eliminate or drastically reduce an employer's ability to subcontract. It is clear that the staffing industry was targeted and made a scapegoat for other forms of subcontracting. According to the bill's sponsor, Assemblyman Roger Hernandez, he designed AB 1897 to "de-incentivize" the subcontracting of labor as a business model.[153]

AB 1897, however, expands liability to all industries and individuals who contract for labor or services.[154] What is worse, many companies argue, is that the new law essentially "allows an employee to file a lawsuit against the third-party company only, without first seeking to obtain relief from their actual employer for the alleged violations" even though the third-party company likely did not commit the violation, know of the violation, or have the ability to prevent the violation.[155]

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Moreover, remedies already exist for those industries in which there has been documented evidence of unlawful contracting practices, including farm labor, garment, construction, security guards, janitorial, and most recently warehouse workers. California law prohibits a person or entity from entering into a contract for labor or services with a certain subcontractor if the person or entity knows or should know that the contract or agreement does not include sufficient funds for the contractor to comply with laws or regulations governing the labor or services to be provided.[156]

Rather than solving an actual problem, it appears that AB 1897 was driven by powerful union interest groups looking to create organizing opportunities by tying subcontractors to larger firms. For instance, Warehouse Workers United, which began as an organizing initiative of the union coalition Change to Win,[157] has targeted Walmart's use of logistics subcontractors. Indeed, organized labor used a warehouse worker from one of Walmart's subcontractors as the face of its lobbying on AB 1897.[158] In addition, the bill was backed by the California Labor Federation, the AFL-CIO, the California Teamsters Public Affairs Council, and the United Food and Commercial Workers Union.[159]

2. Seattle's Minimum Wage Law Discriminates Against Local Franchise Business Owners

Local governments have also joined in the campaign against franchising and subcontracting. A prime example occurred in Seattle, Washington, which in June 2014 raised its minimum wage to $15.00 an hour. The change to the minimum wage in Seattle can be traced to the union-sponsored *Good Jobs Initiative* in the city of SeaTac, a suburb of Seattle.[160]

Seattle's minimum wage ordinance covers all employees for each hour worked within the geographic boundaries of Seattle and employers with at least one employee who performs work in Seattle at least two hours in a two-week period.[161] However, the ordinance divides employers into two categories: Schedule 1 employers and Schedule 2 employers. Schedule 1 employers are required to implement the $15.00 per hour minimum wage by January 2017[162] whereas Schedule 2 employers need not pay the $15.00 per hour minimum wage until 2021.[163]

The Seattle Ordinance, therefore, punishes locally owned franchises and discriminates against the franchising business model because it defines nearly all local franchise business owners as big businesses.

Schedule 1 employers are defined to be "all employers that employ more than 500 employees in the United States, regardless of where those employees are employed in the United States, and 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."[164] Conversely, Schedule 2 employers are defined to be "all employers that employ 500 or fewer employees regardless of where those employees are employed in the United States." Significantly, the ordinance states that Schedule 2 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."[165] Thus, many local franchise business owners, who under any other consideration would be small businesses, are deemed by Seattle to be large, Schedule 1 employers.

The Seattle Ordinance, therefore, punishes locally owned franchises and discriminates against the franchising business model because it defines nearly all local franchise business owners as big businesses. Other similarly situated employers who are not franchised are considered small businesses.[166]

Because of the inequitable application of the Seattle Ordinance, the IFA and other groups (including the U.S. Chamber) have challenged the Seattle Ordinance on the grounds that it "discriminates against franchisees and significantly increases their labor costs in ways that will harm their businesses, employees, consumers and Seattle's economy."[167] Though

this challenge is pending, the fact that it even needed to be filed further demonstrates the concerted effort by organized labor and governmental bodies to disregard historical and legitimate business models.

3. Minimum Wage Legislation in Chicago, Illinois

Chicago, like Seattle, recently approved a minimum wage increase. On December 3, 2014, the city council passed Ordinance 02014-9680, which increases the minimum wage to $13 per hour by July 1, 2019. This increase was based on a plan developed by Mayor Rahm Emanuel's Minimum Wage Working Group.[168]

However, a number of aldermen had supported Ordinance 02014-4251, a radically different proposal that would have gradually raised the minimum wage to $15.00 per hour by 2019.[169] Proposed Ordinance 02014-4251 would have required all businesses with more than $50 million in annual revenue that operate in Chicago (including nationwide franchises operating within the city) to pay employees $12.50 per hour within 90 days of passage and $15.00 per hour within a year.[170] On the other hand, mid- and small-sized employers, defined in the proposed ordinance as "any employer that does not qualify as a large employer," would be afforded up to four years to pay workers the required $15.00 per hour.[171] After that, the minimum wage would automatically increase along with the rate of inflation.[172] Significantly, the ordinance considered local franchise business owners to be a single entity with national franchisors, which would have unjustifiably made many small businesses large employers.

While this language ultimately did not pass, the serious consideration it was given, combined with the Seattle Ordinance, demonstrates that local governments are taking the same interest in joint-employer issues as the federal government.

VI. CONCLUSION

The franchising and subcontracting business models have allowed small businesses and entrepreneurs to create opportunities and jobs across many sectors of the economy. Despite the benefits to workers and employers, organized labor and certain policy makers view these long-standing, successful models with hostility and have launched a multipronged campaign to undermine them.

Should this campaign succeed, brand-name companies and contractors could find themselves liable for employment practices governing workers that they do not, in fact, employ. They will inevitably seek to manage that risk by taking over the franchised or subcontracted operations. Thus, existing franchisees stand to lose control of the day-to-day operations of their businesses, and subcontractors face losing their clients. Needless to say, this would reduce the viability of these business models, likely resulting in higher costs, fewer new businesses, less growth, and fewer new jobs.

Despite facing many challenges over the past several years, America's economy remains the envy of the world, in no small part due to the dynamism of our small businesses and the adaptability of successful business models. Government policy should aim to keep it that way.

ENDNOTES

1 *Whitaker v. Milwaukee County*, 772 F.3d 802, 810 (7th Cir. 2014).

2 *See* Section IV, *infra*.

3 *See, e.g.,* IHS Economics, *Franchise Business Economic Outlook for 2015*, Int'l Franchise Assn. at 3 (January 2015), http://emarket.franchise.org/FranchiseBizOutlook2015.pdf.

4 *Id.* at 2.

5 Robert E. Yuskavage, Erich H. Strassner, and Gabriel W. Medeiros, *Domestic Outsourcing and Imported Inputs in the U.S. Economy: Insights From Integrated Economic Accounts*, U.S. Dept. of Commerce Bureau of Economic Analysis at 3 (May 15, 2008), http://bea.gov/papers/pdf/yuskavage_outsource.pdf.

6 *See* Section V, *infra*.

7 Such coordinated organizing efforts could give entirely new meaning to organized labor's corporate campaigns. *See* Section IV, *infra*. *See* Jarol B. Manheim, *The Death of a Thousand Cuts: Corporate Campaigns and the Attack on the Corporation*, LAWRENCE ERLBAUM ASSOCIATES (2001).

8 *See* Section IV, *infra*.

9 *See* Section V.D, *infra*.

10 *See* Section II, *infra*.

11 *See* Section III, *infra.*

12 *See* Section IV, *infra*.

13 *See* Sections V.A-C, *infra*.

14 *See* Section V.D, *infra*.

15 Creating an exact definition of small business is difficult due to the variations among businesses and industries. For instance, the federal government's definition of small business changes depends upon the sector of the economy. *See, e.g.,* 13 C.F.R. § 121.201.

16 *Fast Facts on Small Business*, U.S. Congress House Committee on Small Business (Apr. 2014), http://smallbusiness.house.gov/uploadedfiles/april_recess_small_biz_talking_pts.pdf.

17 *Id.*

18 *The Pros and Cons of Owning a Business,* Winmark Business Solutions (Dec. 18, 2014), http://www.hostway.com/web-resources/no-category/pros-and-cons-of-owning-a-business/.

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20 Eddy Goldberg, *The Benefits of the Franchise Model*, Franchising.com, http://www.franchising.com/howtofranchiseguide/benefits_of_the_franchise_model.html (last visited Feb 3, 2015).

21 *What Are the Advantages and Disadvantages of Owning a Franchise*? Int'l Franchise Assn., http://www.franchise.org/franchiseesecondary.aspx?id=52630 (last visited Feb 3, 2015).

22 "The U.S. government is the world's largest buyer of products and services. Purchases by military and civilian installations amount to nearly $600 billion a year, and include everything from complex space vehicles to janitorial services. In short, the government buys just about every category of commodity and service available." *Government Contracting 101: PART—Small Business Contracting*, United States Small Business Administration Office of Government Contracting & Business Development at 5 (January 2012), https://www.sba.gov/sites/default/files/files/Work%20book%20gc%20101%20part%201.pdf.

23 Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 Wash & Lee L. Rev. 417, 420-21 (Spring 2005); Francine LaFontaine and Roger D. Blair, *The Evolution of Franchise Contracts: Evidence from the United States,* 3 Entrepreneurial Bus. L.J. 381, 387 (2008-2009).

24 16 C.F.R. §436.1(h)(2).

25 Many states maintain similar definitions. *See* N.Y. Gen. Bus. Law §681(3)(a); Ill. Comp. Stat. 1992, Ch. 815 §§705/1 et seq.; Ind. Code §§23-2-2.5-1 et seq.; Iowa Code §§551A.1 et seq.; Md. Business Regulation Code Ann. §§14-101 et seq.; Mich. Comp. Laws §§445.1501 et seq.; N.D. Cent. Code §§51-19-01 et seq.; Or. Rev. Stat., §§650.005 et seq.; R.I. Gen. Laws §§19-28.1-1 et seq.; Va. Code Ann. §§13.1-557 et seq.; Wash. Rev. Code §§19.100.010 et seq.; Wis. Stat. §§553.01 et seq.

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28 Sean Obermeyer, *Resolving the Catch 22: Franchisor Vicarious Liability for Employee Sexual Harassment Claims Against Franchisees*, 40 Ind. L. Rev. 611, 619-20 (2007).

29 *Id.*

30 *Id.;* Shelley and Morton, *supra* note 27, at 121.

31 King, *supra* note 23, at 422.

32 LaFontaine and Blair, *supra* note 23, at 385.

33 *What Are the Advantages and Disadvantages of Owning a Franchise*?, *supra* note 21.

34 *Id.*

35 *Id.*

36 *Economic Impact of Franchised Businesses, Volume 3*, Int'l Franchise Assn. at 5 (Feb. 7, 2011), http://www.franchise.org/uploadedFiles/Prospective_Franchisee/News/EconomicImpact11.pdf.

37 Obermeyer, *supra* note 28, at 616.

38 LaFontaine and Blair, *supra* note 23, at 387.

39 Obermeyer, *supra* note 28, at 615.

40 Franchise Opportunities, http://www.franchiseopportunities.com (last visited Jan. 28, 2015).

41 Shelley and Morton, *supra* note 28, at 121.

42 15 U.S.C. §1051 et seq.

43 *See, generally,* 15 U.S.C. §1064(5)(A).

44 *Id.*

45 Obermeyer, *supra* note 28, at 616.

46 King, *supra* note 23, at 422-423. Indeed, franchisees enjoy "a higher chance of success than in a sole proprietorship; shorter time to opening; initial training and ongoing support; assistance in finding an optimal site; the selling power of a known brand; lower costs through group purchasing; use of an established business model; national and regional advertising campaigns; customer lead generation through websites and centralized call centers; and a network of peers (fellow franchisees) to provide advice and moral support through a company intranet, annual conferences, and franchisee associations; and, increasingly, assistance with securing funding." Goldberg, *supra* note 20; IHS Economics, *supra* note 3, at 2.

47 47 IHS Economics, *supra* note 3.

48 *Id*.

49 *Expanding Joint Employer Status: What Does It Mean for Workers and Job Creators?* Hearing Before the House Committee on Educ. and the Workforce Health, Education, Labor & Pensions Subcommittee at 2, 113th Congress (Sept. 9, 2014) (testimony of Jagruti Panwala), http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/Jagruti%20Panwala%20-%20Spoken%20Testimony.pdf.

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51 *Id*. at 1-2.

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53 *Subcontracting—Reference for Business*, Encyclopedia of Business 2nd ed., http://www.referenceforbusiness.com/small/Sm-Z/Subcontracting.html (last visited Feb. 3, 2015).

54 *Subcontracting 101*, FDIC.gov, https://www.fdic.gov/about/diversity/sbrp/47.doc (last visited Feb. 3, 2015).

55 *Subcontracting—Reference for Business, supra* note 53.

56 *Subcontracting Provides Huge Government Contracting Opportunities*, Bizfilings.com (May 24, 2012), http://www.bizfilings.com/toolkit/sbg/run-a-business/govt-contracts/subcontracting-for-govt-contracting-opportunities.aspx.

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65 Service Employees International Union, *2013 LM-2 Report,* U.S. Department of Labor (2013), available at www.unionreports.gov.

66 Janice Koch, David Dell, and Lauren Keller Johnson, *HR Outsourcing in Government Organizations, Emerging Trends, Early Lessons*, The Conference Board Research Report E-0007-04-RR at 19 (2004), http://www.govexec.com/pdfs/accenturetechStudy.pdf.

67 *Raines v. Shoney's, Inc*., 909 F.Supp. 1070, 1078 (E.D. Tenn. 1995) (generally, "a franchisor is not the employer of employees of the franchisee.").

68 *Artis v. Asberry*, Civil Action No. G-10-323, 2012 U.S. Dist. LEXIS 149410 (S.D. Tex. Oct. 16, 2012) (mere supervision by contractor of subcontractor, with respect to contractual warranties of quality and time of delivery, are insufficient to support a joint-employer relationship in the absence of ability to hire and fire employees and significantly control their employment); *Mosqueda v. G & H Diversified Mfg*., 223 S.W.3d 571 (Tex. Ct. App. 2007) (in a temporary laborer's personal injury suit against a manufacturer, a judgment notwithstanding the verdict was properly granted to the manufacturer because evidence showed that a supervisor signed a time ticket, which unambiguously set forth the agreement between the manufacturer and the temporary agency as to the right to direct and control the details of the laborer's work).

69 29 U.S.C. §152(2).

70 322 U.S. 111 (1944).

71 H.R. Rep. No. 510, 80th Congress, 1st Sess. (1947).

72 *See* Restatement (Second) of Agency §§219, 220 (1958) (imposing liability on the master based on his presumed control over the actions of his servant).

73 The House Committee report's explicit criticism of the NLRB's prior stance on what constituted an "employer" underscores Congress's intent that the definition of employer under the NLRA focus on the exercise of "direct control." Specifically, the report provides that "[a]n 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the NLRB, means someone who works for another for hire. … 'Employees' work for wages or salaries under direct supervision." H.R. Rep. No. 245, 80th Cong., 1st Sess. at 18 (1947).

74 *San Marcos Tel. Co*., 81 NLRB 314 (1949) (client was a joint employer of accountants' clerks when it reimbursed accountant for the wages paid to and expenses incurred by the clerks); *In re Floyd Epperson,* 202 NLRB 23 (1973), *enf'd*, 491 F.3d 1390 (6th Cir. 1974) (user firm dairy company had indirect control over employee discipline and wages, where it informed the supplier firm trucking company that a particular driver was consistently late to a transport station, and therefore the trucking company removed the employee from that route, and where trucking company increased drivers' wages when it received an increased contractual rate from the dairy company), *enf'd mem*., 491 F.3d 1390 (6th Cir. 1974); *Indus. Personnel Corp v. NLRB*, 657 F.3d 226, 229 (8th Cir. 1981) (reasoning that shipper with a cost-plus lease terminable on 30 days' notice presumably has some control over the wages that would be paid under any collective bargaining agreement the lessor negotiated with the union, even absent evidence of direct involvement in the negotiation of that agreement), enforcing *B.F. Goodrich Co*., 250 NLRB 1139 (1980); *see Walter B. Cooke, Inc*., 262 NLRB 626, 641 n.70 (1982) (indirect control over wages and hours is insufficient to establish a joint-employer relationship); *Spartan Dep't Stores*, 140 NRLB 608 (1963); *FrostcoSuper Save Stores, Inc.*, 138 NLRB 125 (1962)*; General Motors Corp.,* 60 NRLB 81 (1945); *Bethlehem-Fairfield Shipyard, Inc*., 53 NLRB 1428 (1943); *Solvay Process Co*., 26 NLRB 650 (1940); *Sierra Madre-Lamanda Citrus Ass'n*, 23 NLRB 143, 149-50(1040); *West Texas Utilities Co*., 108 NLRB 407 (1954) ("dual employers"); *Volt Technical Corp*., 232 NLRB 321, 322 (1977); *G. Heilman Brewing Co., Inc. v. NLRB*, 879 F.3d 1526 (7th Cir. 1989).

75 *Taylor's Oak Ridge Corp.*, 74 NLRB 930, 932 (1947) (joint-employer relationship found premised on the user employer's contractual right of control regardless of whether the contractual right had been exercised. "That the Employer's power of control may not in fact have been exercised is immaterial, since the right to control, rather than the action exercise of that right, is the touchstone of the employer-employee relationship."); *In re Jewel Tea Co*., 162 NLRB 508 (1966); *Cabot Corp*., 223 NLRB 1388, 1388 (1976) ("determining factor in an owner-contractor situation is whether the owner exercises, or has the right to exercise, sufficient control over the labor relationship policies of the contractor or over the wages, hours, and working conditions of the contractor's employees, from which it may be reasonably inferred that the owner is in fact an employer of the employees."); *Thrifttown, Inc*., 161 NRLB 603, 607 (1966) ("Since the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record.").

76 *In re Jewell Smokeless Coal*, 170 NLRB 392 (1968) ("industrial realities" made coal company a necessary party to meaningful collective bargaining" even though it paid no role in hiring, firing, or directing employees, and retained no right under the parties' oral contract to affect those matters), *enf'd mem.,* 435 F.3d 1270 (4th Cir. 1970).

77 *In re Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966).

78 691 F.2d 1117, 1122-23 (3rd Cir. 1982), *enf'd* 259 NLRB 148 (1981).

79 *Browning-Ferris Indus., Inc*., 691 F.2d at 1123.

80 *TLI, Inc.*, 271 NLRB 287 (1984), *enf'd. mem., Gen. Teamsters Local Union No. 326 v. NLRB*, 772 F.2d. 984 (3rd Cir. 1984); *Laerco Transp.*, 269 NLRB 324, 325 (1984).

81 *TLI, Inc*., 271 NLRB at 798-99.

82 *Id*. at 799.

83 *Id*. (citing *Laerco Transp*., 269 NLRB 324).

84 *AM Prop. Holding Corp*., 350 NLRB 998, 1002 (2007); *Southern Cal. Gas Co.*, 302 NLRB 456, 462 (1991) (finding no joint-employer relationship even though parties' contract required temporary employees to do delineated tasks at certain times and required temporary agency to employ adequate number of trained personnel); *AM Property Holding Corp*., 350 NLRB 998 (2007), *enf'd in part by SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 442-46 (2d Cir. 2011) (finding no joint-employer relationship after analyzing the totality of the facts); *C.T. Taylor Co*., 342 NLRB 997, 998 (2004) (no joint-employer relationship where there was no evidence that the employer controlled contractor's employees, and contractor was found to have set pay rates for its employees and have ability to terminate their employment); *Pitney Bowes, Inc*., 312 NLRB 386, 388 (1993) (finding no joint-employer status between TLI and Pitney Bowes, where Pitney Bowes "exercises minimal influence over essential employment conditions"); *S. Cal. Gas. Co*., 302 NLRB 456, 461-62 (1991) (employer's direction of porters and janitors insufficient to establish joint-employer relationship, where employer did not, inter alia, affect wages or benefits, or hire or fire employees); *Hychem Constructors, Inc*., 169 NLRB 274, 276 (1968) (no joint-employer relationship, even though contractor required subcontracted employees to observe plant safety rules because "[t]he promulgation of such rules, which seeks to insure safety and security, is a natural concomitant of the right of any property owner or occupant to protect his premises"); *Martiki Coal Corp*., 315 NLRB 476 (1994) (owner of coal mine ceased being joint employer after stopping daily supervision of operators' miners); *Aldworth Co*., 338 NLRB 137 (2002) ("[A]ctions taken pursuant to government statutes and regulations are not indicative of joint-employer status, and therefore we do not rely on those actions in reaching our determination."); *Goodyear Tire & Rubber Co*., 312 NLRB 674, 677 (1993) (affirming an ALJ's holding that "control evidence either mandated by contract or mandated by Government regulation" is not evidence of a joint-employer relationship); *Service Employees Union, Local 87*, 312 NLRB 715 (1993) ("An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations … it follows that the existence of such control does not indicate joint employer status.").

85 *Browning-Ferris Indus. Inc.*, 691 F.2d at 1124 (joint employers "share or co-determine those matters governing essential terms and conditions of employment").

86 *AT&T v. NLRB*, 67 F.3d 446, 452 (2d Cir. 1995) (finding no joint-employer relationship where there was no evidence that AT&T exercised day-to-day control over the subcontractor's employees, nor did it have the right to hire, fire, or discipline them. Further, the limited amount of control that AT&T did have occurred only when there was a problem with the cleaning service provided, and it was not sufficient to justify a finding of joint employment.); *Pulitzer Pub. Co. v. NLRB*, 618 F.2d 1275, 1279 (8th Cir. 1980) (employer was not a joint employer of trucking subcontractor's employees, even though the employees occasionally took directions from employer when subcontractor's own assistant managers directed routes and procedures pursuant to a run sheet received from employer's dispatcher and were solely responsible for the hiring, discipline, and firing of its own employees), *cert. denied*, 449 U.S. 875, 101 S. Ct. 217, 66 L. Ed. 2d 96 (1980); *H.S. Care LLC,* 343 NLRB 659, 662 (2004); *Capital EMI Music*, 311 NLRB 997 (1993); *Manpower, Inc.*, 164 NLRB 287 (1967); *Continental Winding Co.*, 305 NLRB 122 (1991) (finding joint-employer status where putative joint employer directed and supervised its co-employer's employees on a daily basis); *Am. Air Filter Co.*, 258 NLRB 49 (1981) (finding that American Air Filter was a joint employer because it directed its co-employer's employees on day-to-day basis and constantly supervised their performance); *Texas World Service Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991) (affirming Board order that contractor and subcontractor were joint employers that engaged in unfair labor practices where the contractor directed union election strategy for subcontractor and influenced hiring and firing decisions); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302 (1st Cir. 1993) (affirming Board order that company and staffing association were joint employers that violated sections 8[a][1] and [3] of the Act, where company refused to accept employees and assumed supervision over the referred employees); *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004) (affirming Board order that distributor and driver staffing company were joint employers, where distributor administered driver applicant road tests, interviewed driver applicants, prevented the hiring of applicants, selected and assigned employees to permanent routes, selected the vehicles they would use, directed them to make special deliveries, made other work assignments, and handled complaints about the drivers); *Flagstaff Med. Ctr.*, No. 22-CA-29125, 2011 NLRB LEXIS 477, *41 (Aug. 26, 2011) ("whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties.").

87 *Holyoke Visiting Nurses Ass'n*, 11 F.3d 302 at 307 (finding joint-employer status where the putative joint employer had "unfettered power to refuse to hire certain employees, monitored the performance of referred employees, assumed day-to-day supervisory control over such employees, gave such employees their daily assignments, reports, supplies, and directions, and held itself out as the party whom employees could contact if they encountered a problem during the day."); *SEIU Local 32BJ,* 647 F.3d at 443 (finding that evidence of supervision that is "limited and routine" in nature does not support a joint-employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work") (internal citations omitted); *Carrier Corp v. NLRB,* 768 F.2d 778, 781 (6th Cir. 1985) (finding joint-employer status where the putative joint employer "exercised substantial day-to-day control over the drivers' working conditions," was consulted "over wages and fringe benefits for the drivers," and "had the authority to reject any driver that did not meet its standards" and to direct the actual employer to "remove any driver whose conduct was not in [the putative joint employer's] best interests.").

88 29 C.F.R. §791.2(a).

89 *Cornell v. CF Center, LLC*, No. 2:09-cv-14135-JEM, 410 Fed. Appx. 265 (11th Cir. Jan. 21, 2011) (holding that the determination of joint liability is a case-by-case inquiry that turns on no formula, but the court will consider such factors as control, supervision, right to hire and fire, ownership of work facilities, investment, and payroll decisions).

90 *Jacobson v. Comcast Corp*., 740 F.Supp.2d 683, 690, n.6 (D. Md. 2010); *see also Zhao v. Bebe Stores, Inc*., 247 F.Supp.2d 1154, 1160 (C.D. Cal. 2003) (no joint-employer relationship where franchisor's employees monitored franchisee's employees for quality control, but franchisor did not schedule or control shifts, or assign duties); *Jacobson v. Comcast Corp*., 683, 688 (not finding joint employment although franchisor had power to hire and fire technicians, and set schedules and performance standards because it was for quality control); *Bricker v. R & A Pizza, Inc*., 804 F.Supp.2d 615 (S.D. Ohio 2011) (plaintiffs failed to include any factual allegations supporting their claim that franchisor could be deemed to have been their employer, and no special relationship could be inferred that would give rise to a duty of care owed by the franchisor to the claimants with respect to the negligent hiring, retention, or supervision claims); *Lockard v. Pizza Hut*, 162 F.3d 1062, 1071 (10th Cir. 1998) (that franchisee utilized policies promulgated by the franchisor, and did not establish that the franchisor had centralized control of labor relations where no evidence indicated what role, if any, the franchisor played in implementing or effecting these policies).

91 *Miller v. D.F. Zee's, Inc*., 31 F.Supp.2d 792, 806 (D. Or. 1998); *Carrillo v. Schneider Logistics, Inc*., No 11-08557 (C.D. Cal. 2011); *Arrez v. Kelly Services, Inc*., 522 F.Supp.3d 997 (N.D. Ill. 2007); Harris Freeman & George Gonos, *The Challenge of Temporary Work in the Twenty-First Century Labor Markets, A Working Paper on the Future of Work in Massachusetts*, Univ. Mass. Labor Relations & Research Center, at 13-24 (2011), *available at* http://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1160&context=facschol ; Michael Grabell, Olga Pierce, and Jeff Larsen, *Temporary Work, Lasting Harm*, Propublica (Dec. 18, 2013), http://www.propublica.org/article/temporary-work-lasting-harm; Catherine Ruckleshaus, et al., *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, National Employment Law Project, at 33-35 (May 2014), *available at* http://www.nelp.org/page/-/Justice/2014/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf?nocdn=1; *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2nd Cir. 2003) (finding joint employment under FLSA for jobber and primary contractor in garment industry), 617 F.3d 182 (2nd Cir. 2010) (affirming jury verdict for plaintiffs), *cert. denied,* 131 S. Ct. 2879 (2011); *Almaraz v. Vision Drywall & Paint, LLC*, No. 2:11-cv-01983-PMP-PAL, 2014 U.S. Dist. LEXIS 66924 (D. Nev. May 15, 2014) (granting general contractors' motion for summary judgment on plaintiffs FLSA and state law wage claims because general contractors did not exercise sufficient control over subcontractors' employees to be considered joint employers).

92 No. C-05-04534, 2007 U.S. Dist. LEXIS 16677, at **3-6 (N.D. Cal. Mar. 7, 2007).

93 *Id.* at 4.

94 *Id.; see also Reese v. Coastal Restoration and Cleaning Services, Inc*., No. 1:10-cv-36, 2010 U.S. Dist. LEXIS 132858, at *3 (S.D. Miss. Dec. 15, 2010); *Donovan v. Breaker of America, Inc*., 566 F.Supp. 1016, 1019, 1021 (E.D. Ark. 1983); *Howell v. Chick-Fil-A, Inc*., No. 92-30188, 1993 U.S. Dist. LEXIS 19030, at **4-5 (N.D. Fla. Nov. 1, 1993).

95 U.S. Dept. of Labor, *Contingent Workers*, http://www.dol.gov/_sec/media/reports/dunlop/section5.htm (last visited Feb. 3, 2015).

96 *Myers v. Garfield & Johnson Enters., Inc.,* 679 F.Supp.2d 598, 607 (E.D. Pa. 2010).

97 *Id.* at 608.

98 *Id.*; *see also Rivas v. Fed. de Asociaciones Pecuarias*, 929 F.2d 814 (1st Cir. 1991) (affirming summary judgment for defendant on plaintiff's ADEA claim where there was insufficient evidence that defendant exercised the degree of control necessary to sustain a finding that it was a joint employer); *Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n of New England*, 37 F.3d 12, 17 (1st Cir. 1994) (ADA case) ("[D]efendants would be 'employers' if they exercised control over an important aspect of his employment," such as health care coverage"); *Orell v. UMass Memorial Med. Ctr*., 203 F.Supp.2d 52, 62-63 (D. Mass. 2002) ("Factors to be considered in determining whether an entity is a joint employer are whether it: 1) supervises the employee's day-to-day activities, 2) has the authority to hire or fire employees, 3) promulgates work rules and conditions of employment, 4) controls work assignments and 5) issues operating instructions." Finding that the putative employer was not a joint employer under the ADEA, the ADA, state anti-discrimination laws, or various tort claims.).

99 *Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n of New England*, 17; *Rivas v. Fed. de Asociaciones Pecuarias*, 814; *Faush v. Tuesday Morning, Inc*., 995 F.Supp.2d 350 (E.D. Pa. 2014) (finding that the putative employer was not liable for race discrimination where it did not pay wages or provide insurance coverage for the plaintiff, and the plaintiff had never applied for a position with the putative employer); *Scott v. UPS Supply Chain Solutions*, No. 12-2886, 523 Fed. Appx. 911, 912-13 (3d Cir. May 3, 2013) (summary judgment in favor of the defendants—clients of the temporary staffing agencies—was affirmed on the basis that the plaintiffs were not employees of the staffing agencies' clients, but rather employees of the temporary staffing agencies); *Shah v. Bank of Am*., 346 Fed. Appx. 831, 833 (3d Cir. 2009) (same); *Prather v. Prudential Fox & Roach*, 326 Fed. Appx. 670 (3d Cir. 2009) (same); *Hollis v. Ply-Trim, Inc*., No. 4:08-cv-02491, 2010 U.S. Dist. LEXIS 2683 at *17 (N.D. Ohio Jan. 6, 2010) (rejecting company's claim that it was not Title VII plaintiff's employee because it had hired him through a temporary agency and the agency provided his paychecks, but company supervised plaintiff, instructed him on how to perform his job, and exerted control over his employment status by asking the agency to reassign plaintiff and/or terminate his alleged at-will employment).

100 *Watson v. Adecco Empl. Servs., Inc*., 252 F.Supp.2d 1347, 1356-57 (M.D. Fla. 2003) (finding that, even if defendant Adecco, the temporary employment agency, were to be deemed a joint employer with the school, it could not be liable for the school's alleged discriminatory discharge of plaintiffs because plaintiffs could not show Adecco failed to take corrective measures within its control); *Sosa v. Medstaff, Inc*., 12-CIV-8926 (NRB), 2013 U.S. Dist. LEXIS 175278 (S.D. N.Y. Dec. 12, 2013) (even if defendant were plaintiff's joint employer, it could not be liable for alleged harassment because plaintiff never made it aware of alleged harassment); *Williamson v. Adventist Health Sys./Sunbelt, Inc*., No. 6:08-cv-32-Orl-31GKJ, 2009 U.S. Dist. LEXIS 41551, at *4 (M.D. Fla. May 18, 2009) (refusing to hold a medical staffing company liable for the allegedly discriminatory conduct of hospital employees against a nurse placed at the hospital by the company).

101 *See* Section IV, *supra*.

102 *See, e.g*., *Airborne Express*, 338 NLRB 72, *2 (Nov. 22, 2002) (Liebman, concurring).

103 *Id.*

104 National Labor Relations Board, *Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC Is a Joint Employer* (July 29, 2014), http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds (noting the investigation of "charges alleging McDonald's franchisees and their franchisor, McDonald's, USA, LLC, violated the rights of employees as a result of activities surrounding employee protests. The Office of the General Counsel has authorized complaints on alleged violations of the National Labor Relations Act. If the parties cannot reach settlement in these cases, complaints will issue and McDonald's, USA, LLC will be named as a joint employer respondent.").

105 Daniel Wiessner, *U.S. Labor Agency Files Complaints Against McDonald's*, Reuters (Dec. 19, 2014, 6:03 PM), http://www.reuters.com/article/2014/12/19/us-usa-employment-mcdonalds-idUSKBN0JX21Y20141219.

106 Melanie Trottman, *Trade Group Sees Threat from NLRB Approach to Franchise Relationships, NLRB Has Received More Complaints Since McDonald's Franchise Ruling*, Wall St. J. (Oct. 31, 2014, 8:18 PM), *available at* http://www.wsj.com/articles/trade-group-sees-threat-from-nlrb-approach-to-franchise-relationships-1414714696; Matthew Haller, *IFA Statement on NLRB "Joint Employer" Complaint Against McDonald's*, FRANCHISE.ORG (Dec. 19, 2014), http://www.franchise.org/Franchise-News-Detail.aspx?id=63382.

107 Trottman, *supra* note 109.

108 *The Goodyear Tire & Rubber Co*., 312 NLRB 674, 678 (1993).

109 Notice and Invitation to File Briefs, *Browning-Ferris Indus. of Cal., Inc.*, NLRB No. 32-RC-109684 (May 12, 2014), *available at* http://www.nlrb.gov/cases-decisions/invitations-file-briefs.

110 Marilyn A. Pearson, *Prepare for NLRB's New Joint Employer Standard - They May Be Your Employees After All!*, Inside Counsel (July 1, 2014), http://www.insidecounsel.com/2014/07/01/prepare-for-nlrbs-new-joint-employer-standard-the (predicting that the Board's decision in *Browning-Ferris* "will abandon the historic test for joint employers in favor of a test that sweeps most outsourcing arrangements into joint employment").

111 *CNN Am., Inc*., No. 05-CA-031828, 2014 NLRB LEXIS 710 (Sept. 15, 2014).

112 Michael J. Lotito and Missy Parry, *Redefining "Employer": How the NLRB Plans to Treat Separate Companies as One*, Legal Backgrounder (Sept. 26, 2014), http://www.wlf.org/upload/legalstudies/legalbackgrounder/092614LB_Lotito2.pdf ("The unfair labor practice charges in this case were originally filed on March 5, 2004. The case was tried over 82 days from 2007 to 2008. There were 16,000 pages of transcripts and 1,300 exhibits. The ALJ issued his decision on November 19, 2008.").

113 *CNN Am., Inc*., 2014 NLRB LEXIS 710, at *5.

114 *Id*. at *11.

115 *Id*. at *24.

116 *Id.*

117 *CNN Was Joint Employer of Subcontractor's Employees, Violated NLRA by Terminating Subcontracts With Antiunion Animus: NLRB,* Practical Law (Sept. 24, 2014), http://us.practicallaw.com/4-581-4425 ("Specifically, CNN used independent business and operational judgment to bar TVS from hiring their competitors' technicians; control the number of technicians TVS hired; control the hours worked by unit employees; decide the news stories to be covered; exercise substantial control over the distribution of assignments, particularly in breaking news or emergency situations; provide all direction and supervision to field technicians [the largest category of TVS employees at the NYC and DC bureaus] and engineering technicians; give all directions to TVS employees on the execution of its live news shows, while TVS managers had no input; advised TVS on market rate salaries to pay employees; and influence whether TVS could agree to union proposals.").

118 *CNN Am., Inc*., 2014 NLRB LEXIS 710, at *24.

119 *Id.*; *CNN America, Inc. v. NLRB*, Case No. 14-1180 (D.C. Cir. Oct. 17, 2014).

120 Brief *Amicus Curae* of the General Counsel of the National Labor Relations Board, *Browning-Ferris Inds. of Cal., Inc.*, NLRB Case No. 32-RC-109684 (June 26, 2014), http://mynlrb.nlrb.gov/link/document.aspx/09031d45817b1e83.

121 *Id.* at 18 (emphasis added).

122 *Id.* at 18-19 (internal citations omitted).

123 *Id.*

124 Richard Griffin, General Counsel, National Labor Relations Board, Address at the Labor Relations Committee Meeting of the U.S. Chamber of Commerce Labor, Immigration & Employee Benefits Division (November 14, 2014).

125 Melanie Trottman, *NLRB Case Tests Who Employs Contract Workers*, Wall St. J. (Aug. 27, 2014), http://online.wsj.com/articles/nlrb-case-tests-who-employs-contract-workers-1409183483.

126 Brief *Amici Curiae* of Coalition for a Democratic Workplace, *et al., Browning-Ferris Indus. of Cal., Inc.*, NLRB No. 32-RC-109684 (June 26, 2014), http://mynlrb.nlrb.gov/link/document.aspx/09031d45817b1fe2 (noting the "destabilizing" effect a change in the standard could have on the construction industry).

127 Allen Smith, *NLRB Urged Not to Change Definition of "Joint Employer,"* Society for Human Resource Management (June 30, 2014), http://www.shrm.org/legalissues/federalresources/pages/nlrb-joint-employer.aspx (last visited Feb. 4, 2015).

128 With reserved gates, a general contractor assigns a specific gate to a subcontractor subject to a labor dispute. Thus, unions can only picket at that gate. All other subcontractors can use other gates, where unions are prohibited from picketing, minimizing overall disruption of the construction project.

129 29 U.S.C. §151.

130 Brief *Amici Curiae* of Coalition for a Democratic Workplace, *supra* note 126.

131 Weil also authored *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press (2014).

132 David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division*, Boston University at 1 (May 2010), http://www.dol.gov/whd/resources/strategicEnforcement.pdf.

133 *Id.*

134 *Id.* at 2 (emphasis added).

135 Tammy D. McCutchen, *David Weil as Wage and Hour Administrator,* Society for Human Resource Management (Mar. 31, 2014), http://www.shrm.org/legalissues/federalresources/pages/weil-wage-and-hour.aspx.

136 Weil, *Improving Workplace Conditions Through Strategic Enforcement, supra* note 132, at 77 (emphasis added).

137 David Weil, *Administrator's Interpretation No. 2014-2: Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities Under the Fair Labor Standards Act*, U.S. Dept. of Labor (June 19, 2014), http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf ; *see also, Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA)*, U.S. Dept. of Labor (June 2014), http://www.dol.gov/whd/regs/compliance/whdfs79e.htm.

138 Weil, *Improving Workplace Conditions Through Strategic Enforcement, supra* note 132, at 77.

139 Brief *Amicus Curiae* of the EEOC, *Browning-Ferris Inds. of Cal., Inc.,* NLRB No. 32-RC-109684 (June 15, 2014), http://mynlrb.nlrb.gov/link/document.aspx/09031d4581786359.

140 *Willie Betts, et. al. v. McDonald's Corporation, et. a*l., No. 4:15-cv-00002 (W.D. Va. Jan. 22, 2015).

141 Cal. Assemb. Bill 1897 (2014), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1897.

142 *Id.*

143 *Id.*

144 *Id.*

145 Garret Murai, *Your "Independent Contractor" Clause Just Got a Little Less Relevant*, Cal. Construction L. Blog (Jan. 9, 2015), http://calconstructionlawblog.com/2015/01/09/your-independent-contractor-clause-just-got-a-little-less-relevant/.

146 Ruben Guerra, *Bill Threatens Innocent Businesses: Guest Commentary,* San Gabriel Valley Tribune (Sept. 17, 2014), http://www.sgvtribune.com/opinion/20140917/bill-threatens-innocent-businesses-guest-commentary.

147 Jessica Lynn Ashbridge and Gordon M. Berger, *California Law Expands Scope of Liability of Employers That Use Labor Contractors*, FORD & HARRISON LLP (Oct. 13, 2014), http://www.fordharrison.com/california-law-expands-scope-of-liability-of-employers-that-use-labor-contractors.

148 Ryan Fife, *et al*., *California Enacts AB 1897 Which Means Greater Liability for Employers Who Use Labor Contractors*, JDSupra (Oct. 8, 2014), http://www.jdsupra.com/legalnews/california-enacts-ab-1897-which-means-gr-56006/.

149 48 Cal.3d 341 (1989).

150 49 Cal.4th 35 (2011).

151 *Futrell v. Payday California, Inc*., 190 Cal. App. 4th 1419, 1432 (2d. Dist. 2010).

152 *Labor Contracting; Client Liability*, Hearing Before the California Assembly Committee on Labor and Employment (Apr. 23, 2014) (testimony of Roger Hernández), http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1851-1900/ab_1897_cfa_20140421_143526_asm_comm.html.

153 Gary Cohn and Bill Raden, *The Dirty Truth Behind Fast Food Lettuce*, Huffington Post (May 29, 2014), http://www.huffingtonpost.com/2014/05/28/taylor-farms-exploited-labor_n_5406238.html.

154 *"Job Killer" Bill Imposing Liabilities on Business in Committee Today*, California Chamber of Commerce (June 11, 2014), http://www.calchamber.com/Headlines/Pages/06112014-job-killer-bill-imposing-liabilities-on-business-in-committee-today.aspx.

155 Andrea Deveau, TechNet, *Assembly Bill 1897 Threatens Innovation in California*, Fox and Hounds Daily *(Sept. 26, 2014)*, http://www.foxandhoundsdaily.com/2014/09/assembly-bill-1897-threatens-innovation-california/.

156 *Labor Contracting; Client Liability, supra* note 151. Labor Code section 2810 specifically holds the entity that contracts for workers in those industries liable if the contract for such labor does not include (1) a description of the total hours to be worked, the total wages to be paid, and the dates of payment; (2) the worker's compensation policy and insurance carrier information; (3) the employer tax identification number; (4) the address of where the work will be performed; and (5) the name, address, and telephone number of the person or entity through whom the labor or services are to be provided; *Id.*

157 Warehouse Workers United—Worker Center Watch, *What Is a Work Center*? http://www.workercenterwatch.com/worker-centers/warehouse-workers-united/ (last visited Jan. 27, 2015).

158 Steve Smith, California Labor Federation, *Temporary Workers Hit Capitol to Curb Abuses*, Labor's Edge Blog (May 14, 2014), http://www.calaborfed.org/index.php/page/temporary_workers_hit_capitol_to_curb_abuses_support_ab_1897.

159 *Labor Contracting; Client Liability, supra* note 151.

160 Peter Dreier, *How Seattle's $15 Minimum Wage Victory Began in New York City's Zuccotti Park*, The American Prospect (June 5, 2014), http://prospect.org/article/how-seattle%E2%80%99s-15-minimum-wage-victory-began-new-york-city%E2%80%99s-zuccotti-park; *see also* Nancy Bartley, *Group Says It Has Signatures for SeaTac Wage Initiative*, The Seattle Times (August 27, 2013), http://seattletimes.com/html/localnews/2021696652_minwageseatacxml.html.

161 Seattle Municipal Code §14.90.020(A).

162 *Id*. at §14.19.030(A). The complete schedule of minimum wage increases for schedule employers is: As of April 1, 2015, Schedule 1 employers must pay $11.00 per hour. On January 1, 2016, the minimum wage for such employers rises to $13.00 per hour; *Id*. On January 1, 2017, the $15.00 per hour minimum wage takes effect for Schedule 1 employers. On January 1, 2018, and annually thereafter, the minimum wage for such employers "increase[s] annually on a percentage basis to reflect the rate of inflation."; *Id*.

163 *Id*. at §14.19.040(A). The schedule for Schedule 2 employers is phased in more slowly on the following schedule: $10.00 per hour in 2015, $10.50 per hour in 2016, $11.00 per hour in 2017, $11.50 per hour in 2018, $12.00 per hour in 2019, $13.50 per hour in 2020, $15.00 per hour in 2021, $15.75 per hour in 2022, $16.50 per hour in 2023, and $17.25 per hour in 2024. As of January 1, 2025, the minimum wage for all employers "shall equal the hourly minimum wage applicable to Schedule 1 employers."

164 *Id.* at §14.19.010(T).

165 *Id*. at §14.19.010(U).

166 *Id*.

167 Dan Whitcomb, *Trade Group, Franchisees Sue to Block Seattle Minimum Wage Hike*, Reuters (June 11, 2014), http://www.reuters.com/assets/print?aid=USKBN0EM2PL20140611.

168 City of Chicago Minimum Wage Working Group, *A Fair Deal for Chicago's Working Families: A Proposal to Increase the Minimum Wage*, Minimum Wage Working Group, http://www.cityofchicago.org/content/dam/city/depts/mayor/general/MinimumWageReport.pdf (last visited Feb. 3, 2015).

169 Ethan Corey, *Chicago Alderman Want a $15 Minimum Wage in Their City, Too*, In These Times (July 17, 2014), http://inthesetimes.com/working/entry/16849/chicago_15_dollar_minimum_wage; *see also* Chicago, Ill., Ordinance 02014-4251 (May 28, 2014).

170 *Id*.

171 *Id*. The complete schedule for mid- to small-size employers is that they would be required to pay workers $12.50 per hour within 15 months of the ordinance's passage, $13.00 per hour within two years, $14.00 per hour within three years, and $15.00 per hour within four. *Id*.

172 *Id.*

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