CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
VICE PRESIDENT, WORKPLACE POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

February 11, 2019

Ms. Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

Via Electronic Submission: www.regulations.gov

RE: Reply Comments Of The United States Chamber Of Commerce To The National Labor Relations Board Proposed Rulemaking, "The Standard For Determining Joint-Employer Status", 83 FR 46681, RIN 3142-AA13 (September 14, 2018)

Dear Ms. Rothschild:

On January 28, 2019, the Chamber submitted Comments in support of the Board's Proposed Rule to establish a standard for determining joint employer status. As explained in those Comments, the Chamber believes rulemaking is an appropriate vehicle for codification of the correct joint employment standard, in accordance with the common law, Supreme Court precedent, and traditional Board jurisprudence. In contrast to the Chamber's supportive Comments, various entities submitted comments opposing the Proposed Rule and arguing that the Board should abandon the rulemaking process. The Chamber submits this Reply Comment to address some of the shortcomings in the opposing Comments, in particular, the reliance many of the commenters placed on the recent decision of United States Court of Appeals for the District of Columbia in *Browning-Ferris Industries of California, Inc. v. NLRB* ("*BFI*")[1] as the

[1] 911 F.3d 1195 (D.C. Cir. 2018).

basis for halting the Board's rulemaking process and supporting adherence to the Board's 2015 articulation of the joint employer standard in its own *Browning-Ferris* decision.

I. The D.C. Circuit Decision Does Not Preclude Rulemaking By The Board.

The *BFI* Court made abundantly clear that its opinion should not halt the Board's rulemaking process. The Court emphasized both that the Board intended for any potential Rule to apply prospectively, and that the Board specifically requested the Court to proceed notwithstanding the rulemaking process.[2] In other words, the Court procedurally viewed *BFI*, as an individual case, as, "an apple that is outside of [the Board's] orchard."[3] It thus limited its inquiry to: "whether the Board's joint-employer test [articulated in *BFI*] comports with traditional common-law principles of agency."[4] Importantly, the "comports with" inquiry differs significantly from questions such as whether the *BFI* standard is the "most appropriate" or "only appropriate" approach to joint employment issues under the common law and the Act.

Furthermore, the *BFI* Court's holding directly refutes any claim that it prescribes or dictates a particular outcome or standard by the Board, whether through rulemaking or otherwise.[5] Its holding denies the Board's applications and cross-applications for enforcement, and declines to approve of the *BFI* standard. Meanwhile, the Court's holding grants in part putative employer Browning-Ferris's petition, and remands the case to the Board for further proceedings. Commenters suggesting this outcome enshrined the *BFI* standard as the Board's marching orders have ignored the most important aspect of *BFI*: its outcome.

II. The *BFI* Court Rejected the Board's *BFI* Joint Employment Standard.

---

[2] *Id*. at 1208-1209.
[3] *Id*. at 1209.
[4] *Id*. at 1208.
[5] *Id.*.("The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary.") and *id.* at 1220 (inviting the Board to "erect some legal scaffolding that keeps the inquiry within traditional common-law bounds.").

As explained in the Chamber's January 28, 2019 Comments, the Board sharply deviated from its traditional principles of joint employment through a 3-2 vote in *Browning-Ferris Industries of California Inc. d/b/a Newby Island Recyclery*.[6] The new test, according to the *BFI* Board, would ask:

1. "[W]hether there is a common-law employment relationship with the employees in question[;]" and

2. "Whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."[7]

Crucially, the Board also announced that both prongs of the test would examine evidence of reserved control and indirect control.[8] This standard creates the potential for the Board to impose joint employer status on an entity that exercises no actual or direct control over the employees in question. In contrast to this standard, the Proposed Rule clarifies:

> A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.[9]

The *BFI* Court's rationale demonstrates that, far from requiring further applications of the standard articulated in the Board's 2015 *BFI* decision, it instead seeks a different approach. The Court specifically criticizes the *BFI* standard on several grounds, including that it incorrectly:

- "[F]ailed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment[;]"[10]

- Assigned equal weight to indicia of direct control, such as direct communication of work assignments, and indicia of indirect control, such as a cost-plus contract;[11]

---

[6] 362 NLRB No. 186 (2015)
[7] *Id.* at 2.
[8] *Id*. at 2, 13, 16, 17 n.94.
[9] 83 Fed. Reg. 46696.
[10] *Id*. 1222-23; see also *id*. at 1216, 1220.
[11] *Id*. at 1220.

- Viewed control exercised through an intermediary as evidence of direct, rather than indirect, control;[12]

- "[P]rovid[ed] no blueprint for what counts as 'indirect' control[;]"[13]

- Failed to explain "what terms and conditions are 'essential' to make collective bargaining 'meaningful[;]'"[14] and

- Failed to "clarify what 'meaningful collective bargaining' entails and how it works in this setting."[15]

The Court thus found the *BFI* Board's willingness to consider evidence of indirect control "requires it to erect some legal scaffolding" to avoid these shortcomings, while also ensuring adherence to common law standards. The absence of such scaffolding, as the Court's opinion makes clear, resulted in a holding adverse to the *BFI* standard.

Therefore, the repeated claims by some commenters that the D.C. Circuit's opinion in *BFI* requires continued application of the *BFI* standard strain credulity. To the contrary, the procedural posture of the case, its holding, and its rationale all demonstrate the many flaws inherent to that standard.

III. The Proposed Rule Falls Squarely Within the *BFI* Court's Rationale.

The D.C. Circuit's *BFI* decision and the Proposed Rule operate with largely the same concerns in mind. The *BFI* Court did *not* endorse evidence of indirect control as potentially dispositive of joint employer status. Instead, the Court merely acknowledges such evidence as a *permissible* consideration, amongst other factors, *if* the Board addresses the infirmities it identified.

---

[12] *Id*.
[13] *Id*.
[14] *Id*. at 1221-22.
[15] *Id*. at 1222.

Several statements throughout the decision highlighted this distinction. Specifically, the Court repeatedly describes the common law, Board standards, its own precedent, and other authority in terms such as, "indirect control *can be a relevant factor* in the joint-employer inquiry."[16] Instead of affirmatively *requiring* consideration of evidence of indirect control, the Court merely rejects "[a] categorical rule against even considering indirect control[.]"[17]

The Proposed Rule accords with these principles. Nowhere does the Proposed Rule prohibit any consideration whatsoever of evidence of indirect control. Instead, it requires only that some evidence of direct control be present as a condition of finding joint employer status. Consequently, under the Rule, evidence of indirect control remains available for consideration, but rightfully occupies a secondary role behind evidence of direct control. Not only does this approach comport with the *BFI* Court's rationale, it also helps the Board erect the necessary "legal scaffolding" to ensure that consideration of evidence of indirect control does not push it beyond the common law.

The commenters who have mischaracterized the Proposed Rule would build one problem on top of others. Instead of taking steps to address the *BFI* standard's infirmities, as identified by the Court, they would instead exacerbate those problems by granting indirect control a larger analytical role than the Court considered. The Proposed Rule, on the other hand, helps ensure that the Board and the Court, as well as others applying the common law nationwide, operate within the same legal framework moving forward.

IV. Comments Submitted by Opponents of the Proposed Rule Lack Adequate Data and Rely on Flawed Rationales.

---

[16] *Id*. at 1216 (emphasis added; referring to the common law); see also 1209 (same), 1216-17 (referring to the Act), 1217 (citing state court standards and the Court of Appeals' own precedent), 1218 (examining the now-vacated Board decision in *Hy-Brand*, 365 NLRB No. 156 (2017)).
[17] *Id*. at 1219.

Attached below are responses to the main points raised by several commenters who support the current *BFI* definition, and oppose the NLRB's proposed regulation.

V. Conclusion

For the foregoing reasons, as well as those explained in its January 28, 2019 Comments, the U.S. Chamber of Commerce respectfully urges the Board to adopt its proposed joint employer rulemaking as set forth in 83 FR 46681, September 14, 2018.

Sincerely,

Vice President, Workplace Policy
Employment Policy Division

Of Counsel:
Brian E. Hayes
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, DC 20006
(202) 887-0855

Todd C. Duffield
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One Ninety One Peachtree Tower
191 Peachtree Street, N.E., Suite 4800
Atlanta, GA 30303
(404) 881-1300

Harrison Kuntz
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
7700 Bonhomme Avenue, Suite 650
St. Louis, MO 63105
(314) 802-3935

Responses to Public Comments Submitted to the NLRB "Definition Of Joint Employer" Rulemaking Docket Which Present Significant Economic Data Or Analyses

Prepared by Ronald Bird, Ph.D.
Senior Economist, Regulatory Analysis

Comments of the Economic Policy Institute

The Economic Policy Institute (EPI)'s comments in opposition to the NLRB's proposed rulemaking to reconsider and clarify the definition of "joint employer" currently in force, subsequent to the 2015 *Browning-Ferris* decision, alleges that the NLRB proposed rulemaking will "result in fewer joint-employer findings, leaving more workers unable to hold firms that play a role in determining the terms and conditions of their employment accountable for violations of labor law …many workers would find it nearly impossible to bring all firms with the power to influence their wages and working conditions to the bargaining table." [18] Central to their support of keeping the vague *Browning-Ferris* definition (finding joint employment with merely indirect and/or potential, reserved right to control terms and conditions of employment, even if unexercised), the EPI alleges by an obtuse series of calculations that the benefit to workers of the current-law *Browning-Ferris* definition is at least $1.3 billion per year in wages.

The EPI's comments are misleading and erroneous on many levels, but the most prominent is the naïve and simplistic misstatement of the purpose of the National Labor Relations Act as being the achievement of a particular outcome of collective bargaining in monetary favor of the labor side. The purpose of the National Labor Relations Act in promotion of collective bargaining is to ensure labor peace through negotiation, thus avoiding the disruptions to economic production, distribution and efficiency of work stoppages, boycotts,

[18] https://www.regulations.gov/document?D=NLRB-2018-0001-7803 ID: NLRB-2018-0001-7803

public demonstrations and physical confrontations. The measure of success of the collective bargaining process is the extent to which talking replaces work stoppages; it is not the achievement any particular outcome favoring either side. Regardless of the terms of any negotiation outcome, collective bargaining practice benefits the consuming public by ensuring that the free flow of goods and services is not disrupted by labor market strife. It also benefits both workers and employers by focusing the parties on mutually beneficial resolutions of issues instead of zero sum gamesmanship.

Rather than promoting effective collective bargaining and economic peace, the vague and broad definition of joint employment promoted by the EPI is a recipe for ineffective collective bargaining, increased labor market strife, and economic harm to businesses, workers, and the consuming public bystanders.

Following are key points made by EPI, and the Chamber's responses:

1. The EPI suggests that bringing more employer parties to the bargaining table will somehow make collective bargaining more efficient and effective. Practical experience suggests that the *Browning-Ferris* approach reflected in the EPI comments will have the opposite effect. It will complicate, confuse, and delay the negotiating process because the supposed "joint employer" companies do not themselves have perfectly aligned interests. Bringing them all to the bargaining table across from a single labor representative will distract the process by adding conflicts among the business parties to the negotiating agenda. Broadening the joint employer concept risks turning a two-sided negotiation into a multi-party brawl.
2. The vague and broad definition of joint employer promoted by the EPI would have results contrary to the purpose of the NLRA to promote labor market peace and the

stable functioning of economic markets to produce and distribute goods and services to the consuming public. Designation as joint employers of the suppliers, customers, licensors, franchisors, or tenants of an employer involved in a labor dispute facilitates union activities to disrupt commerce, gain attention, and intimidate bystanders through boycotts, picketing, and protests on private property that would otherwise be prohibited in the absence of the joint employer designation. Rather than encouraging reasoned collective bargaining, the application of the current vague and broad joint employer definition provides an incentive for unions to abandon the bargaining table and to take their grievances to the streets.

3. Even if assuming *arguendo* the claim by the EPI that the leverage provided to workers by the *Browning-Ferris* joint employer definition results in an annual benefit to union workers of "at least $1.3 billion,"[19] that benefit must be compared to the cost that it imposes on society – business owners, other workers, and the consuming public. Comments submitted previously to this docket by the United States Chamber of Commerce and by the International Franchise Association demonstrate that the economic costs are at least $17 billion per year and are more likely $33 billion per year just in terms of the adverse economic impact on the franchise sector.[20] Put more simply, the economic cost of maintaining the current *Browning-Ferris* standard is potentially more than *twenty-five* times the economic cost estimated by EPI of changing the rule in the manner the Board has proposed.

---

[19] *Id., p. 9..*
[20] Matt Haller, "The Economic Impact of an Expanded Joint Employer Standard," (January 28, 2019) p.2, and Exhibit L, p. 10, both at https://www.regulations.gov/document?D=NLRB-2018-0001-26349 and Marc Freedman, "Comments on Behalf of The United States Chamber of Commerce," (January 28, 2019), Appendix A, p.1, p.10, at https://www.regulations.gov/document?D=NLRB-2018-0001-26883

The economic cost impacts cited in these comments were based on field interviews of business owners and managers regarding their actual experiences and observations of the effect that the *Browning-Ferris* redefinition of joint employer in 2015 has had on the operations of businesses in the franchise sector in the years following *Browning-Ferris,* compared to their experiences and observations for the years prior, when a more constrained and predictable definition of joint employer applied. The field interview study these commenters cited found that the adverse economic impact of the *Browning-Ferris* redefinition of joint employer was the result of the fear and uncertainty that the new definition generated. That fear and uncertainty of being designated as a joint employer had a chilling effect on franchisors in terms of the communications, assistance and guidance services provided to their franchisees – independent, often small, businesses to which they license their trademark names and methods.

Before the *Browning-Ferris* decision, franchisors felt confident that they could avoid becoming ensnared by the joint employer designation by avoiding direct and immediate intervention in their independent franchisees' decisions regarding the terms and conditions of franchisees' employment or working conditions. Franchisor companies have a legal obligation under the federal Lanham Act to their stockholders and to their franchisees to protect the integrity of their trademarks by monitoring and upholding standards of product/service quality and value. Relying on their expectation that franchisors would uphold the integrity of their trademarks,

franchisees invested their own capital in their local establishments to operate under the franchised arrangement, and they paid the franchisors significant fees (initially and as on-going royalty percentages of gross revenue, marketing fees, etc.) Franchisors' interests were aligned with franchisees' economic interests in terms of promoting the overall financial success of franchisees.

Under the pre-*Browning-Ferris* prevailing definition of joint employer status, franchisors felt confidence to provide franchisees with training, administrative operating systems, voluntary operational training materials for employees, common information systems infrastructure, mentoring, sharing of operating experiences among the brand community, assessments, and advice without fear of running afoul of the long-standing "direct and immediate control of terms and conditions of employment" definition triggering joint employer status. These services were valued by franchisees as contributing to their prospects of business success, and franchisees viewed these services as well-worth the price they paid in fees and royalties for participating in the franchised business model. Prior to *Browning-Ferris*, franchised businesses became an avenue for entry into the economic middle class and more for families without prior business experience and limited assets. This was especially the case for veterans, women, and members of minority groups who suffered under previous discrimination and lack of access to mainstream business experience. The services and support provided to them by franchisors was essential.

The consuming public also benefited from the collaboration of franchisors and franchisees: consumers enjoyed the expansion of the supply of goods and services from fast food restaurants, to roadside lodging accommodations, convenient and reliable automotive servicing locations, and reliable local vendors of personal services ranging from haircuts and manicures to pest control and plumbing. The increased supply of competitive goods and services benefited consumers through lower prices, better quality, and more convenient access.

The *Browning-Ferris* decision was a shock to this prospering and effective economic collaboration. Fear of joint employer designation under this new and vague standard forced franchisors into a defensive posture. They began distancing themselves from involvement with and support of the franchisees they had previously embraced with assistance. Franchisors interviewed in the study described their conflict between concern to help their franchisees succeed (especially the most vulnerable and new) versus their obligations to their stockholders and to the aggregate franchisee system to avoid the potential catastrophe of joint employer designation with its attendant legal and other perceived costs.

The vagueness and potential expansion of the Browning-Ferris decision through subsequent case law decisions was a frequently repeated theme in franchisor interviews. Where previously the standard for safe conduct had been perceived as relatively clear and settled, after the *Browning-Ferris* decision there was widespread

> uncertainty. The natural reaction of businesses facing such uncertainty is to withdraw to a safer ground.
>
> Franchisees interviewed for the study widely reported awareness that their previously close advisors and supporters had become more distant and careful in their communications. Many assistance services previously valued and expected had been curtailed or eliminated by franchisors. Many franchisees reported understanding that the *Browning-Ferris* joint employer decision was the cause of the observed distancing behavior, but they still felt that they were no longer getting from franchisors the support that they needed and that they expected in return for their franchise participation fees and royalties.
>
> The reported cost of $17 billion to $33 billion per year, as the adverse economic impact of the *Browning-Ferris* decision, is the statistically significant result of the impacts described in quantitative terms by interview respondents who experienced the conditions in the franchise industry before and after the *Browning-Ferris* decision. This calculation objectively dwarfs the EPI's estimated $1.3 billion cost in "lost wages" (an estimate which, as noted above, is based on faulty premises) of the Board's proposed rule.

Comments submitted by Labor Law, Antitrust Law and Economics Professors

The comments by the group of 15 Law and Economics Professors weaves multiple threads of academic research into a tapestry presenting a dystopian view of the American labor market as one in which the majority of workers are exploited and robbed of just compensation by collusion among unscrupulous, monopsonist employers. They ignore contrary evidence that the

average working family in America today enjoys higher real compensation than at any time in history. In 2018, the real value of compensation paid to workers was $34.53 per hour, equivalent to $71,822 per year for a full-time year round worker, and a 10.9 percent real (inflation adjusted) increase since 2004.[21]

While it is accurate that improving labor market outcomes enjoyed by most workers over the recent years have not been shared by all workers, the professors show no basis for their assertion that a broadened definition of joint employment liability will change this outcome. Workers with the lowest levels of educational attainment and whose skills have been made obsolete by technological change and by shifting realities of global competition have experienced relative economic disadvantage. Adopting an overly-broad definition of joint employer under the National Labor Relations Act will do nothing to change this fact.

The professors' comment and some of the specific research that they cite identifies the growth sectors (e.g., franchising and business support services contracting) where many of these workers are employed as the cause of the observed decline in relative economic condition for those workers. That conclusion wrongly confuses causation with correlation. The root causes of the deterioration of the economic condition of workers with no more than a high school education and few vocational skills are to be found in changing technology, growing world-wide economic prosperity and competition, and increasing mobility of capital. These are economic realities that will not be altered by drawing a distinction between "broad" or "narrow" definitions of the legal concept of joint employment.

[21] https://www.bls.gov/data/#wages

Nowhere in their comment do the professors' explain in practical terms how imposition of the broad definition of joint employer will result in more jobs, higher wages or better working conditions for workers. The narrative exhibits a naïve view of how employers who would now be joint employers would react: An employer with "indirect" influence on the wages or other conditions of employment is designated to be a joint employer, the joint employer joins the direct employer at the collective bargaining table, and the constraints that previously limited wages of lower skill workers are lifted. How exactly will bringing more parties to the collective bargaining table benefit worker outcomes in practice? Consideration of the practical effects suggests that the outcomes will more likely make the economic condition of the most vulnerable workers worse:

- The ideal described in the professors' narrative imagines that a "large" business that is the sole client (or one of a few clients) of a small family owned local janitorial services company will be designated as joint employer of the janitors who work for the service company because the client company contract pays a large share of the service company's revenue, and the fixed contract amount limits the service company's ability to bargain with the workers or their union for a wage increase. The professors imagine that the designated joint employer will sit at the collective bargaining table with the services company across the table from the janitors' union representative and agree to increase the contract payment for janitorial services so that the service company is no longer constrained in its response to wage increase demands.
- The practical reality is that the client company will not calmly acquiesce as imagined. Faced with the prospect of joint employer designation, the client will likely cancel its contract with the small service company, and it will contract for janitorial services in the

future with a large nationwide service provider, with whom the client company is one of thousands of customers. As one of many clients of the big janitorial services provider, the client will be immune from charges that it alone exerts meaningful influence or constrains the ability of the big service company to bargain. Instead of benefiting by higher wages, the employees of the small service company will lose their jobs and the owner's family will lose their income as well. If some of the displaced workers are fortunate, they may find jobs with the expanding big service company, but there is no reason to expect that they will earn better wages or enjoy better working conditions. Because the bigger company may operate more efficiently, getting the same work done with fewer workers, at least some of the workers who lose their jobs because of the joint employer designation may remain unemployed long term or be forced to accept lower paying jobs in other lines of work. In this scenario the small company workers were assumed to be union represented. Is it as likely that a union would be able to organize successfully the thousands of employees of a large, integrated national janitorial services firm that displaces the smaller company? Loss of union representation could be an additional impact of a broad joint employer definition.

- The professors' comment focuses particularly on supposed harm done by the growth of the franchise business model. In recent decades the growth of franchising has expanded economic opportunity and brought prosperity to thousands of families who would otherwise have been trapped in dead-end jobs or poverty. Women and minority group members have especially benefited from the opportunity to become entrepreneurs by operating small independent businesses as franchisees of respected national brands. Consumers have benefited by the expansion of the number of locations providing food,

lodging, health care and a variety of personal services. There are, for example, many convenient and affordable hotels at rural interstate highway interchanges that are profitable and that provide needed jobs because of the hard work and personal investment of time by franchisee families. Many of these would not exist if the only avenue for expansion of a nationally recognized lodging brand were by construction of brand-owned and operated facilities. The professors' comment and the theories of Dr. Weil whom they cite would abolish this outcome. Under that approach, all employees of brand-name hotels, restaurants and other services providers would be direct employees of the brand-owner company. The intermediary entrepreneurs (mostly small business owners) would be cut out of the picture. The professors' and Dr. Weil imagine that by making large "core" companies more responsible for bargaining with workers and for enforcing labor law standards workers will be better rewarded and protected. The reality, however, is that there would be fewer hotels, restaurants, health care facilities and other service locations provided, and that the number of jobs and their wages would likely be less.

Instead of promoting more labor market competition, more job opportunities and higher wages for workers, the practical outcome of the broadened joint employer definition that the professors advocate will likely be less competition in both labor and services markets, job losses, and lower earnings. The implications of a broadened joint employer definition for small businesses are also negative: Fewer small businesses will be formed under a broad joint employer regime and fewer will survive.

Comments Submitted by the National Employment Law Project

The NELP comment linking low wages in the temporary labor supply services sector misstates the proper role of the NLRB to promote collective bargaining as instead being to

promote higher wage outcomes of collective bargaining. The NELP comment also repeats the error of other commenters of confusing causation with correlation. By implying that relatively low wages in the temporary labor supply service sector are caused by the inability of unions to bring indirect employers to the collective bargaining table NELP suggests that maintaining the broadened *Browning-Ferris* standard will change that outcome and result in increased wages for affected workers. In addition to the fact that obtaining high wage outcomes is not a goal within the purview of the NLRB, the implied causation is plainly incorrect.

NELP presents no empirical evidence to prove that workers employed through the temporary labor supply service channel earn lower wages than comparable persons employed in the same occupation and with similar duties through other channels on account of differences in bargaining power. Any credible study to investigate such differences should control for variances in educational attainment and experience, weekly hours worked, annual hours worked, periods of unemployment, and job search cost. Since obtaining temporary employment through a labor supply service for workers desirous of a temporary job may be more expeditious and less costly to the job seeker than finding job opportunities by other means, it would be expected that some wage differential between that channel and other employment channels may be observed. The value that workers place on job search advantages of the labor supply service channel must be determined before the question regarding presence of a bargaining power differential in the wage residual can be addressed.

NELP, like other commenters, relies on the mere fact that workers are employed in temporary staffing, contracting or franchise business models to label all of the parties involved as joint employers without demonstrating actual indicia of control: "By inserting temporary and staffing agencies and other types of subcontractors between themselves and workers, contracting

companies can degrade work conditions and more successfully avoid liability for violations of workplace laws even as they benefit from and have the right to control the work itself." (NELP, p. 14) The concept of "control" (whether exercised or not) espoused by NELP and other commenters is so nebulous that no client or customer is safe from the joint employer designation. A restaurant customer who complains about an undercooked dish and prevails upon the waiter to send it back to the kitchen is likely a joint employer to the chef by the NELP argument. Absent from the NELP analysis is any consideration of the kind or degree of influence that the customer has over the direct employer. Whether the customer is the sole source of revenue to the direct employer or only one among thousands of customers, the NELP analysis defines their relationship as joint employment by the simple fact that they are linked by a contract or a franchise agreement. The approach advocated by NELP and others goes beyond the dispute between direct and indirect control and seeks to define joint employment as the fruit of almost any business-to-business transaction.

NELP cites studies purporting to show that workers employed through intermediaries (e.g., temporary staffing agencies or contractors) receive less compensation than workers in "standard" work arrangements. These studies, however, are both misleading and irrelevant. They are misleading because the studies did not properly control the subject and comparison groups to ensure that like workers are being compared. They are irrelevant because the compensation outcome alone is not a basis for defining joint employment. It is not the amount of compensation but who controls compensation that matters. In fact, the most recent authoritative study by the U. S. Department of Labor's Bureau of Labor Statistics of contingent workers and workers in alternative work arrangements (independent contractors, temporary, contract supply and on-call) found that the proportions of all three components of the alternative work

arrangement group were unchanged from the previous study a decade earlier. In particular, the proportions of workers associated with temporary help agencies or working under contract on-site labor supply arrangements remained notably small at nine-tenths of one percent and six-tenths of one percent of the work force respectively.[22]

The differing experience, skills, and productivity of the more highly compensated group may account fully for the apparent differences cited by NELP. Also, the two groups of workers may themselves not share the same work-related desires. The flexibility and mobility of temporary work through a staffing agency, for example, may better fit the subjective preferences of workers who self-select that work arrangement. NELP presents no evidence based on revealed preferences of the workers themselves, without which the comparison studies cited by NELP are not valid.

NELP's comment also refers to the mere fact of rapid employment growth of certain employment arrangements as reason enough to designate parties to the arrangement as joint employers: "Temporary and staffing agency work hours have grown 3.9 times faster than overall work hours and temporary and staffing agency jobs have grown 4.3 times faster than jobs overall. This data, even if accurate, is irrelevant to the policy decision regarding definition of joint employer.

The NELP comment concludes that the proposed NLRB joint employer standard will be injurious to small businesses compared to the broader standard now in effect. This conclusion is based on their assertion that "Under the proposed narrow standard, small businesses that can't afford to subcontract out operations will be at a competitive disadvantage to large corporations

[22] Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements, May 2017," USDL-1—0942, available at www.bls.gov

that can and do outsource." NELP presents no empirical evidence that such hypothetical disadvantages do exist, nor does NELP provide any estimate of the economic significance of such differences if they do exist. NELP seems to be proposing that it is the duty of the NLRB to craft regulations with the primary goal to level the competitive playing field among all participants. This is contrary to the intent and language of the Regulatory Flexibility Act, which only requires agencies to take notice of significant disadvantages that a proposed rule may impose on small entities and to consider whether less burdensome alternatives or exceptions for small entities may be feasible in the context of the overall regulatory objective. The NELP comment does not present sufficient evidence to make its complaint credible.

Comments Submitted by the Attorneys General of New York, Pennsylvania, etc.

The attorneys general enthusiastically endorse as the rationale for their advocacy of a broad joint employer definition the "fissured workplace" analysis promoted by Professor David Weil in his book, *The Fissured Workplace*. They see the continuation (and possible expansion) of the current broad definition of joint employer as a tool of social engineering to reverse the workplace ills that Professor Weil describes.

Their argument and the Weil thesis on which it is based proceed from a number of false premises:

1. *They claim that employers are increasingly moving away from direct hiring and, instead, relying on temporary, contract workers, who are direct employees of temporary help agencies or service contractors.*

In fact, according to the latest (2017) rendition of the U.S. Department of Labor's Survey of Contingent and Alternative Employment Arrangements, there has been little change in the

proportions of the workforce associated with the work arrangements described by Professor Weil. At 10.1 percent of total employment the proportion of employees in Alternative Work Arrangements (independent contractors, persons employed by temporary staffing agencies, labor supply contractors, and on-call workers) was unchanged from surveys conducted in 2005 and 1998. Within the Alternative Work Arrangements category, the largest subgroup was independent contractors, 10.6 million in 2017, comprising 6.9 percent of total employment. Independent contractors are freelance workers who self-identify largely as self-employed proprietors or as the sole employee of an incorporated small business. BLS data shows that independent contractors overwhelmingly (79 percent) prefer their work arrangement over so-called "traditional" work arrangements. These workers are not the focus of any of the discussion surrounding the joint employer issue. The workers most often mentioned in the "fissured workplace" and joint employer contexts are temporary help agency workers and workers provided by contract firms, and the numbers of each of these identified by the BLS survey are small and their proportions relative to total employment are essentially unchanged from the surveys of twelve and twenty years ago: in 2017, temporary help agency workers numbered 1.4 million, or *nine-tenths of one percent* of all workers, and workers provided by contract labor supply firms numbered 933,000, or *six-tenths of one percent* of all workers.[23]

2. *In addition to their focus on the imagined growth of reliance on temporary and contract workers hired and managed by others, the attorneys general also adopt Professor Weil's critique of outsourcing and franchising. They claim that firms distance themselves from direct hiring and insert between themselves and "their" workers a layer of sub-contractors, franchisees and third-party labor managers*

[23] *Id.*

expressly for the purpose of avoiding collective bargaining, avoiding responsibility for labor law compliance, and to suppress wages of workers.

The false premise that outsourcing and franchising are motivated by animus towards the interests and well-being of workers overlooks the real competitive market forces in the expanding global market that have propelled the growth of outsourcing and franchising. Corporations outsource non-core support service functions in order to focus their own management resources and creative talent on their core functions. By outsourcing non-core functions like security, payroll systems, housekeeping, and information technology systems, companies are able better to focus scarce resources on improving productivity, efficiency and competitiveness in the core functions that define the business. For a bank, this means outsourcing housekeeping and information technology operations to specialist firms in those areas so that the bank can focus better on good banking practices. For the automobile manufacturer it means outsourcing employee cafeteria and security operations to specialist firms so that the car company can focus its scarce talent and resources on designing and manufacturing better and more competitive automobiles.

Minimizing cost and maximizing profit are incentives for this restructuring of business operations that has been gaining momentum for over thirty years, but it is not only about immediate profit: It is about creating a focus on creativity and quality that will ensure that the company survives in the long-run. This trend is not antithetic to the interest of workers. It benefits workers in the core business operations by enhancing their productivity (which translates into better compensation and working conditions) and it ensures the long-term stability of their jobs. It also benefits workers whose jobs are in the specialist companies to which tangential operations and services are shifted. These workers who previously would have been

of secondary importance in the traditional integrated structure that Professor Weil advocates, now become more valued core members of the workforce team as part of a specialty services firm. They stand to benefit through increased productivity as well.

Franchising is another example where Professor Weil gets it wrong. He and his advocates mischaracterize franchisors' motives as exploitive and rent seeking, but the reality is the opposite: The franchisors' and franchisees' interests are aligned in terms of growing revenues, maintaining quality, increasing operational efficiency and minimizing cost. Workers' interests also align rather than conflict with those of their employers: All gain from training and experience that enhance productivity. The franchise model allows established brands to expand more quickly and more broadly into locations where brand-owner operated establishments would be less feasible. This creates entrepreneurship and independent business ownership opportunities for franchisees, and it creates jobs and paychecks for workers in places where jobs and paychecks would otherwise be scarce.

Professor Weil and the attorneys general assert that application of the broad joint employer definition will benefit workers through improved labor law compliance as companies assume responsibility for monitoring the labor law compliance of their contractors and franchisees. Yet, they present no empirical evidence of improved labor law compliance following a joint employer designation. Indeed, there is too little empirical data available to determine whether labor law compliance currently is high or low, improving or deteriorating overall, or in relation to specified business models or industries.

3. *They claim that the maintenance and enforcement of a broad joint employer rule will fundamentally alter the culture of corporate behavior, and that the mere likelihood of legal enforcement of joint employer liability will induce most employers voluntarily to*

embrace greater responsibility for improving and protecting the working conditions of the employees of their suppliers, contractors and franchisees. A few occasional legal enforcement actions under the broadened joint employer doctrine will be sufficient, they think, to induce multitudes of large companies to adopt a revised and benevolent stance with respect to the employees of the other independent companies with whom they transact business and to join them at the collective bargaining table.

The error of this premise is closely tied to the error in the second premise that the commenters and Professor Weil espouse: Because they misunderstand the motive behind outsourcing and franchising, they also misconstrue the behavior that will result from enforcing a broad joint employer standard as the cure. Because they believe that outsourcing and franchising are motivated by a desire to suppress worker compensation and to avoid responsibility for labor law compliance, they think that legal imposition of joint employer status will remove and reverse that motive and lead to more participants in collective bargaining and closer coordination between companies and their contractors or franchisees for the benefit of employees.

The actual behavioral effect on companies of imposition of the broad joint employer definition is likely to be the opposite of what they envision and intend. Companies have adopted outsourcing and franchising business models to enhance growth, productivity and competitiveness, not for the narrow desire to suppress compensation and oppress workers that Professor Weil argues. Companies see the potential for designation as a joint employer because of their relationships with their outsourcing contractors or franchisees as a cost that may offset the efficiencies and other advantages that motivated their business structuring choice. Rather than respond to the threat of joint employer designation by resignedly coming to the collective bargaining table, companies may sacrifice some of the efficiency gains of outsourcing or

franchising to distance themselves from providing help and guidance to their contractors or franchisees in order to avoid entanglement with the broad joint employer doctrine.

The efficiency and output growth gains that companies sacrifice to avoid joint liability designation comprise the social costs of the broad joint employer doctrine. The efficiency and output loss is not just a loss to companies. It is a loss to workers in terms of foregone wages and job opportunities, and it is a loss to consumers in terms of goods and services not produced. It is a deadweight loss on the economy.

The validity of this behavioral forecast was confirmed by a survey of franchise sector executives conducted by the International Franchise Association and the U.S. Chamber of Commerce. That survey found that over 90 percent of respondents had already noticed significant retrenchment by franchisors from providing the level of training and assistance that had been provided before the *Browning-Ferris* decision. Franchisees noticed the difference in the behavior of franchisors before and after the decision. Fear and uncertainty about the implications and costs of the new broad definition drove franchisors into a legal protective posture, distancing themselves from potential joint employer designation. That choice involved a cost – a sacrifice of opportunity for higher efficiency and greater growth – but franchisors judged that the sacrifice was justified in order to avoid the perceived greater cost of assuming joint employer status. That choice also cost franchisees in terms of the loss of training and assistance from franchisors that they valued and relied upon to achieve better efficiency and growth of output and sales revenue. Finally, workers lost because slower growth and less efficiency translate into fewer new jobs and smaller compensation increases over time. Respondents to the survey were asked what they would pay to get back the relationship between franchisors and franchisees that existed before the *Browning-Ferris* decision: Their responses

translated into a nationwide economic loss of at least $17 billion per year and perhaps as high as $33 billion per year.

4. *The attorneys general's comment included criticism of the Board regarding the adequacy of the cost benefit analysis conducted to justify the proposed rule.*

The position advocated by the attorneys general and others in support of continuing the current broad definition also requires cost benefit analysis scrutiny, and no commenter has presented any evidence that the benefits of the broad definition will approach the cost level estimated solely for the impact through the franchise sector. Adding in the impact through supply chain management and support service contract sectors, the full cost may be several times greater. The only benefit estimate included in comments is the Economic Policy Institute's estimate of $1.3 billion per year benefit to workers for maintaining the broad definition. *The costs to the franchise sector alone are 13 to 25 times greater.*