

The NLRB and the Joint-Employer Standard

New Interpretations, New Liabilities
and the Impact on Other Statutes

Friday, March 20, 2015

U.S. Chamber of Commerce
Lee Anderson Veterans Center



U.S. CHAMBER OF COMMERCE



U.S. CHAMBER OF COMMERCE
Workforce Freedom Initiative

The Workforce Freedom Initiative is a grassroots mobilization and advocacy campaign of the U.S. Chamber of Commerce to preserve democracy in the American workplace, protect employer free speech rights and employee freedom of choice, and block the anti-competitive agenda advocated by many labor unions.



U.S. CHAMBER OF COMMERCE
Labor, Immigration & Employee Benefits

The Labor Relations Committee develops Chamber policy and programs on a wide range of labor and employment issues including: labor-management relations, employment nondiscrimination, minimum wage and wage-hour, occupational safety and health, immigration, union organizing, workplace privacy, work-family balance and leave mandates, and emerging international labor policy. The Labor, Immigration and Employee Benefits division works with the committee in developing the policies that best advance the interests of Chamber members in these areas, and then advocates those positions before Congress and the administration.

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- 8:40 **Welcoming Remarks** by Lisa Rickard,
Executive Vice President, U.S. Chamber of Commerce
- 8:45 **Remarks** by Thomas J. Donohue,
President and CEO, U.S. Chamber of Commerce
- 8:55 **Remarks** by Andy Puzder, CEO of CKE Restaurants Holdings, Inc.
- 9:30 **First Panel:** The Legal Landscape. Michael Lotito, Marshall Babson,
Brian Hayes. Moderated by Glenn Spencer, Vice President, Workforce
Freedom Initiative, U.S. Chamber of Commerce.
- 10:25 **Second Panel:** The Impact on Employers. Pratik Patel, Chairman of
the Asian-American Hotel Owners Association; Clint Ehlers, President,
FASTSIGNS Lancaster and Willow Grove, PA; Bob McDevitt, Senior Vice
President, Franchise Development, Golden Corral. Moderated by Robert
Cresanti, Executive Vice President, International Franchise Association.
- 11:15 **Third Panel:** The Impact on Other Statutes. Paul DeCamp, Baruch Fellner,
Camille Olson. Moderated by Randel K. Johnson, Senior Vice President,
U.S. Chamber of Commerce.
- 12:10 **Fourth Panel:** The Congressional Perspective. Kyle Fortson, Labor Policy
Director, U.S. Senate Committee on Health, Education, Labor, and
Pensions; Ed Gilroy, Director of Workforce Policy, House Education and
the Workforce Committee. Moderated by Jim Plunkett, Director, Labor
Law Policy, U.S. Chamber of Commerce.
- 12:45 **Event concludes**



**Statement for the Record
by the U.S. Chamber of Commerce
Submitted to the Senate Committee on
Health, Education, Labor, and
Pensions, February 12, 2015**

February 12, 2015

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

Dear Chairman Alexander:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates this opportunity to provide a statement for the record as part of the Committee's February 5, 2015 hearing entitled "Who's the Boss? The 'Joint Employer' Standard and Business Ownership." The purpose of this letter is to provide you with a summary of our members' concerns regarding the National Labor Relations Board's efforts to overturn its long-standing "joint employer" standard.

The National Labor Relations Act is a vital law which is designed to strike a balance between the rights of workers, employers and unions. Unfortunately, over the last few years, the Board has upset this delicate balance by overturning decades of precedent and pursuing one-sided regulatory initiatives. As detailed below, the Board's recent efforts to overturn its joint employer standard is simply the latest example of this radical policy shift. Consequently, we wish to thank you for holding a hearing on this important subject in particular and making NLRB oversight a priority. We look forward to working with you and other members of the Committee on these issues in the coming months.

I. Summary

The National Labor Relations Board ("NLRB" or "Board") is attempting to redefine what it means to be an employer. Through two separate vehicles, the Board and its General Counsel are attempting to upend the Board's longstanding "joint employer" standard. This is a complicated but important issue that will have a significant impact on Chamber members and the business community in general.¹

While the Board's recent joint employer allegations involving McDonald's have received much of the attention, a change in the joint employer standard would have the potential to extend far beyond the circumstances of those cases, and threatens to impact any business which uses

1 In light of this concern, on March 5, 2015, the Chamber will be hosting a conference entitled, *The NLRB and the Joint-Employer Standard: New Interpretations, New Liabilities and the Impact On Other Statutes*.

non-traditional workplace arrangements (e.g., franchise arrangements, temporary workers, subcontractors, etc.). Countless industries would be impacted by the Board's actions. They include, but are not limited to, restaurants and other franchises, construction, healthcare, hospitality, employment services companies and logistics companies.

As explained more thoroughly below, if the Board is successful in changing the joint employer standard, businesses that franchise or use subcontractors or temporary workers will be susceptible to increased liability and litigation. Worse, a bad ruling by the Board could permeate other areas of employment law such as wage and hour and workplace discrimination law.

II. The Board's Current "Joint Employer" Standard

Under the National Labor Relations Act, two separate and independent business entities are considered "joint employers" when they "share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation*, 269 NLRB 324, 325 (1984). For example, a factory owner may be considered the "joint employer" of janitorial workers who perform services in the factory but who are directly employed by a separate outside vendor if the factory owner participates in the hiring, firing and discipline of the workers, sets their work schedules, and directs and supervises the work to be performed.²

For over 30 years, the Board has maintained a clear test for determining whether two separate companies are joint employers.³ The test is whether the putative joint employer⁴ exercises direct and immediate control over the employees at issue. This direct control is generally

2 In this way, the phrase "joint employer" should not be confused with "single employer"—a similar but different labor law term of art—which addresses the question of whether two supposedly separate employers are actually one employer. The test for determining whether two entities are actually the same, "single employer" involves an analysis of the following factors: (1) inter-relation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *See, e.g., NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982).

3 "Prior to 1982 when the United States Court of Appeals for the Third Circuit decided *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), the Board's analysis of what constituted a joint employer relationship was somewhat more amorphous." *The Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993).

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

understood to include the ability to hire, fire, discipline, supervise and direct.⁵ The test is very fact-intensive and no one factor is particularly more compelling or persuasive than another.

Over the years, employers, employees and unions have come to rely upon the predictable application of the standard, and the Board has rejected several efforts to upend this consistent standard. The result is 30 years of unbroken NLRB jurisprudence which holds that **two entities are “joint employers” only when they share direct and immediate control over the same employees**. For example, even where there is evidence of integration of certain operations between a putative joint employer and a direct employer, the Board and federal courts have found that two entities were *not* joint employers in the following situations:

- Where the putative joint employer owned the facility used by the direct employer, placed its logo on the uniforms and trucks of the workers, and provided equipment necessary for the work. *Airborne Express*, 338 NLRB 597 (2002).
- Where the putative joint employer engaged in “limited and routine” supervision of work and retained the contractual right to approve hires by the direct employer. *AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007).
- Where the putative joint employer engaged in “limited supervision” of the direct employer’s employees and also participated in collective bargaining. *AT&T v. NLRB*, 67 F.3d 446, 451-452 (2d Cir. 1995).

In each of these cases, **there was no finding of joint employer status because the two companies did not share direct and immediate control over the terms and conditions of employment**. On the other hand, where two entities share a sufficient degree of control and direction over the employees at issue, the Board has found that the joint employer standard was met in the following cases:

- Where the putative joint employer disciplined, terminated, and set work assignments of the direct employer’s employees and also participated in decisions involving employee incentive awards. *Aldworth Co.*, 338 NLRB 137, 140 (2002).

5 The test adheres to the agency principles that Congress instilled in the Taft-Hartley Act in 1947, which changed the definition of “employer” from “any person acting in the *interest* of the employer,” to “any person acting as an *agent* of the employer.” 29 U.S.C. § 152(2)(emphasis added).

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- Where the putative joint employer hired the direct employer’s employees, authorized their overtime and “conducted an informal grievance meeting concerning one of the employees.” *Computer Assoc. Int’l, Inc.*, 332 NLRB 1166, 1167 (2000).
- Where the putative joint employer, in addition to other indicia of control, “through the constant presence of the site superintendents and a high degree of detailed awareness and control of unit employees’ daily activities, exercise[d] substantial supervisory authority over unit employees.” *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991).

There are good policy reasons why the current standard has been in place for over 30 years. The current standard ensures that the putative joint employer is actually involved in matters that fall within the Board’s purview, to wit, the employment relationship. Accordingly, the putative joint employer is required to come to the bargaining table only when it actually controls terms and conditions of employment—the very issues that will be the subject of bargaining.

As explained more fully below, depending on the circumstances, a large company may have contractual relationships with hundreds or thousands of franchisees, vendors and contractors. The current direct control test ensures that such companies will not be embroiled in labor negotiations or disputes involving employees and workplaces over which they have little or no control. Indeed, it makes sense to impute liability—as the current standard does—only in those cases in which an employer is in a position to investigate and remedy unlawful actions.

III. Current Board Efforts to Upend the Joint Employer Test

A. The *McDonald's* and *Browning-Ferris* Cases.

Since the establishment of the current well-defined standard, labor unions and their allies on the Board have advocated a return to a looser, ambiguous joint employer test which would make it easier to enmesh multiple employers in labor disputes and organizing campaigns. See *Airborne Express*, 338 NLRB at 597 n. 1 (rejecting then-Member Liebman's suggestion to revisit joint employer standard). Now, however, with the rise of worker centers⁶ and a locked-in Democrat majority at the Board, there is a new concerted effort by the NLRB to topple the existing standard. The Board is trying to change the current standard through two different cases:

- **McDonald's.** On July 29, 2014, the Board's Division of Advice recommended that the General Counsel issue complaints against McDonald's USA LLC for the employment decisions of individually owned-and-operated franchised restaurants. The pending complaints stem from charges filed by employees who claim that their rights were violated when they were disciplined for walking off the job to support minimum wage protests orchestrated by the Service Employees International Union (SEIU). In filing the charges against the individually-owned McDonald's franchisees, these charges also named McDonald's USA LLC as a joint employer. The recommendation upends decades of established Board law governing joint employers and has applications beyond both the franchise model and the NLRA. Following this recommendation, on December 19, 2014, the NLRB's Office of General Counsel announced that it issued complaints against McDonald's franchisees and their franchisor, McDonald's USA, LLC, as joint employers. The complaints allege various violations of the NLRA and were issued from 13 different NLRB Regional Offices. According to the NLRB, absent settlement, hearings in these cases will begin on March 30, 2015.
- **Browning-Ferris.** At the same time that the decision to issue complaints against McDonald's USA LLC was likely being formulated in the General Counsel's office, the Board took its own steps to reconsider the current joint employer standard. In *Browning-Ferris*,

6 See, The New Model of Representation: An Overview of Leading Worker Centers, <http://www.workforcefreedom.com/sites/default/files/WFI%20Worker%20Center%20Study%20-%20New%20Model%20of%20Representation.%20Final%20version%20downloaded%202.20.14.pdf>; The Emerging Role of Worker Centers in Union Organizing, <http://www.workforcefreedom.com/sites/default/files/WFI%20Manheim%20Study%2011-21-2013.pdf>; Labor Organizations by Another Name, <http://www.fed-soc.org/publications/detail/labor-organizations-by-another-name-the-worker-center-movement-and-its-evolution-into-coverage-under-the-nlra-and-lmra>;

Leadpoint Business Services provided workers to perform recycling and cleaning duties at a facility operated by Browning-Ferris. The Teamsters filed a representation petition, asking the Board to hold an election of employees of *both* Leadpoint and BFI, claiming that the two entities were joint employers. The NLRB Acting Regional Director applied the existing joint employer test and determined that Leadpoint was the sole employer of the employees at issue. The union appealed the Acting Regional Director's ruling to the Board, claiming that BFI and Leadpoint were joint employers under the current standard, and that if they were not, the Board should reconsider the standard. The Board has invited stakeholders to submit comments on whether a change in the standard is appropriate.⁷

- Both the *McDonald's* and *Browning Ferris* cases indicate the Board's clear intention to overturn its current joint employer test in favor of a looser test that will have a negative impact on employers. Such a standard will result in instability and uncertainty.

B. The Board's Likely New Standard

As noted above, the Board has not actually decided anything yet or articulated a new standard. However, the *amicus* brief submitted by the Board's General Counsel in the *Browning-Ferris* case likely foreshadows what the new joint employer standard may be. In the brief, the General Counsel proposes the following test for establishing joint employer status:

“[W]here, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence”

See General Counsel brief at page 17.

⁷ The Chamber submitted an *amicus* brief here: <http://www.chamberlitigation.com/sites/default/files/cases/files/2014/U.S.%20Chamber%20Amicus%20Brief%20--%20Browning%20Ferris%20Industries%20of%20California%20%28NLRB%29.pdf>. Additionally, the Chamber signed on to the brief submitted by the Coalition for a Democratic Workplace here: <http://myprivateballot.com/wp-content/uploads/2012/10/Brown-Ferris-Brief-Amici-Curiae.pdf>

The brief advocates “a return to the Board’s traditional approach” which, in the past, the Board itself has described as “amorphous.”⁸ Rather than the existing standard which focuses on the direct and immediate control of the employees, the General Counsel proposes finding joint employers even when there is only *indirect* control of employees.

This “indirect control” standard means that joint employer status could be found simply through the existence of a contractual agreement between a company and its contractor or vendor. For example, the structure of certain contracts may result in the putative joint employer influencing the direct employers’ operations by setting certain production or safety standards or wage reimbursement rates. In such a situation, the General Counsel’s argument goes, “meaningful” collective bargaining cannot occur absent the participation of the putative joint employer.⁹ Essentially, almost any economic or contractual relationship could trigger a finding of joint employer status under the proposed new standard.

IV. Impact of a Change in the Joint Employer Standard on Employers

The NLRB’s actions in both *McDonald’s* and *Browning-Ferris* will have direct impacts in the labor law context. Some potential direct negative impacts of a joint employer standard which focuses on “indirect control” include the following:

1. **Corporate Campaigns.** Being able to characterize large, well-known businesses as the “employer” of a targeted group of workers who are employed by smaller, lesser-known businesses, will encourage unions to launch very public organizing campaigns in hopes that the larger employer will bend to public pressure and recognize the union. A national card check/neutrality agreement extracted from a nationally-recognized brand could be used to quickly organize smaller local affiliates or franchisees.

8 See Footnote 2, *supra*.

9 Proponents of the indirect control standard continue to advance this line of reasoning despite the fact that the Board has ruled that vendors, suppliers and contractors are free to pay wage rates that are higher than the reimbursement rates provided for in their agreements with the putative joint employer. See *Management Training Corp.*, 317 NLRB 1355, 1356 (1995). In fact, the Regional Director in *Browning-Ferris* noted that the direct employer was not prohibited from paying its employees over and above the reimbursement levels in its contract with Browning-Ferris. See Decision and Direction of Election, 32-RC-109684, pg. 15.

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2. **Liability under the National Labor Relations Act.** The putative joint employer would be liable for labor violations committed by the direct employer, even though the putative joint employer exerts no control over the employees of the direct employer or how the direct employer manages its labor relations.
3. **Collective Bargaining.** If the direct employer is organized, the putative joint employer would have to participate in collective bargaining. Depending on the circumstances, the putative joint employer could be dragged into bargaining relationships with hundreds of entities over whose day-to-day operations they have no control. The union could require the putative joint employer to supply information relevant to bargaining, including wage and benefit data for its employees.
4. **Secondary boycotts.** The NLRA's prohibition on secondary boycotts means that if a union has a dispute with one employer (e.g., a janitorial services company), it cannot entangle other employers in the dispute (e.g., the factory owner that contracts with the janitorial services company). This distinction would likely be eviscerated under the potential new standard, and unions could picket and demonstrate against both entities.
5. **Effects Bargaining.** Under the NLRA, unionized employers retain the inherent managerial right to unilaterally determine whether to downsize or shutdown its business. However, the law requires the employer to bargain about the decision's effects on unit employees. Accordingly, an employer must provide the union with notice of such a decision, as well as an opportunity to bargain about issues such as severance pay, or health coverage for displaced workers. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Under a new joint employer standard, should an entity wish to terminate an existing services contract for whatever reason—such as poor performance or to reduce costs—it could be required to engage in effects bargaining with the union who represents the workers who are employed by that particular service provider. *See W.W. Grainger*, 286 NLRB 94, 97 (1987). This will erode both economic competition and employers' flexibility.

V. Potential Ramifications Under Other Employment Statuses

Furthermore, although a new test established by the NLRB would not be binding on other agencies, it will likely be persuasive, and the new expansive standard could be applied by the Department of Labor, the Equal Employment Opportunity Commission and other agencies' enforcement efforts. Plaintiffs' attorneys will also be eager to explore how they may exploit a new standard. If the current joint employer standard is relaxed, some negative effects beyond the NLRA include the following:

1. **Threshold employer coverage.** Many statutes, such as the Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act have small business exceptions and only apply if an employer has a certain number of employees. By loosening the joint employer standard, employer coverage under such statutes will explode¹⁰ This would essentially eliminate carefully-negotiated small business exceptions in these federal statutes.
2. **Discrimination law.** In its amicus brief submitted in the *Browning-Ferris* case, the EEOC notes that "the Board's joint employer standard influences judicial interpretation of Title VII." If the Board adopts a new, looser joint employer standard, this might encourage both the EEOC and the plaintiffs' bar to stretch the bounds of the law in an effort to entangle more employers in discrimination lawsuits.¹¹ Perhaps already trying to take advantage of pending *McDonald's* cases at the NLRB, on January 22, 2015, 10 employees at three different McDonald's locations in Virginia filed a lawsuit alleging race discrimination and sexual harassment under Title VII, and named as defendants not just the individual local restaurants, but also McDonald's corporate. See *Betts v. McDonald's Corp., et al.*, Case No. 4:15-cv-00002 (W.D. Va. Jan. 22, 2015). Lawsuits like this one are likely to become more frequent should the Board adopt the General Counsel's proposed "indirect control" test.

10 See EEOC Compliance Manual, Section 2: Threshold Issues ("To determine whether a respondent is covered, count the number of individuals employed by the respondent alone *and* the employees jointly employed by the respondent and other entities. If an individual is jointly employed by two or more employers, then s/he is counted for coverage purposes for *each* employer with which s/he has an employment relationship.")

11 By now, it has been well-documented that the EEOC is more than willing to pursue questionable litigation theories. See "Part II: EEOC's Unsuccessful 2013 Amicus Program" in U.S. Chamber, "A Review of EEOC Enforcement and Litigation Strategy During the Obama Administration—A Misuse of Authority." June 2014, https://www.uschamber.com/sites/default/files/documents/files/021449_LABR%20EEOC%20Enforcement%20Paper.pdf .

Importantly, compensatory damages are capped under Title VII, and the caps generally increase as the number of employees increases. Thus, the plaintiff's bar will be encouraged to establish joint employer status because doing so could increase the number of employees, thereby increasing the amount of available damages.

3. **Wage and Hour issues.** Employers who use subcontractors may be liable for the subcontractor's wage-and-hour violations if it is determined they are a joint employer of the employee. Because of the broad definitions in both the Fair Labor Standards Act and its implementing regulations, most federal courts already use a more expansive "economic realities" test in wage and hour cases.¹² However, some circuits' tests are more restrictive than others and all tests focus on the element of control. Accordingly, both the Wage & Hour Division and the plaintiffs' bar will likely look to see how they may exploit any new joint employer standard adopted by the Board. It is no secret that the current Wage and Hour Administrator, David Weil, has a strong distaste for alternative workplace arrangements.¹³
4. **Occupational Safety and Health Administration (OSHA) issues.** An expansion of the joint employer standard may also provide an opportunity for OSHA to ratchet up fines against a parent company for repeated violations. For example, the same safety violation occurring at several different franchisees could be considered repeat violations if the franchisor is considered to be a joint employer with each of the franchisees. Also, OSHA has recently launched an effort to target workplaces that use outside sources for their workers such as temporary staffing agencies or services. If the new joint employer model advances, OSHA's ability to cite the host employer would be enhanced which could be used by unions as leverage against employers who have been targeted for organizing.

12 A similar test is used with regard to Family and Medical Leave Act cases. See *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004)(applying FLSA joint employer factors in an FMLA case to conclude that Air France was not a joint employer with various ground handling service companies and therefore exempt from scope of FMLA). However, "only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits." 29 CFR 825.106(c).

13 See David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 The Econ. & L. Rel. Rev. 33, 44 (2011)("Strategic enforcement should therefore focus on higher-level, seemingly more removed business entities that affect the compliance behaviour 'on the ground' where vulnerable workers are actually found").

5. **Affordable Care Act Issues.** Under the health care law’s employer mandate, any employer with 50 or more “full-time equivalent employees” (FTEs) must provide a certain mandated level of health care coverage to all full-time employees and their dependents, or potentially face a penalty. The employer mandate takes effect in 2015 for businesses with 100 or more FTEs, and in 2016 for businesses with 50 to 99 FTEs. If the current joint employer standard is changed, individual franchises falling well below the employer mandate threshold and small businesses that depend on independent contractors or temporary workers could soon have to comply with the employer mandate’s requirements. They would not only be on the hook for providing coverage to all of their full-time employees (and dependents), but would also have to ensure that the coverage meets the new affordability and minimum value standards of the ACA. Since the formula for determining FTEs includes full-time employees and hours worked by part-time employees, figuring out if these new “joint employer” entities are subject to the employer mandate will be an extreme burden because the requisite record keeping by each organization involved may not be complete. The franchise and temporary worker/subcontractor communities will be particularly hit hard since they use high numbers of part-time workers that might now be considered “full-time” under the new definition of full-time work in the ACA as 30 hours per week.

6. **Blacklisting in Federal Contracting.** On July 31, 2014, President Obama signed Executive Order 13673, “Fair Pay and Safe Workplaces,” which seeks to use the federal procurement process as a vehicle to create additional remedies for labor and employment law violations.¹⁴ The Order would require federal contractors and subcontractors seeking to obtain federal contracts or subcontracts worth \$500,000 or more to disclose violations that occurred within the last 3 years. The reportable violations include “administrative merits determinations,” “arbitral awards or decisions,” and “civil judgments” issued under the following 14 federal labor employment laws and their state equivalents:
 - a. Fair Labor Standards Act
 - b. Occupational Safety and Health Act of 1970
 - c. Migrant and Seasonal Agricultural Worker Protection Act
 - d. National Labor Relations Act

¹⁴ The Chamber has been steadfast in its opposition to federal contracting blacklisting proposals. See, e.g., Randel K. Johnson, U.S. Chamber of Commerce, *Comments on U.S. Department of Agriculture Direct Final Rule (DFR) (76 Fed. Reg. 74,722) and Notice of Proposed Rulemaking (NPRM) (76 Fed. Reg. 74,755) covering “Labor Law Violations” (RIN 0599-AA19)* (January 24, 2012). Available at: <https://www.uschamber.com/sites/default/files/documents/files/120124usdablistcommentsDFR.pdf>

- e. Davis-Bacon Act
- f. Service Contract Act
- g. Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity)
- h. Section 503 of the Rehabilitation Act of 1973
- i. Vietnam Era Veterans' Readjustment Assistance Act of 1974
- j. Family and Medical Leave Act
- k. Title VII of the Civil Rights Act of 1964
- l. Americans with Disabilities Act of 1990
- m. Age Discrimination in Employment Act of 1967
- n. The President's February 12, 2014 federal contractor minimum wage Executive Order (No. 13658)

During the bidding process, the contracting officer will then take these violations more closely into account when evaluating whether the company satisfies the requirement for having a satisfactory record of integrity and business ethics. The phrase "administrative merits determinations" could include NLRB General Counsel complaints, EEOC cause determinations and other non-final agency actions. This nebulous reporting requirement is bad enough on its own, but becomes worse when contemplating the Board's current actions. For example, an expansion of the joint employer concept could require a contractor to report, as part of the federal contract bidding process, on labor or wage and hour violations committed by the vendors with whom it contracts to supply cleaning or security services. Considering that federal contractors likely have hundreds or thousands of relationships with subcontractors and vendors, a change in the joint employer standard will exacerbate the bad policy results of the Executive Order.

VI. Economic Impacts

In an increasingly competitive economy, companies make decisions on a daily basis to adapt, change and find unique advantages over their competitors. As part of this decision-making, companies often find that certain functions of the workplace—such as logistics, information technology, human resources, etc.—can be more efficiently performed by an outside vendor. The Board's current joint employer test strikes the right balance in these situations by allowing the putative joint employer the ability to monitor and oversee the performance of its subcontractors and vendors, while ensuring that employees have a right to bargain with the employer that actually controls the terms and conditions of employment.

Unfortunately, these contractual relationships would become less attractive under a new joint employer standard, as a company could be considered a joint employer simply for setting operational or performance standards in an agreement with a vendor or supplier. Because myriad liabilities and obligations—including the duty to bargain—attach to a finding of joint employer liability, employers could respond in very different ways.

First, some employers may determine that, as long as they are going to be held liable for the actions of their subcontractor or vendor, they must exert more control over the day-to-day operations of the vendor. The *McDonald's* case illustrates how this could be particularly devastating to both franchisors and franchisees. Franchisors would have to exert themselves into the decision-making process regarding issues such as hiring/firing, compensation, training, and labor costs. Even if this were possible for certain franchisors, the costs of exerting this control would be astronomical. For the franchisees, they would be relegated to partners or employees of a business over which they worked so hard to build.¹⁵ Ultimately, this would discourage both existing companies and entrepreneurs from participating in the franchise business model.

Conversely, employers could try to avoid a finding of joint employer liability altogether by further distancing themselves from their subcontractors. This could have unintended negative consequences as employers might choose to remove certain labor, safety or environmental standards from the agreements with subcontractors in order to avoid a joint employer finding.

Finally, employers could choose to cancel or eliminate these relationships which will most directly impact small businesses and independently-owned operations. Ultimately, the “indirect control” test as advanced by the General Counsel and union in the *Browning-Ferris* case would limit employer flexibility and competition at a time when the economy continues to experience anemic economic growth.

15 See testimony Mr. Gerald F. Moore, Franchise Owner, The Little Gym. “*Who’s the Boss? The ‘Joint Employer’ Standard and Business Ownership.*” SENATE COMMITTEE ON HEALTH, EDUCATION LABOR & PENSIONS, February 5, 2015.

VII. Changing the Joint Employer Standard is the Latest Example of the Board's Overreach

Of course, the Board's efforts to upend its joint employer standard do not occur in a vacuum. Rather, this is just the latest attempt by the Board and the Administration to dramatically overhaul labor law in favor of their union allies. Set forth below are several examples of such actions taken by the Board and the Administration.

- **Unconstitutional Appointments to the Board.** In June of 2014, the Supreme Court in *Noel Canning* unanimously ruled that President Obama exceeded his constitutional authority when he appointed Sharon Block and Dick Griffin to the NLRB while the Senate was in session.¹⁶ During their time as unconstitutionally appointed members of the Board, Griffin and Block participated in numerous decisions which departed radically from Board precedent and which were harmful to the employer community. Making matters worse, Griffin is now the Board's General Counsel and Block was re-nominated to serve as a member of the Board, though her re-nomination was eventually withdrawn.
- **Ambush Elections.** The Board issued its final "ambush" election regulation on December 12, 2014, just prior to the December 16 expiration of Democrat Board Member Nancy Schiffer's term. The changes to the Board's election procedures will dramatically shorten the time period between the filing of a representation petition and the actual election. It will also require employers to hand over to union officials and the NLRB personal contact information about employees, even if the employees wish to keep such information private. Like the Employee Free Choice Act, the goal of the proposal is to limit an employer's ability to communicate with its employees about the pros and cons of unionization. Given that the Board's own statistics demonstrate that 94% of elections are held within 56 days, this endeavor is nothing more than a sop to the labor unions whose membership numbers continue to crater.¹⁷ The Committee's hearing on February 11, 2015, entitled "Ambushed: How the NLRB's New Election Rule Harms Employers & Employees," detailed the serious negative consequences that the Board's rule will have on both employers and employees.¹⁸

16 The U.S. Chamber Litigation Center represented Noel Canning, a member of the Chamber, in the Supreme Court, and served as co-counsel to Noel Canning alongside the law firm Jones Day.

17 The Chamber's comments to the Board's ambush election proposal are here: <https://www.uschamber.com/sites/default/files/documents/files/NLRB%202011%200002%20US%20Chamber%20of%20Commerce.pdf>

18 The Chamber's testimony at the hearing is here: https://www.uschamber.com/sites/default/files/chamber_testimony_on_ambush_elections_mark_carter_-_final_-_2-11-2015.pdf

- **Fractured Workplaces.** The Board has overturned its long-standing criteria for determining an appropriate bargaining unit under the NLRA. Under *Specialty Healthcare* and its progeny, unions can now gerrymander bargaining units into very small micro-units of known union adherents. This has already led to a Balkanization of the workforce,¹⁹ and will potentially saddle an employer with multiple unions, multiple bargaining agreements (with potentially different pay scales, benefits, work rules, bargaining schedules, and grievance processes for similarly situated employees) and increased chances of work stoppages.²⁰
- **Mandatory, Biased Posters.** In an ill-advised rulemaking, the Board attempted to promulgate a regulation which would have required employers to post a biased notice of labor rights in their workplaces. The regulation created a new unfair labor practice out of whole cloth for an employer's failure to post the notice. Fortunately, the federal courts prevented the Board's power grab, as one federal court of appeals—in a case filed by the Chamber—ruled that the Board had no statutory authority to issue the regulation,²¹ and another court of appeals ruled that the regulation violated the First Amendment.
- **Union Access to Employer Email.** In a case called *Purple Communications*, issued in December 2014, the NLRB ruled that once an employee is given access to company email, he or she may generally use that email for union organizing during non-working time. This ruling infringes on employers' property interests to prohibit personal use of its email system in order to maintain production, ensure protection from computer viruses, and limit its exposure to legal liability.
- **Expansive Application of Section 7.** The Board has undertaken a specific agenda which is intended to severely limit employers' abilities to effectuate rules and policies in their workplaces. The Board has accomplished this by expanding its interpretation of "protected activity" under Section 7 of the National Labor Relations Act (NLRA or Act). In this way, the Board has dramatically expanded its role beyond being a neutral arbiter of labor disputes to

19 See *Macy's*, 361 NLRB No. 4 (2014) (finding appropriate the union's petitioned-for unit of only the cosmetics and fragrance employees at a Macy's department store).

20 The Chamber's amicus brief which urged the U.S. Circuit Court of Appeals for the 6th Circuit to overturn *Specialty Healthcare* is here: <http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Kindred%20Nursing%20Centers%20East%2C%20LLC%2C%20fka%20Specialty%20Healthcare%20v.%20NLRB%2C%20et%20al.%20%28NCLC%20Amicus%20Brief%29.pdf>

21 The opinion of the U.S. Circuit Court of Appeals for the 4th Circuit is here: <http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Opinion%20--%20Chamber%20of%20Commerce%20et%20al.%20v.%20NLRB%20%28Posting%20Rule%29%20%28Fourth%20Circuit%29.pdf>

become an agency which now concerns itself with second-guessing employers' HR policies. For example, in *Karl Knauz Motors, Inc.*,²² the Board invalidated an employer's common sense rule which encouraged courteous behavior on the sales floor of a car dealership. Additionally, in *Plaza Auto*,²³ an employee berated the owner of the car company for which he worked, calling him a "f*****g crook" an "a***hole" and telling him he would regret it if he was fired. The Board determined that the termination was unlawful and violated the employee's Section 7 rights because it occurred during a discussion over working conditions.

VIII. Conclusion

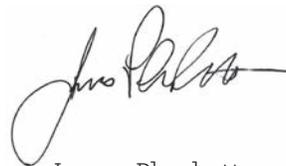
While a new joint employer standard will have significant implications in the labor-management realm, a new standard has the potential to extend beyond just the Browning-Ferris and McDonald's cases and the NLRB. Clever agency enforcement officials and plaintiffs' attorneys will undoubtedly explore any avenue to expand and apply a relaxed joint employer standard to their own particular circumstances, resulting in devastating consequences for both employers and employees. Unfortunately, discarding a doctrine that has worked consistently well for over 30 years in order to increase union organizing opportunities and plaintiffs' attorneys' prospects has become de rigeur for an agency that is supposed to be a neutral arbiter of labor disputes.

We wish to thank you for taking the time to hold this important hearing on NLRB oversight. These comments only begin to summarize the very great concern that we have with the NLRB's policy agenda. We look forward to working with you as you continue to examine these important issues. Please do not hesitate to contact us if we may be of assistance in this matter.

Sincerely,



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



James Plunkett
Director
Labor Law Policy

22 358 NLRB No. 164 (Sept. 28, 2012).

23 360 NLRB No. 117 (May 28, 2014)



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