

U.S. SENATE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP

Keeping the American Dream Alive: The Challenge to Create Jobs
Under the NLRB's New Joint Employer Standard

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I would like to thank the Chairman of this Committee, Senator David Vitter, ranking Committee member, Senator Jeanne Shaheen and the other members of the Committee for this opportunity. My testimony will address two points regarding the National Labor Relations Board's (NLRB or Board) joint-employer rule announced in *Browning-Ferris Industries of California*¹ (*BFI*) as it relates to the issues of work conditions and job creation. First, the *BFI* decision is a proper exercise of the Board's statutory authority and is consistent with Supreme Court precedent. Second, the Board's return to a more inclusive joint-employer standard creates a legal environment that will improve the quality of jobs in the small business sector by providing a voice to workers who are challenging an epidemic of low-road employment practices in large corporate settings and in small businesses where joint employment arrangements are commonplace. The *BFI* joint employer standard brings the possibility of meaningful collective bargaining relationships to workplaces where joint employer arrangements are routinely used by employers to shirk their obligation to prevent employment discrimination, comply with wage and hour standards, enforce health and safety laws and act in conformance with federal labor law, which provides collective bargaining mechanisms for resolving these workplace problems.

The viewpoint I offer today rests on my profound respect for the labor rights and procedures embodied in the National Labor Relations Act, which I have acquired over the course of fifteen years teaching labor law and researching the workplace rights of contingent workers. My view of the Board's modification of its own legal standard is also informed by my experience adjudicating labor law disputes during the six-plus years I served on the Commonwealth Employment Relations Board in Massachusetts. In this capacity, my decision making process was often guided by well-regarded NLRB precedent, policy, and the Board's sound methods of adapting labor law standards to the evolving realities of the modern workplace.

The NLRB's Joint Employer Standard in Context

The NLRB's reexamination of the joint employer doctrine in *BFI* was an appropriate response to the rapid expansion of subcontracting and precarious low-wage work. Over the course of the 21st century, this trend has irreversibly fissured and restructured the

¹ 362 NLRB No. 186 (2015).

American workplace.² The extensive subcontracting of core business functions now has deep roots in low-wage sectors of our economy due to the widespread use of temporary staffing services and the expansion of franchising relationships.

I begin my remarks focusing on the 'industrial realities' of temporary staffing agencies and franchising arrangements, two ubiquitous forms of business organization that are impacted by the NLRB's *BFI* ruling. Temping and franchising account for a disproportionate share of the economic growth that followed the Great Recession of 2008. By 2013, staffing services generated \$109 billion in sales and 2.8 million temp positions each day - a full 2.0 percent of total jobs. Profits are also high; consider that in the first quarter of 2014, True Blue (formerly Labor Ready), the largest U.S. staffing agency, reported profits of \$120 million on gross revenues of \$453 million. Franchising is equally profitable. The ten largest fast-food franchises employed over 2.25 million workers and earned more than \$7.4 billion in 2012. Shareholders earned another \$7.7 billion in buybacks and dividends. This trend should be of particular concern to members of the Congressional Small Business Committee because soaring profits and substantial job growth in franchising and temporary staffing services have advanced hand in glove with poverty-level wages, extraordinarily high rates of wage theft and widespread health and safety violations in these sectors.

Widely reported problems associated with low-wage temp work have eroded the wages, benefits and conditions of work in logistics, manufacturing, recycling and food processing.³ Compared to direct hires, temp workers deployed through staffing agencies experience a wage penalty. This is most severe among blue-collar temps who now comprise 42 percent of the temporary staffing workforce. For example, in metro Chicago, a class of permanent, long-term temp workers load and unload goods at the warehouses that service WalMart and other big box stores. These perma-temps comprise over two-thirds of the 150,000 strong warehouse workforce. Their pay averages \$9 per hour -- \$3.48 less than direct hires. Almost two-thirds of these workers fall below the federal poverty line.

A well-documented, national epidemic of wage theft by unscrupulous staffing agencies only makes matters worse. A spate of lawsuits across the nation against low-road staffing agencies and their user clients has also brought to light systemic discrimination facilitated by the secretive use of disparaging code words to unlawfully filter temporary workers by race, age, and gender.⁴ Further, OSHA complaints and protests by temp workers have unearthed major health and safety issues, causing OSHA to establish a Temporary Worker Initiative to determine, in part, when to hold staffing agencies and

² See David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE ABOUT IT*, (HARVARD UNIV. PRESS 2014).

³ See, e.g., Michael Grabell, *Temp Land: Working in the New Economy*, PRO PUBLICA, <https://www.propublica.org/series/temp-land> (last visited March 15, 2016)

⁴ See Will Evans, *When companies hire temp workers by race, black applicants lose out*, CENTER FOR INVESTIGATIVE REPORTING, <https://www.revealnews.org/article/when-companies-hire-temp-workers-by-race-black-applicants-lose-out/> (last visited June 13, 2016).

client employers jointly liable for violations that impact the temporary workforce. In these contexts, a robust joint-employer doctrine opens the door that leads to meaningful collective bargaining and litigation strategies to remedy the myriad violations of workplace law that are endemic in low-wage, subcontracted labor markets.

The workplace ills associated with franchising are exemplified by the challenges facing the 3.8 million workers who are employed in the fast-food sector. More than 75 percent of them work in franchised outlets and routinely face under-employment, poverty-inducing earnings and wage theft. Households that include a fast-food worker are four times as likely to live below the federal poverty level. The social costs of these conditions are borne by U.S. taxpayers, who shell out about \$3.8 billion per year to subsidize public benefits received by fast-food workers employed at the top-ten fast-food franchises who must supplement poverty-level wages with assistance from government welfare programs.

Small business owners are also adversely impacted by the systemic production of economic inequality associated with many franchising arrangements. Individual franchise owners face high levels of economic uncertainty and, like franchise workers, are being squeezed by multi-national franchisors that unilaterally set the terms of the franchise relationship. A growing body of evidence indicates that the non-negotiable terms of many franchise agreements dictate extensive franchisor control over day-to-day operations while placing most of business risk on the franchisee. These agreements routinely require franchisees to pay exorbitant fees for the right to operate; this not only places a downward pressure on wages, but leads to higher failure rates for franchised small business owners.⁵

The *BFI* Decision is a Return to the Traditional Joint Employer Test Endorsed by the Supreme Court

The *BFI* decision did not radically reinterpret Board precedent and it did not resurrect a dormant, outmoded legal test. The Board merely returned to the traditional joint employment standard endorsed by the U.S. Supreme Court more than fifty years ago.⁶ *BFI* maintains the basic inquiry long used to determine whether a putative joint employer “possesses sufficient control over the work of the employees to qualify as a ‘joint employer’ with [the actual employer].”⁷ Under the *BFI* decision the Board reaffirmed that a finding joint-employment is made only when a case-specific factual analysis shows that two employers “share or co-determine” the essential terms and conditions of employment.

What the NLRB’s *BFI* did was to close a longstanding loophole in the joint employer test. Relying on the joint employer test endorsed by the Supreme Court in *Boire v. Greyhound Corporation*⁸ and the influential reasoning of the Third Circuit Court of Appeals’

⁵ See Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 933-34 (1990); Catherine Rucklehaus, et al., *Who’s the Boss: Restoring Accountability in Outsourced Work* (NELP May 2014).

⁶ *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964).

⁷ *Id.* at 481.

⁸ *Boire*, 376 U.S. 473.

decision, *NLRB v. Browning-Ferris Industries of Pennsylvania*,⁹ the Board found that joint employment rests on a broader approach to the concept of control than is found in later Board rulings beginning in 1984.¹⁰ Under this broader framework, the Board can once again examine the full range of common law agency factors that can reveal whether and how an employer actually exercises legal control over the essential terms and conditions of employment. The Board no longer limits its inquiry to examining whether employer controls are exercised “directly and immediately.” Instead, it will now use the traditional, multifactor common law inquiry to determine whether an employer “affects the means or manner of employees’ work and terms of employment, either directly or through an intermediary.”¹¹ This test is straightforward, and more broadly applicable to businesses that use staffing agencies and franchising arrangements.

The Board implemented this approach in the *BFI* case and found that the user employer maintained legal control over the 240 long-term temps at its recycling facility through a host of direct and intermediated factors, all of which decisively affected the means and manner of the employees’ work and terms of employment. The user employer was found to have issued “precise directives” through staffing agency supervisors to communicate when a worker should be dismissed, where workers should be deployed, and the pace at which the work should be completed.¹²

The staffing agreement between BFI and the Leadpoint staffing agency was also found to establish BFI’s control over the workforce. The agreement gave BFI final say over who the staffing firm could hire to work at BFI’s facility, how much the staffing agency could pay the workforce, and the right of BFI to override Leadpoint supervisors’ directives to the workforce.¹³ The Board majority’s robust, fact-based inquiry into the employment relationship at BFI’s facility contrasts sharply with the limited factual assessment of the employment relationship urged by the two dissenting Board members.¹⁴

The *BFI* decision does not specifically address or apply the joint employer test to franchising arrangements. That factual determination is currently underway as part of an unfair labor practices complaint alleging that McDonalds Corporation, one of the nation’s largest franchisors, is a joint employer along with a number of its franchise outlets.¹⁵ I am not in a position to second-guess the outcome of this fact-intensive inquiry.

However, this much is clear: Over the course of the last decade, tightly controlled business format franchisee arrangements have expanded significantly to ensure that major

⁹ 691 F.2 1117 (3rd Cir. 1982).

¹⁰ *Browning-Ferris Industries*, 362 NLRB No. 186, slip op. at *16-18.

¹¹ *Id.*, slip op. at *21.

¹² *Id.*

¹³ *Browning-Ferris Industries*, 362 NLRB No. 186, slip op. at *24

¹⁴ *Id.*, slip op. at *25 (Dissent of Members Miscimarra and Johnson).

¹⁵ *McDonald’s USA, LLC, a Joint Employer, et al.*, 02-CA-093893, et al.; 363 NLRB No. 92 (New York, NY, January 8, 2016) (consolidating 13 complaints and 78 charges against McDonald’s USA. LLC).

franchisors can maintain uniformity of brand, product and operations essential to their business models. Franchisors in the fast-food industry have also implemented sophisticated computer-driven management systems to ensure brand maintenance and protection. But separate and apart from terms and mechanisms that legitimately allow for brand and product control by the franchisor, other terms establish franchisor control over franchisee workers' terms and conditions of employment. These terms may extend franchisor control over employee terms and conditions of work through training, obligatory operating manuals, and regular communications with franchisees.¹⁶

Those systems and the terms of franchise agreements, that allow for franchisor control over work conditions are often enforced through unannounced, on-site visits by franchisor representatives and allow franchisors to unilaterally set the terms for the number of workers required to do the job, the manner and speed of the performance of every work task, the equipment and supplies used on the job, the manner in which equipment is used, as well as employee grooming and uniform standards. Every one of these control mechanisms dictated by the franchisor may affect the essential terms and conditions of employment.

The NLRB's *BFI* Decision Presents a Workable Joint Employment Test That Does Not Create Uncertainty for Small Business

In the context of the economic realities of twenty-first century subcontracting that I have outlined, the *BFI* joint employer standard does not present an unworkable test and it should not be a source of legal uncertainty or anxiety for the small business community. The *BFI* ruling and advice provided by the NLRB General Counsel provide ample, clear guidance for small business owners, their human resource officers and legal counsel. In fact, as recently as April of last year, the NLRB's Office of the General Counsel issued a detailed ten-page advice memorandum that applied the *BFI* joint employer test in a case involving, *Nutritionality, Inc.*, a major fast-food franchisor in Chicago.¹⁷

The General Counsel's advice memorandum explained that the franchisor, *Nutritionality, Inc.*, was not a joint employer. The General Counsel reached this legal conclusion even though the franchisor exercised extensive control over its franchisees' operations to ensure standardized products and customer experience. However, the General Counsel found that the controls *Nutritionality* exercised through its franchise agreement and the directives it issued related to the image that the franchisor wished to convey and did not extend to any control over the terms and conditions of the employees at the franchisee's restaurant.¹⁸ The memorandum concluded that the franchisor,

¹⁶ See Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 933-34 (1990).

¹⁷ Advice Memorandum from Barry J. Kearney, Assoc. Gen Counsel, Div. of Advice, Office of the Gen. Counsel NLRB to Peter Sung Ohr, Reg. Dir., Region 13 (April 28, 2015), <https://www.nlr.gov/cases-decisions/advice-memos>.

¹⁸ *Id.*

Nutritionality, was not a joint-employer and, therefore, not liable for unfair labor practices allegedly committed by its affiliate. The NLRB's advice memorandum is yet another indicator of the fact that, going forward, the Board's joint employment test does not predetermine the outcome of any fact-intensive, case-by-case inquiry into joint employment.

It should also be noted that the *BFI* joint employer standard has not in any way altered the legal status of small business owners that operate a sizeable portion of franchises. Under the *BFI* joint-employer standard, a franchisee owner maintains the same employer status and legal obligations that flow from it as it held under the Board's previous test. What has changed is the legal status of certain franchisors that had no employer liability under the former test even when the terms of the franchise relationship gave the franchisor extensive control over terms and conditions of employment. In any franchising scenario where joint-employment is established the burden of responsibility for the terms and conditions of franchise employees would be equally shouldered by the franchise owner and the franchisor. Indeed, it makes legal sense for a corporation to be jointly responsible for low wages and lousy working conditions when it dictates to the franchisee the ratio of staff to customers on an hourly basis or the number of minutes that employees ought to spend on specific task.

A finding joint employer status in such a franchising arrangement might actually prove beneficial to franchisee owners. Joint employment would bring the franchisor to the bargaining table along with the franchisee. This would place the soaring profits being made at the top of the franchise chain on the table as a source of wage hikes for the underpaid franchise workforce. This could very well provide relief for beleaguered franchise owners whose small business is forced to operate with costly levels of workforce turnover¹⁹ and under razor thin margins imposed by the franchisor business model.

With regard to temping: the BFI decision does not present any uncertainty for large or small employers that use a temporary staffing agency workforce to perform essential work of their business. In these situations, the NLRB has made it clear that that a user employer who contracts with a temporary staffing agency is potentially a joint employer of the temp workers that are deployed to the user firm's place of work. The potential for a finding of joint employment is built into the structure of temporary staffing arrangements and contractual agreements. Unlike franchising, the temporary staffing industry business model is based on codetermination of the terms and conditions of employment. Typically, the user firm contracts with the staffing agency and retains extensive direct and indirect control over the means and manner by which the work is carried out in its own facility. The temporary staffing agency earns a substantial profit for handling all payroll issues,

¹⁹ High turnover rates hurt low-wage companies in general, costing employers \$4,700 each time a worker leaves and is replaced in the high-turnover sector. Robert Pollin & Jeannette Wicks-Lim, *A Fifteen Dollar Minimum Wage: How Fast Food Industry Could Adjust Without Shedding Jobs*, Political Economy Research Institute Working Paper, No. 373 (Jan. 2015), http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_351-400/WP373.pdf.

providing worker's compensation insurance and coordinating the hiring of the workforce. BFI makes it clear that even when the temporary staffing agency deploys supervisors to the user employer's worksite along with the temp workers, the staffing agency supervisors are obliged to follow the directives issued by the user firm's managerial and supervisory staff.²⁰

Over the last few years, we have witnessed large numbers of under-employed, low-wage temporary workers and franchised fast-food workers demand their fundamental labor rights. The NLRB's joint employment test now allows for these workers to enter into meaningful collective bargaining relationships in workplaces where temporary staffing arrangements and franchising result in two employers sharing or codetermining the conditions of work. It would be virtually impossible for the temporary workforce at BFI to meaningfully bargain over a wage increase or to discuss a safety issue when BFI is not at the bargaining table to address these mandatory subjects of bargaining. Similarly, there can be no meaningful collective bargaining when a franchisor exercises palpable, albeit indirect control, over workplace conditions that are at the core of the obligation to engage in good faith bargaining if that franchisor is not legally obligated to sit at the bargaining table with workers that choose to unionize.

Conclusion

Given the NLRB's obligation to apply labor law to changing economic realities,²¹ the Board acted well within the authority granted to it by Congress when it revised its joint employer standard in *BFI*. Nothing in the original statutory text of the NLRA, the Taft-Hartley amendments or in well-reasoned precedent prevents the Board from returning to the traditional joint employer test that predominated until 1980, when a rigid and narrower conception of joint-employment gained sway in Board proceedings. It is my view that the Board's revival of the traditional, joint-employer standard affords the flexibility employers seek and creates a legal framework for fair treatment and decent wages that temps and franchise workers demand and deserve. Absent the NLRB's revised joint employment test, our nation runs the risk of labor law becoming irrelevant in the much of the low-wage economy, where collective bargaining is sorely needed to address the extreme levels of inequality and exploitation currently experienced by millions of American workers.

Thank you for considering my comments.

²⁰ *Browning-Ferris Industries*, 362 NLRB No. 186, slip op. at *22-24; See also Harris Freeman & George Gonos, *Taming the Employment Sharks: the Case for Regulating Profit-Driven Labor Market Intermediaries in High Velocity Labor Markets*, 13 EMPL. RTS. & EMPLOY. POL'Y J. 285 (2009).

²¹ See *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975).