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Congress of the United States
U.S. House of Representatives
Committee on Small Business

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To: Members, Subcommittee on Investigations, Oversight, and Regulations
From: Committee Staff
Date: March 14, 2016
Re: Hearing: "Risky Business: Effects of New Joint Employer Standards for Small Firms"

On Thursday, March 17, 2016 at 10:00 a.m., the Subcommittee on Investigations, Oversight, and Regulations will meet in Room 2360 of the Rayburn House Office Building for the purpose of examining the changing federal standards for determining whether two employers are joint employers. In 2015, the National Labor Relations Board (NLRB) announced a revised standard in *Browning-Ferris Industries of California, Inc*. (*Browning-Ferris*)[1] for determining whether two separate businesses are joint employers under the National Labor Relations Act (NLRA or Act).[2] Since the decision in the *Browning-Ferris* case was rendered, the Department of Labor (DOL) has issued guidance on joint employment under two other labor statutes.[3] The hearing will examine the consequences of these joint employer standards for small businesses.

I. Overview of the NLRA and NLRB

The purpose of the NLRA is to eliminate labor disputes that burden or obstruct the free flow of commerce.[4] The Act does so by providing employees the right to organize, collectively bargain, and engage in related activities and the right to refrain from those activities.[5] It also defines what are considered to be unfair labor practices by employers and by labor organizations[6] and provides processes for resolving disputes regarding collective bargaining and unfair labor practices.[7] The NLRA generally applies to private-sector employers involved in interstate commerce with some exceptions,[8] and most private-sector employees are covered by the Act.[9]

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[1] 362 NLRB No. 186, slip op. (Aug. 27, 2015).
[2] 29 U.S.C. §§ 151-169.
[3] DOL, WAGE AND HOUR DIVISION, ADMINISTRATOR'S INTERPRETATION NO. 2016-1 [hereinafter DOL WHD Guidance], *available at* http://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf.
[4] 29 U.S.C. § 151.
[5] *Id*. § 157. These are colloquially referred to as "Section 7 Rights." NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 2 (1997) [hereinafter NLRB Basic Guide], *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf.
[6] 29 U.S.C. §§ 158, 160.
[7] 29 U.S.C. §§ 159(b)-(e), 160.
[8] *Id*. § 152(2). The definition of "employer" under the Act does not include: the United States; any wholly-owned government corporation; any Federal Reserve Bank; any state or political subdivision thereof; or any employer subject to the Railway Labor Act. *Id*. In its discretion, the NLRB acts only in cases involving employers that have substantial effect on commerce. *See* 29 U.S.C. § 164(c); NLRB Basic Guide, *supra* note 5, at 33. The NLRB has

The NLRA is administered and enforced by the NLRB, which consists of a five-member Board (Board), a General Counsel, and regional offices.[10] The NLRB enforces the NLRA by conducting and certifying the results of representation elections and preventing unfair labor practices.[11] The General Counsel, who supervises the regional offices, has independent authority from the Board and is responsible for investigating charges of unfair labor practices, issuing complaints, and prosecuting cases.[12]

NLRB administrative law judges preside over unfair labor practice cases, and Regional Directors, acting on behalf of the Board, decide representation cases.[13] The Board decides unfair labor practices cases and representation election questions that come from regional offices.[14] Although the Board has statutory rulemaking authority,[15] it generally sets policy through the adjudication of cases.[16]

II. The NLRB's Joint Employer Standard

The NLRA defines an "employer" as "any person acting as an agent of an employer, directly or indirectly"[17] but provides no definition of "joint employer." Consequently, the NLRB has developed its "joint employer" standard through case decisions. Before the issuance of the *Browning-Ferris* decision, the standard the NLRB had used to determine whether two independent businesses were joint employers had been in effect since 1984.

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established "jurisdictional standards" for exercising its power based upon the annual amount of business done by an employer or the annual amount of its sales or purchases. *Id*. at 33-34. The standards are different for different kinds of businesses and are expressed in terms of total dollar volume of business. *Id*. at 34. For example, under its "jurisdictional standards," retailers with a "gross annual volume of business" of $500,000 or more fall under the NLRB's jurisdiction. https://www.nlrb.gov/rights-we-protect/jurisdictional-standards.

[9] 29 U.S.C. § 152(3). The definition of "employee" does not include: agricultural laborers; domestic servants; any individual employed by his parent or spouse; independent contractors; supervisors; individuals employed by any employer subject to the Railway Labor Act; or government employees. *Id*.

[10] *Id*. § 153. Board members are appointed by the President with advice and consent of the Senate for a five-year term, and the President designates one member as Chairman of the Board. *Id*. § 153(a). If an individual is appointed to fill a vacancy, he or she serves only the remainder of the unexpired term. *Id*. The General Counsel serves for a term of four years and is also appointed by the President with the advice and consent of the Senate. *Id*. § 153(d).

[11] NLRB Basic Guide, *supra* note 5, at 33. A "petition" must be filed with the appropriate regional office to request an election, and a "charge" must be filed with the appropriate regional office to initiate an unfair labor practice case. *Id*. at 36-37.

[12] 29 U.S.C. § 153(d).

[13] https://www.nlrb.gov/resources/nlrb-process.

[14] NLRB Basic Guide, *supra* note 5, at 1. A detailed description of the procedures in representation and unfair labor practices is beyond the scope of this memorandum.

[15] 29 U.S.C. § 156.

[16] https://www.nlrb.gov/who-we-are/board.

[17] 29 U.S.C. § 152(2).

A. The Joint Employer Standard Before Browning-Ferris

In two cases decided that year, *Laerco Transportation*, 269 N.L.R.B. 324 (1984) (*Laerco*), and *TLI, Inc*., 271 N.L.R.B. 798 (1984) (*TLI*), the NLRB expressly adopted the joint employer standard accepted by the United States Court of Appeals for the Third Circuit:

> The basis of the [joint employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment.[18]

In *Laerco* and *TLI*, the Board provided additional clarification by stating that to establish a joint employer relationship "there must be a showing that the employer *meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction*."[19] Furthermore, in *TLI*, the Board found that "limited and routine" supervision and direction "[did] not constitute sufficient control to support a joint employer finding."[20] Thus, as the Board later stated in a 2002 case, the crucial element of its analysis is whether the potential joint employer had "*direct and immediate*" control over employment matters.[21]

B. The New Joint Employer Standard

In 2015, the Board issued a fractured opinion in the *Browning-Ferris* case which revised the joint employer standard. The case involved BFI Newby Island Recyclery (BFI), a recycling facility, which had a contract with Leadpoint Business Services (Leadpoint), a supplier firm, which provided workers to BFI.[22] The question was whether BFI and Leadpoint were joint employers in a union representation case. The Board granted the request for review of the decision and direction of election issued by the Regional Director who had found that Leadpoint was the sole employer of the petitioned-for employees.[23]

In considering the case, the Board revised the NLRB's joint employer standard. The Board reaffirmed that two separate businesses may be joint employers "if they share or codetermine those matters governing the essential terms and conditions of employment."[24] However, the three-member majority abandoned its 30 year old test, no longer requiring that a joint employer act on its ability to control. Instead, the majority stated that merely possessing

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[18] *NLRB v. Browning-Ferris Indus. of Pa.*, 691 F. 2d 1117, 1123 (3d Cir. 1982).
[19] *Laerco*, 269 N.L.R.B. at 325; *TLI*, 271 N.L.R.B. at 798 (emphasis added).
[20] *TLI*, 271 N.L.R.B. at 799.
[21] *Airborne Freight Co.*, 338 N.L.R.B. 597, 597 n.1 (2002) (emphasis added).
[22] *Browning-Ferris*, 362 NLRB No. 186, slip op. at 2-3.
[23] *Id*. at 1.
[24] *Id*. at 15.

unexercised control was sufficient to find that two businesses were joint employers. This expressly overruled previous Board decisions including *Laerco* and *TLI*.[25]

The Board applied the restated test in the case and concluded that BFI and Leadpoint were joint employers. [26] The two Board members that dissented in *Browning-Ferris* described the majority's new test as one that "removes all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint employer finding."[27] Furthermore, they stated that the test is a "major departure from precedent" that "promises to [a]ffect a sea change in labor relations and business relationships."[28]

III. The DOL's Guidance on Joint Employment

In the wake of the NLRB's decision in *Browning-Ferris*, the DOL issued Administrator's Interpretation No. 2016-1 (AI No. 2016-1) to explain when two separate employers could be deemed joint employers and found jointly liable for the purposes of the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA).[29] The FLSA establishes minimum wage and overtime standards for most, but not all, private and public sector employees. The MSAWPA establishes employer standards related to wages, transportation, housing, disclosures and recordkeeping for migrant and seasonal agricultural workers.

The DOL's existing regulations describe when an employee is considered to be jointly employed by two or more employers for the purposes of the FLSA and MSAWPA.[30] Under FLSA regulations, joint employment exists if "employment by one employer is not completely disassociated from employment by the other employer(s)."[31] A joint employment relationship will be found when an employee works simultaneously or at different times during the workweek for two employers, in three situations: 1) when an employee's services are shared, such as an interchange employee; 2) when one employer is acting directly or indirectly in the interest of the employer in relation to the employee; and 3) when employers are not completely disassociated and one employer is under the common control or is controlled by the employer.[32] The MSAWPA regulations regarding joint employment reference the FLSA regulations, and provide factors to consider in determining whether "putative employers share responsibility" and therefore are not "completed disassociated with respect to the employment."[33]

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[25] *Id*. at 15-16. "[W]e will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner." *Id*. at 15.
[26] *Id*. at 18.
[27] *Id*. at 25.
[28] *Id*. at 26.
[29] 29 U.S.C. §§ 201-19; 29 U.S.C. §§ 1801-72.
[30] 29 C.F.R. § 791.2; 29 C.F.R. § 500.20(h)(5).
[31] *Id*. § 791.2(a).
[32] *Id*. § 791.2(b)(1-3).
[33] *Id*. § 500.20(h)(5).

AI No. 2016-1 provides new information on how DOL will analyze whether there is a joint employment relationship under the FLSA and MSAWPA. The guidance, for the first time, distinguishes between two different types of joint employment – horizontal joint employment and vertical joint employment – and describes how these relationships will be analyzed in FLSA and MSAWPA cases.[34]

Horizontal joint employment involves two or more employers that "each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee."[35] An example of horizontal joint employment could occur when an employee is separately employed by "separate restaurants that share economic ties and have the same managers controlling both restaurants."[36] Vertical joint employment may exist when an employee of one employer is also economically dependent on another employer.[37] According to the guidance, examples of relationships that would be subject to vertical joint employment analysis are a construction worker who is employed by a subcontractor that is doing work for a general contractor, and a farmworker who is employed by a contractor that is doing work for a grower.[38]

The guidance goes on to provide examples of horizontal joint employment and a list of factors that may be considered to analyze the degree of association and shared control between horizontal employers.[39] It also provides examples of vertical joint employment and describes how seven "economic realities" factors found in MSAWPA regulations should be used to assess vertical joint employment for the purposes of the FLSA as well.[40]

The guidance is a significant departure from existing regulations. It lays out two kinds of joint employment for the first time and states that factors from MSAWPA regulations should be applied in the FLSA context. Because the DOL did not utilize the notice and comment rulemaking process under the Administrative Procedure Act to change its regulations, the agency's actions could be challenged.

IV. Consequences for Small Businesses

While only the parties to the *Browning-Ferris* case are directly affected by that decision, the new joint employer standard has ramifications for other companies. The ambiguous nature of the standard makes it difficult to ascertain whether a current or prospective business relationship puts them at risk of being deemed a joint employer. Companies in a variety of business to business relationships – user-supplier, contractor-subcontractor, franchisor-franchisee, and others – may find it necessary to seek the advice of lawyers to determine whether

[34] DOL WHD Guidance, *supra* note 3, 4-15; *see also* Tammy McCutcheon and Michael J. Lotito, Littler Mendelson P.C., *DOL Issues Guidance on Joint Employment under FLSA* (Jan. 20, 2016), *available at* https://www.littler.com/publication-press/publication/dol-issues-guidance-joint-employment-under-flsa.
[35] *Id*. at 5.
[36] *Id*.
[37] *Id*. at 5.
[38] *Id*.
[39] *Id*. at 6-9.
[40] *Id*. at 9-15.

there is a risk that they could be found to be joint employers under the NLRA based on the standard announced in the *Browning-Ferris* decision.

Under the new NLRB joint employer standard, companies could be more easily found liable for the unfair labor practices of their contractors and suppliers. To avoid potential liability for the unfair labor practices or being required to engage in collective bargaining negotiations with other companies, companies in business to business relationships could change the amount of control they are asserting or possibly terminate certain business relationships and contractual agreements.

Similarly, the DOL's guidance also makes it more complicated for separate companies in business to business relationships to assess whether they could be found to be joint employers for the purposes of the FLSA or MSAWPA. This could have significant ramifications for employers, such as liability for unpaid overtime pay. The DOL is quite clear that is believes that it easier to improve compliance with these statutes by putting pressure on larger businesses;[41] however, it is foreseeable and likely that smaller businesses with fewer resources and expertise will be negatively affected as businesses, large and small, evaluate their business relationships to determine whether or not they could be deemed joint employers under the FLSA or MSAWPA.

Consequently, certain business models may no longer be as attractive given the labor law ramifications of being in a business to business relationship. For example, instead of subcontracting work to a small business, a large business may find it easier and less risky to bring that work in-house so that it can completely and fully control employment matters. This could negatively affect a wide variety of small businesses that have chosen to set up their operations as suppliers, subcontractors, and franchisees and may lead to fewer small businesses and increased consolidation in certain industries.

V. Conclusion

The NLRB's recent decision and DOL's guidance on joint employers have injected uncertainty into business to business relationships. The new standards do not provide bright lines but rather muddy the assessment of whether two separate businesses are joint employers. This makes it more complicated for small businesses, which have fewer resources and less expertise, to understand whether they are at risk of being deemed a joint employer. Ultimately, small businesses are likely to be harmed as businesses, large and small, reevaluate the structure and need for certain business to business relationships and make changes or eliminate those relationships completely.

[41] "Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and to hold all responsible parties accountable for their legal obligations." DOL WHD Guidance, *supra* note 3, at 2.