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Subcommittee on Investigations, Oversight and Regulations**

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“Risky Business: Effects of New Joint Employer Standards for Small Firms”

I. INTRODUCTION AND EXECUTIVE SUMMARY

On August 27, 2015, the National Labor Relations Board (“Board” or “NLRB”) announced a controversial new legal standard for determining if a business is the “joint employer” of individuals employed by another business. The decision, *Browning-Ferris Industries, Inc.* (“*BFI*”) departed from decades of established precedent and established a test of sweeping scope that could eventually redefine the employer-employee relationship across all areas of business and industry in the United States.²

The *BFI* majority premised its decision on a claimed need to return the Board’s joint-employer standard to the state in which it existed before the Board supposedly narrowed the test in recent decades. The history of the Board’s joint-employer precedent suggests this premise is inaccurate at best, and misleading at worst. The new standard promises to go *much* further in practice than prior Board precedent by dramatically increasing the number of entities who will face joint-employer liability.

Under the new standard, the Board will consider two or more businesses to be joint employers if: (1) both entities are employers under the common law; and (2) both employers share or codetermine those matters governing the “essential terms and conditions of employment.” This standard, on its face, is essentially a restatement of earlier Board precedent. However, *BFI* goes much further:

We will no longer require that a joint employer not only *possess* the authority to control employee’s terms and conditions of employment, but also *exercise* that authority . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer’s control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint employer status.³

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² 362 NLRB 186, slip op. (August 27, 2015).

³ *Id.*, at 2.

In other words: (i) a company's retention of an unexercised right to control another company's employees, or (ii) a company's exercise of mere indirect control on the employment terms of those employees, are now both relevant and potentially dispositive of joint-employer status. This leads to an obvious question: if a putative joint employer never actually exercises direct control over the employees of another company, how much retained or indirect control will be sufficient to establish joint-employer status?

The murky guidance provided by the Board's majority opinion makes this question virtually impossible to answer. And the stakes are high: the consequences of a finding that a business and its subcontractor are joint employers could be significant, including: (i) a requirement that the customer participate in collective bargaining with the union that represents (or seeks to represent) the subcontractor's employees; (ii) a finding that picketing directed at the customer is no longer illegal secondary activity under federal labor law; (iii) shared liability for unfair labor practices committed against the subcontractor's employees; and (iv) potential limitation of the customer's business flexibility.

All of these risks are now likewise inherent in the dealings between franchisor and franchisee; temporary staffing agency and end-user of temporary labor; general contractor and subcontractors, and perhaps even parent and subsidiary, particularly in the case of private equity. The test articulated in *BFI* is wide enough to encompass these relationships, many of which have never before been subjected to joint-employer liability under the Act.

Those on the side of the Board majority claim the new joint-employer test is a good thing, and that it is designed to combat the practice of "unscrupulous" employers who take advantage of the growing contingent workforce. But the Board's new test includes no exception for the "scrupulous" employer – whatever that might mean. It sweeps with a broad brush across all industries and virtually all types of business relationships, ensnaring arrangements that are perfectly legal and in fact vital to the growth and success of small business in this country.

Ultimately, the uncertainty over how to deal with the Board's new standard poses a grave risk to small business owners. Some employers may conclude that if they are going to be held responsible for the liabilities of their suppliers, subcontractors or franchisees, they must exert more control over their day-to-day operations so that they can be more aware of, and seek to mitigate, these liabilities. Franchisors would become responsible for matters like who to hire, when to fire, and how much to pay. Their administrative costs would skyrocket. On the other hand, the small business owner franchisee would be relegated to a middle manager, no longer in control of their ultimate business success. Such effects could cause both sides to reconsider their participation in franchising altogether.

Other employers may decide to avoid joint-employer liability by reducing their level of control over business partners. The potential unintended consequences of this course are too numerous to list, but at a minimum would include: an increase in incidents of workplace violence and harassment, if the putative employer relinquishes a say in who can work on its jobsite; an increase in on-the-job accidents, if the putative employer decides to no longer require subcontractors to comply with its own safety rules, or refuses to supply them with safety equipment; and a degrading of the integrity of a franchised brand, if the franchisor/putative employer decreases or discontinues its oversight over matters such as product line and preparation, customer experience and satisfaction, and store or property appearance. None of these outcomes would be beneficial to American business.

Ironically, the Board may wind up discouraging the very behaviors it claims its new policy is intended to foster in labor-management relations. Unions, human rights groups and others in the employment community have challenged companies to implement responsible contractor policies and codes of conduct not only for their own employees, but for those of their suppliers and business partners. Browning-Ferris discourages employers from doing just that. If, for example, a general contractor were to require that its subcontractors pay a living wage, comply with federal anti-discrimination and overtime regulations, or implement minimum safety procedures, it may be sealing its status as a joint employer under the Board's new standard.

The Board's previous joint-employer standard worked well for over thirty years. It provided management and labor alike with predictability in terms of who is the employer of any given group of employees, knowledge that is vital to stable collective bargaining and effective labor relations. The new standard shatters that stability and throws both sides into new and unprecedented territory. Congress should intervene and return the standard to the well-understood rule that existed prior to *BFI*.

II ANALYSIS

A. The National Labor Relations Act (and The Common Law) Limits The Board's Authority to Define Who is an "Employer" and Who is an "Employee"

The history underlying passage of the Taft-Hartley amendments to the National Labor Relations Act (the "Act") make clear that Congress has restricted the Board to well-established principles of common law agency in determining who is an employer and who is an employee under the Act, and that those principles do not support the Board's sweeping decision in *BFI*. Prior to Taft-Hartley, the U.S. Supreme Court had held that the Act's definition of "employee" should include independent contractors. The Court based this holding on the belief that anyone having an "economic relationship" with a firm should be deemed its "employee," and that the employment relationship should be determined based on "economic facts rather than technically and exclusively by previously established legal classifications."⁴

In response to the Supreme Court's decision in *Hearst*, Congress amended the Act to expressly exclude "independent contractors" from the definition of "employee."⁵ Congress also revised the definition of "employer," limiting the definition to those who are "acting as an *agent* of an employer."⁶ Taft-Hartley's legislative history illustrates that Congress' intention in making these changes was to limit the employer-employee concept to instances in which the putative employer exercised some direct form of control over the putative employee:

[The concept of "employee"], according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board,

⁴ *NLRB v. Hearst Publications*, 322 U.S. 111, 128-28 (1944).

⁵ 29 U.S.C. §152(3).

⁶ 29 U.S.C. §152(2) (emphasis supplied).

means someone who works for another for hire . . . [and who] work for wages or salaries under *direct supervision*.⁷

Thus, Taft-Hartley reflects Congress' rejection of more expansive and policy-based notions like the "economic realities" philosophy in favor of the principles of common-law agency. Those principles have long been recognized by the courts as requiring much more than the indirect or retained but unexercised control espoused by the majority in *BFI*. For instance, the Supreme Court has held for over 100 years that "under the common law loaned-servant doctrine *immediate control and supervision* is critical in determining for whom the servants are performing services."⁸ More recently judicial decisions have repeatedly emphasized that the common law test for employer status requires evidence of direct and immediate control.⁹

The lesson to be drawn from this history is simple: (1) the Board must use traditional common law principles when deciding who is an "employer" and who is an "employee" under the Act, and (2) those principles have always been understood by interpreting courts as requiring more than mere indirect, or reserved but unexercised, control by the putative employer over the day-to-day work of the putative employees.

B. The Board's Prior Joint-Employer Standard Was Consistent With The Common Law Concepts Enshrined in The Act

Understanding the history of the Taft-Hartley amendments and the manner in which courts have long applied common law agency principles undermines the *BFI* majority's claim that its newly announced test is a "return" to the common law standard supposedly abandoned by more recent Board precedent. The *BFI* majority traces the "core" of the Board's joint-employer jurisprudence to a 1965 decision, *Greyhound Corp.*¹⁰ Ironically, the standard applied in that case, although not clearly articulated, was consistent with the common law and with the Board's more recent joint-employer precedent.

⁷ H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947)(emphasis supplied); *see also id.* at 11 (revised definition of "employer" "makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and unions"); and *id.* at 68 ("before the employer can be held responsible for a wrong . . . the man who does the wrong must be specifically an agent or come within the technical definition of an agent").

⁸ *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963), citing *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909).

⁹ *See, e.g., Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)(because Copyright Act of 1976 does not define "employer" or "employee," Court must look to common law to determine whether work of artist hired by petitioner was "work for hire" under statute; common law focuses on "the hiring party's right to control the manner and means by which the product is accomplished"); *Gulino v. N.Y. State Education Department*, 460 F.3d 361, 379 (2d Cir. 2006)(interpreting *Reid* in Title VII case as "countenanc[ing] a relationship where the level of control is *direct, obvious and concrete, not merely indirect or abstract*")(emphasis supplied); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009)(Wal-Mart not joint employer of the employees of its suppliers where it had no right to "*immediate level* of day-to-day control")(emphasis supplied); *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014)(franchisor not liable for franchisee's harassment of its employee under California Fair Employment and Housing Act, because traditional agency principles "require[] a *comprehensive and immediate level of day-to-day authority* over matters such as hiring, firing, direction, supervision, and discipline of the employee")(emphasis supplied).

¹⁰ 153 NLRB 1488 (1965).

In *Greyhound Corp.*, the Board considered whether Greyhound was a joint employer of janitors and maids provided by an outside maintenance company. The Board found joint-employer status because Greyhound and the maintenance company “share[d], or codetermine[d], those matters governing essential terms and conditions of employment” and because Greyhound “possessed sufficient control over the work of the employees” to qualify as a joint employer.¹¹ Specifically, the Board found it probative that Greyhound provided the janitors with detailed daily and weekly instructions, set their pay rates and retained the right to recapture profits if employees were hired below these rates, and mandated the maintenance company follow all of its “suggestions.” Thus, the evidence established that Greyhound directly controlled the wages earned by the maintenance company’s employees.

In the years following the *Greyhound* decision, the Board continued to utilize, more or less, the “share or codetermine” rationale for determining joint-employer status. While these decisions were not always clear in terms of the precise legal test employed, the underlying facts and the Board’s interpretation of those facts reflect that it would typically require – even in the cases the *BFI* majority cites as support for its new standard – that to be probative of joint-employer status, reserved control must be virtually absolute, and exercised control must be meaningful, and not merely indirect or tangential.

1. The Board Would Not Find Joint-Employer Status Based on Retained Control Over Routine or Minor Matters

In *Mobil Oil Corp.*, the Board looked to the parties’ actual practice in finding an oil platform operator the joint employer of workers supplied by a contractor.¹² The Board considered the fact that the contractor’s lead men were merely “conduits” between the operator and the laborers, and the contractors could not give their laborers any direction without “being given the say-so” of the operator. The operator often bypassed the lead men altogether and gave direct work instruction to the contract laborers. The operator also: regularly interviewed potential laborers and made hiring decisions; determined the classifications of those hired; prepared and posted work schedules; authorized overtime; approved promotions and vacations, and verified time slips. In view of the operator’s actual exercise of direct control over its contract laborers, the Board found joint-employer status.

In *Ref-Chem Co.*, the Board found that a company engaged in the manufacture, sale, and distribution of petrochemical products was the joint employer of insulation maintenance service technicians supplied by a corporate contractor.¹³ Record evidence established the manufacturing company had a practice of approving prospective maintenance service technicians’ applications, determining the number of employees needed, and deciding who (if anyone) would be permitted to work overtime. In addition, the manufacturing company maintained “virtually complete control” over the maintenance service technicians as reflected in the day-to-day operations. In fact, the contractor had no authority to exercise discretion in the manner its employees’ work was carried out under the contract. All work was performed on the manufacturing company’s premises with its own equipment and machinery, and the maintenance service technicians’

¹¹ *Id.*

¹² 219 NLRB 511 (1975). Interestingly, the Board claimed it “did not know” whether the operator was the joint employer of a different group of employees because “no evidence was introduced regarding the manner in which [this other services contract] was actually implemented.”

¹³ 169 NLRB 376 (1968).

supervisor could not undertake any project without receiving a work order and specifications from the manufacturing company's central maintenance. The Board also found it probative that the manufacturing company owned nearly 50% of the contracting company's stock. As a result of these close financial ties and the "complete control" exercised by the manufacturing company, the NLRB found joint-employer status.

In another post-*Greyhound* case, *Harvey Aluminum, Inc.*, the Board determined that a plant owner was the joint employer of the employees of the plant operator.¹⁴ The plant owner retained (and seemingly utilized) sufficient control over virtually every element of operation. In addition, it was the sole business of the plant operator to operate the plant in question, meaning that the operating company's only obligation was to service and satisfy the plant owner.

In other instances, the Board considered the potential "power" of retained control by the putative joint employer. For example, in *Jewel Tea Co., Inc.*, the Board determined that a corporate licensor was the joint employer of all individuals employed at various departments in two retail stores—some of which were operated by the licensor and some of which were operated by separate employers under a license agreement.¹⁵ The Board noted that the fact that "the licensor has not [necessarily] exercised such power [retained in a contract] is not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control." However, the licensor retained virtually complete control over all elements of the licensees' work. The corporate licensor had the authority to approve all employees and had the automatic right to terminate the agreement; meanwhile, the licensee was required to discharge employees "immediately" upon the licensor's request and to conform to all store policies regarding wages, hours, and other terms and conditions (including paid vacations and holidays) of employment. The record did not establish whether the licensor exercised all of these retained controls, but the facts indicate the licensees *did* conform to the licensor's standards.

The Board also addressed the potential relevance of retained control in *Value Village*.¹⁶ In that case, the Board found that a discount store was the joint employer of the employees working in the shoe department, which was operated by a licensee. The discount store retained total control over the shoe department and could "significantly affect the profits of its operators through its control over the allocation and reduction of floor space, the amount of overhead expense which is shared on a pro rata basis, and over advertising, pricing policies, and items of merchandise to be sold." As the Board noted, "[s]ince the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record." However, the Board also reached this decision in consideration of the "special nature of discount stores."

Thus, following *Greyhound* the Board sometimes, but not always, considered retained control to be probative of joint-employer status. However, the cases indicate that retained control over one or two terms and conditions of employment was insufficient to find joint-employer status. The few cases in which the Board found joint-employer status on the basis of

¹⁴ 147 NLRB 1287 (1964).

¹⁵ 162 NLRB 508 (1966).

¹⁶ 161 NLRB 603 (1966).

retained control only were situations in which a party retained *virtually complete control* over every term and condition of employment.

2. The Board Would Not Find Joint-Employer Status Based on The Exercise of Indirect Control Alone

In *Sun-Maid Growers*, the Board found joint-employer status when contract electrical workers were assigned work by and supervised directly by Sun-Maid supervisors instead of by a supervisor from their employer-contracting company.¹⁷ While the Board noted that a putative employer need not “hover over the maintenance electricians, directing each turn of their screwdrivers and each connection that they made,” the control exercised by Sun-Maid in this case was nonetheless significant and only loosely defined as “indirect.” Similarly, in *Hamburg Industries, Inc.*, a company was considered a joint employer because it “constantly check[ed] the performance of the [contract] workers and the quality of the work.”¹⁸ It is difficult to construe “constant” supervision as anything other than direct control.

In *Clayton B. Metcalf*, “the Board found significant indicia of control where a putative employer [a mine operator], although it ‘did not exercise direct supervisory authority over’ the workers [subcontractors] at issue, nonetheless” held “day-to-day responsibility for the overall operations” of the worksite and gave the subcontractors assignments in addition to those defined in the contract.¹⁹ In other words, the Board did not appear to consider indirect supervisory control sufficient and instead looked to other indicia of control to find joint-employer status.

Other cases that addressed the potential probative value of indirect control also included evidence of direct control as well. For example, in *Floyd Epperson*, the Board considered the fact that a putative joint employer had indirect control over drivers’ wages *and* direct supervisory control over the drivers’ assignments.²⁰

As these cases make clear, the Board has no established history of finding joint-employer status solely on the basis of indirect control. Its post-*Greyhound* decisions were largely faithful to common law agency principles in that they typically required some evidence of direct control and did not find retained control to be probative of joint-employer status unless it was *virtually absolute*.

3. The Board Has Never “Narrowed” The *Greyhound* Standard

It is clear from these decisions the Board never espoused a “traditional” joint-employer test that is anything close to the sweeping test adopted in *BFI*. A review of the more recent Board decisions overruled by *BFI* further demonstrates the Board has never “narrowed” the *Greyhound* standard in any meaningful way, but instead simply has expressed more clearly principles that were already reflected in the majority of the decisions described.

¹⁷ 239 NLRB 346 (1978). It is also interesting to note that in this case, the Board held that it would recognize Sun-Maid as a joint employer so long as it “*exercised* effective control over the working conditions.” (emphasis added).

¹⁸ 193 NLRB 67 (1971).

¹⁹ 233 NLRB 642 (1976).

²⁰ 220 NLRB 23 (1973), *enfd.* 491 F.2d 1390 (6th Cir. 1974)..

The Board's efforts to clarify its joint-employer standard began with the Reagan Board in the early 1980's. In 1982, the Third Circuit endorsed the *Greyhound* "codetermine or share" standard for determining if two or more statutory employers are joint employers. The Court noted that some Board decisions had confused the joint-employer test with the separate "single employer" doctrine used to determine whether nominally separate entities were in fact a single, integrated enterprise such that they were truly one company. Clarifying that the single employer doctrine was not applicable in cases where two separate firms contracting for services share some level of control over one firm's employees, the Court noted that "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."²¹ In adopting the Board's *Greyhound* standard as the correct standard in joint-employer cases, the Court stated:

We hold therefore that . . . where two or more employers *exert significant control* over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' within the meaning of the NLRA.²²

Shortly after the Third Circuit's ruling in *Browning-Ferris*, the Board issued a pair of decisions that more clearly articulated its existing standard. In *Lareco Transportation and Warehouse*, the Board restated its joint-employer rule as follows:

The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment . . . To establish joint employer status there must be a showing that the employer *meaningfully affects* matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.²³

The Board applied the standard to the facts before it to rule that Lareco was not the joint employer of truck drivers supplied under a leasing contract with another company. The Board noted that while Lareco provided some supervision of the drivers, it was "of an extremely routine nature," and that "[a]ll major problems relating to the employment relationship" were handled by the drivers' employer. Although Lareco provided the drivers with vehicles, occasionally provided direction regarding driver performance, and established driver qualifications and safety regulations, the Board held these factors were inadequate to establish the level of control required to find joint-employer status.

The Board reached a similar decision in *TLI, Inc.*, another case involving the provision of leased truck drivers by TLI to another company. The Board ruled that TLI's customer was not a joint employer of the drivers because "the supervision and direction exercised by [the customer] on a day-to-day basis is both limited and routine, and considered with [its] lack of hiring, firing,

²¹ *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d. Cir. 1982), enfg. 259 NLRB 148 (1981) (emphasis supplied).

²² *Id.* at 1124 (emphasis supplied).

²³ 269 NLRB 324, 325 (1984) (emphasis supplied).

and disciplinary authority, does not constitute sufficient control to support a joint employer finding.”²⁴

The Board has consistently applied the clarified standard articulated in *Lareco* and *TLI* for over thirty years. Those decisions established several clear-cut and easy to understand principles:

(1) the “essential element” in the joint-employer analysis is whether a putative joint employer’s control over employment matters is “direct and immediate;”²⁵

(2) control, to be sufficiently indicative of joint-employer status, cannot merely be “limited and routine,”²⁶ and

(3) the Board should not “merely” rely on the existence of contractual provisions, but rather must look “to the actual practice of the parties;” in other words, retained but unexercised control is insufficient by itself to create joint-employer status.²⁷

While the *BFI* majority describes these cases as a narrowing departure from the clearly-established *Greyhound* line of precedent, they are better described as the Board’s attempt to explain the way it had been applying *Greyhound* all along and, in doing so, to define the kinds of control that would qualify as “sufficient” to result in joint-employer status.

C. The Board’s Prior Joint-Employer Standard Provided Businesses With Predictability and Stability in Their Business Relations

By now it should be relatively clear that the Board’s pre-*BFI* precedent, while not always cogently explained, has remained relatively consistent for decades and has largely been faithful to Congress’ command that employer status under the Act must be established based on common law agency principles. The Board’s requirement that control must be “direct and immediate” to establish joint-employer status, and that retained but unexercised control alone is not probative of such status, are concepts that are easy to comprehend and apply in practice. These benchmarks have allowed businesses of all sizes to structure and enter into myriad business relationships – contractor-subcontractor; lessor-lessee; franchisor-franchisee; and parent-subsubsidiary, to name a few – with confidence that they could operate free from the fear of being found a joint employer, provided they followed the Board’s guidance.

²⁴ *TLI, Inc.*, 271 NLRB 798 (1984).

²⁵ *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002); see also *Southern California Gas*, 302 NLRB 456 (1991) (building management company was not the joint employer of workers supplied by a janitorial company—regardless of the fact that the building management company dictated the number of workers to be employed, communicated specific work assignments to the workers’ manager, and ultimately determined whether the cleaning tasks had been completed properly—because manager exercised no direct control besides communicating the job to the contractor and making sure contracted work was completed as requested).

²⁶ *AM Property Holding Corp.*, 350 NLRB 998 (2007) (noting the Board generally has found supervision to be limited and routine where a supervisor’s instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work).

²⁷ *Id.* (“[T]he contractual provision giving AM the right to approve [contractor] hires, standing alone, is insufficient to show the existence of a joint employer relationship”).

The Board’s “direct and immediate” requirement also ensured that a putative employer must actually be involved in those matters most critical to the employment relationship, such as hiring, firing, scheduling, establishing wages, and directly supervising the performance of work. In a practical sense, employers who do not exercise this level of control over the employees of a staffing firm, subcontractor or franchisee are not “meaningfully” affecting the terms and conditions of their employment. The Board’s prior precedent recognized this fact and did not subject companies to disputes or liability involving employees over which they had little control.

Moreover, the standard made sense for both “sides” of a given business transaction. A larger franchisor, or general contractor, may have contractual relationships with dozens (or even thousands) of business partners. It makes no sense to impute joint-employer liability to such entities if they are not in a position to directly address workplace issues, meaningfully affect the outcome of collective bargaining, or remedy the unlawful actions of their business partners.

On the other hand, the vast majority of small business owners – whether they are franchisees, subcontractors, or suppliers of temporary labor – are not in business to be middle managers. The Board’s prior joint-employer standard allowed them to enter business relationships with the knowledge that they could operate their business with a degree of autonomy and freedom, which is the very reason they may have started a business to begin with.

At the same time, the Board’s recognition that the exercise of control that is merely “limited and routine” does not give rise to joint-employer status allowed businesses to maintain a reasonable degree of commercial oversight over brand integrity, contractor efficiency, and overall quality without risking liability for doing so. It is not unreasonable for a major franchisor, for example, to expect that its franchisees adhere to certain standards that preserve and maintain the status of the franchised brand. Preservation of such standards are what enable the brand to succeed in the first place. Franchisees likewise benefit from adherence to such standards. Indeed, a small business owner may elect to open a successful restaurant franchise rather than his or her own branded restaurant specifically because the value and commercial attraction of the brand is likely to enhance the restaurant’s profitability and ultimate success. That would not be possible if the franchise did not impose certain minimum standards on its franchisees. The Board’s prior precedent recognized that maintenance of such standards alone should not turn the franchisor into a joint employer.

Similarly, a general contractor performing a major commercial or residential construction project must rely on the work of dozens of specialty trades. Sequencing the timing and execution of each of these trades is critical to successful completion of the project. Exercising control over the timing of the work performed by a subcontractor and expecting that the work will meet a certain minimum standard should not turn the general contractor into a joint employer. Again, the Board’s prior standard would not have found a joint-employer relationship between the general contractor and its subcontractors based on the exercise of such indirect controls.

D. The *Browning-Ferris* Standard Radically Departs From Prior Precedent and Leaves Employers in The Dark as to The Relevant Standard

In *BFI*, the Board jettisoned its previously clear precedent in favor of a new standard of virtually unbounded scope. The Board’s majority opinion takes employers, unions and employees alike on a confusing journey through prior precedent – misconstruing it along the way

– and concludes by establishing an amorphous standard that is both theoretically limitless and practically unworkable. The new standard allows for a finding of joint-employer status where an employer *retains, but does not exercise*, control over another firm’s employees, or where it exerts only *indirect* control over their employment terms. This standard is a marked departure from the precedent discussed above. Moreover, it is unfaithful to the legislative intent underlying Taft-Hartley and divorced from the realities of American business.

To justify its expansive holding, the *BFI* majority argued that the current test’s requirements “leave the Board’s joint employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships.” The majority claimed that the increase in the number and scope of temporary employment arrangements in the United States over the past two decades “is reason enough to revisit the Board’s current joint-employer standard.”²⁸ Despite the majority’s claims to the contrary, its justification for revisiting the test is grounded in the same “economic realities” philosophy that Congress rejected when it passed Taft-Hartley.

The *BFI* majority’s holding is also based on the false premise that it was “returning” the Board’s joint-employer precedent to the “traditional” standard it employed prior to *TLI* and *Lareco*, which it claimed unjustifiably “narrowed” the standard. As already demonstrated, this is simply not the case. Yet, the *BFI* majority’s review of these cases reads as if the *Greyhound* test plainly allowed for a joint-employer finding based on exercise by the putative joint employer of a few isolated instances of indirect control and/or the retention (but not exercise) by the putative joint employer of some, but not substantial, control. Having set up this straw man, the *BFI* majority “restate[d]” the joint-employer standard, which it claimed “return[s] to the traditional test” first announced in *Greyhound*: “The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.”²⁹ The majority then continued with the following sweeping statement:

We will no longer require that a joint employer not only *possess* the authority to control employees’ terms and conditions of employment, but also *exercise* that authority . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer’s control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint employer status.³⁰

Despite referring to the common law, the majority offered no guidance – besides the new and disturbing passage quoted above – for determining when such a relationship might exist between putative employer and putative employee. The majority’s articulation of its new test disturbingly suggests that retained control *by itself* can give rise to a joint-employer finding, and/or that the exercise of indirect control *by itself* can result in such a finding. This is evident in the manner in which the majority discussed why these elements of control are relevant in the first place.

²⁸ *BFI*, 362 NLRB 186, slip op. at 1, 11.

²⁹ *Id.* at 15.

³⁰ *Id.* at 2.

1. The Probative Value of Retained Control

The *BFI* majority argued that having the “right to control” is probative of an employment relationship—whether or not that right is exercised: “Where a user [of services] has reserved authority, we assume that it has rationally chosen to do so, in its own interest. There is no unfairness, then, in holding that legal consequences may follow from this choice.”³¹ Incredibly, the majority asserted that a situation in which “it appears that the user has, in practice, ceded administration of a term to a supplier” but “the user can still compel the supplier to conform to its expectations,” is no less probative than a situation in which the joint employer actually exercises such control.³²

In order to rationalize a potential joint-employer finding based solely on reserved control, the *BFI* majority insinuated that many cases decided under the *Greyhound* test treated the right to control the work of employees and the terms and conditions of their employment—alone—as probative of joint-employer status. For example, the majority alleged that in *Mobil Oil Corp.*, the Board found probative the fact that the operator retained the contractual power to set working hours, dictate the number of workers to be supplied, and terminate the contract at will.³³ In reality (and as explained above), the putative joint employer in *Mobil Oil* actually *exercised* these (and many additional) controls. Similarly, the *BFI* majority argued that in *Ref-Chem Co.*, the Board found probative the manufacturing company’s retention of contractual power to terminate workers, set wage rates, approve overtime, and inspect and improve work.³⁴ Again, however, the putative joint employer in that case actually *exercised* virtually “complete control” over the workers at issue.

The majority also misconstrued cases like *Jewel Tea Co.* and *Value Village*, in which the Board considered the respective putative joint-employers’ retention of complete control over nearly every term and condition of employment. Despite the fact that these decisions focused on the total amount of control retained by the employers, the *BFI* majority insinuated that the Board in those cases only considered the employers’ control over one or two terms and conditions of employment, such as retaining the contractual power to terminate workers, and set working hours.³⁵ This was simply not the case.

2. The Probative Value of Indirect Control

The *BFI* majority also stressed that indirect control should be probative of a joint-employer relationship: “Just as the common law does not require that control must be exercised in order to establish an employment relationship, neither does it require that control (when it is exercised) must be exercised directly and immediately.”³⁶ The majority’s explanation of this principle strongly suggests a willingness to find indirect evidence *alone* sufficient to establish a joint-employer relationship. For example, the Board noted that “in many contingent

³¹ *Id.* at 14.

³² *Id.*

³³ *Id.* at 9.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 14.

arrangements, control over employees is bifurcated between employing firms with each exercising authority over a different facet of decision making.”³⁷ The majority then observed:

Where the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user’s guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees’ working conditions are a byproduct of two layers of control. The Board’s current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers’ terms and conditions of employment of the user firm.³⁸

In other words, where the user firm exercises only indirect controls, and the service provider exercises all of the direct controls, the majority believes the user has exercised sufficient control to be a joint employer.

To justify this portion of its ruling, the majority cited to cases like *Sun-Maid Growers, Hamburg Industries, Clayton B. Metcalf*, and *Floyd Epperson* as evidence that indirect control, taken alone, can lead to joint-employer status.³⁹ However, as explained above, none of these cases were determined solely on the basis of indirect control. In each, the Board considered examples of indirect control but placed controlling weight on the presence of direct control. Moreover, the examples of “indirect” control present in these cases were significant (often bordering on direct control) and *always* accompanied by elements of more direct control. The *BFI* majority omitted these facts from its analysis.

In summary, despite its protests to the contrary, it is clear the test announced in *BFI* is a radical departure from the Board’s prior precedent that “does not represent a ‘return to the traditional test used by the Board,’” but instead “fundamentally alters the law” applicable to who is the “employer” under the Act.⁴⁰

E. The Uncertainty Created By The Board’s New Standard Will Lead to Unintended Legal Consequences, Stifle New Business Growth, Inhibit Job Creation, and Harm Small Business

The Board has a responsibility to establish and maintain precedents that offer some measure of predictability for employers and unions alike, and for good reason. “To comply with [the Board’s] rules . . . substantial planning is required . . . When it comes to the duty to bargain . . . there is no more important issue than correctly identifying the ‘employer.’ Changing the test for identifying the ‘employer,’ therefore, has dramatic implications for labor relations policy and its effect on the economy.”⁴¹

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 9.

⁴⁰ *Id.* at 23 (Miscimarra and Johnson, dissent).

⁴¹ *Id.* at 21 (Miscimarra and Johnson, dissent).

Accordingly, the Board must articulate a compelling reason for changing a standard as critical as identifying the “employer,” and when changing such a standard must do so in a manner that is understandable and practicably workable for the layperson. The new *BFI* standard does the opposite. As Member Miscimarra and former Member Johnson cogently pointed out in their dissent:

The majority abandons a longstanding test that provided certainty and predictability, and replaces it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, even if this is based solely on a never-exercised ‘right’ to exercise ‘indirect’ control over what a Board majority may later characterize as ‘essential’ employment terms. This new test leaves employees, unions and employers in a position where there can be no certainty or predictability regarding the identity of the ‘employer.’ . . . This confusion and disarray threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties, including employees, employers, unions, and countless entities who are now cast into indeterminate legal limbo, with consequent delay, risk and litigation expense.⁴²

Thus, the biggest concern with the Board’s new test may be the sheer confusion that it has created going forward. Indeed, the *BFI* majority’s sprawling opinion has been challenging to fully understand, even for the most experienced labor law practitioners. Since its release in August of 2015, labor lawyers have puzzled over how the test may apply in future cases. The test leaves numerous questions unanswered. For example, in the absence of evidence of the exercise of direct control by a putative employer, how much *indirect* control must the firm exercise before it is a joint employer? Must it exercise indirect control over a large number of factors, or just one or two? And how much retained, but unexercised, control will now be sufficient? Must the firm retain near total control? What if the evidence suggests the firm has actually exercised *no control at all*? And what about the case where a firm retains only the right to exercise indirect control? Could the Board now find joint-employer status in the case of an entity that retains only indirect control, and exercises no control, over a group of putative employees? The *BFI* majority does not answer.

These unanswerable hypotheticals beg a troubling question: if experienced labor lawyers are unable to determine with confidence how the test may apply in future cases, how can business owners possibly be expected to understand how *BFI* may affect their businesses going forward?

The answer is simple: they cannot. And that is the biggest problem with what the *BFI* majority has done. The uncertainty created by the Board’s new test is likely to lead to analytical paralysis as firms struggle with how to address their potential liability under the standard. In this regard, the NLRB is not like the Department of Labor, or OSHA, where employers can request, and receive, opinion letters on the lawfulness of planned business activities. Notwithstanding the recent spate of overregulation from these agencies, employers seeking to comply with federal wage/hour and workplace safety laws can at least obtain reliable feedback from the agencies charged with enforcing those laws.

⁴² *Id.* at 23 (Miscimarra and Johnson, dissent).

But the Board has no equivalent to the opinion letter. Employers cannot call or write to the Board and ask whether they will become a joint employer if they enter into a business transaction or include certain controls in commercial contracts. Instead, *the Board's legal precedents are supposed to provide that guidance*. And, as demonstrated throughout, the *BFI* decision does the opposite. The uncertainty over how the new standard might be applied will hamstring those in the business community seeking to structure their contractual relationships going forward.

1. The New Test Will Affect Myriad Business Relationships and Have a Devastating Effect on Small Business

The *BFI* test is not just a problem for businesses involved in leased worker arrangements. The test is open-ended enough to be applied to find joint-employer status in virtually *any* business relationship. The dissenting Members understood and highlighted this troubling fact:

Contrary to [the majority's] characterization, the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act.⁴³

The dissent's warning is easily illustrated by several examples:

General Contractor – Subcontractor

One of the primary responsibilities of a general construction contractor is making sure that projects are completed on time in order to meet inspections and delivery requirements. To do this, general contractors commonly exercise tight control over the timing and sequencing of the services performed by specialty trades and other subcontractors. They may require additional labor and/or increased overtime when delays threaten to run a project behind schedule. They may also delay the completion (or even the commencement) of a particular subcontractor's work in order to allow for the completion of a different part of the project. This is arguably strong indicia of control by the general contractor over the terms and conditions of employees of its subcontractors, i.e., scheduling. It is unclear, given the amorphous new standard, whether the exercise of control over subcontractor scheduling alone would turn a general contractor into a joint employer, but in combination with other indicia, it would be almost certain to do so.

A finding of joint-employer status between general contractor and subcontractor could cause a variety of problems at a construction site. If the general contractor is a joint employer with its subcontractors, and a labor dispute arises between one of the subcontractors and its union, it may be impossible for the general contractor to set up a valid reserved gate system, which allows neutral employers to avoid picketing and other concerted activity in which unions may lawfully engage during disputes with primary employers. Moreover, the general contractor's status as a joint employer could prevent it from replacing a subcontractor whose employees go out on strike, as doing so may now be an unfair labor practice. Thus, an entire commercial construction project could be paralyzed because of the labor problems of a single

⁴³ *Id.* at 23 (Miscimarra and Johnson, dissent).

subcontractor. The resulting delays could cause the general contractor to incur millions of dollars in penalties for failing to complete the project on time.

While some might view such actions by a general contractor to be “anti-union,” it should be obvious that a general contractor’s decision to replace a striking subcontractor may have no effect on the result of collective bargaining negotiations between the subcontractor and its union or on the ultimate employment status of the subcontractor’s employees. The subcontractor may have dozens of other jobs (all of which may be union jobs) to which it can assign its workforce. The general contractor should not be forced into the practical equivalent of commercial handcuffs while it waits for a subcontractor to resolve matters with its union. But a finding of joint-employer status under *BFI* would do just that. A general contractor with several dozen specialty subcontractors could be completely paralyzed as a result.

In this way, *BFI* could have the perverse result of encouraging general contractors to avoid bidding on union jobs, at least in geographic areas where nonunion labor is a viable alternative, which would shrink their portfolio of projects and impact their own employment levels. Alternatively, general contractors may simply refrain from working with unionized subcontractors in order to avoid being trapped in a business relationship they cannot get out of without risking substantial labor law liability. Another possibility is that general contractors will insource specific trades. Such decisions will reduce the number of opportunities for outside subcontractors. The economic impact on the subcontractors – many of which are small businesses – and their employees, could be significant.

Alternatively, general contractors who cannot insource certain specialty trades may decide to exert *total control* over the work of their subcontractors. If a general contractor concludes it is going to be a joint employer under *BFI* no matter what it does, it may go in the other direction and dictate everything about a subcontracted project. This would dramatically reduce the subcontractor’s own flexibility and reduce it to a mere subdivision of the general contractor instead of an independent business.

Franchisor – Franchisee

According to the International Franchise Association, which submitted an amicus brief in *BFI* opposing the new standard, in 2012 there were 750,000 franchises in the United States employing over 8 million workers. These businesses generated a staggering \$769 billion in economic output and accounted for approximately 3.4 percent of America’s gross domestic product.⁴⁴ Virtually all franchises must exercise some level of control over the consistency and integrity of the franchised brand so that both parties – franchisor and franchisee – can reap the benefits of the brand. Indeed, the franchisor is legally required to maintain control over its brand in order to maintain the trademarks it has licensed to franchisees.⁴⁵ Prior to *BFI*, the Board avoided finding joint-employer status in most franchisor-franchisee relationships absent evidence

⁴⁴ Br. of IFA at 1.

⁴⁵ See, e.g., *Barcamerica International USA Trust v. Tyfiled Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002)(“A trademark owner may grant a license and remain protected provided quality control of the goods and services maintained under the trademark by the licensee is maintained”).

of direct control.⁴⁶ But now, if a franchisor retains and/or exercises control over the manner in which the franchisee sets up a store, how it prepares and markets its products, what tools or equipment it uses in the performance of the franchised business, and how the franchisee's employees operate the business, the Board may find it has retained sufficient indirect control over the employment terms of the franchisee's employees to be their joint employer. Thus, franchisors may be exposing themselves to joint-employer liability simply by maintaining controls that are legally required in order to preserve the status of their trademarks under federal law.

The consequences of a broad application of the *BFI* standard to the franchising industry could be catastrophic. Large franchisors cannot possibly be expected to know, let alone attempt to control, all of the minute details regarding the employment relations of their franchisees. But if *BFI* would make them joint employers with their franchisees, many franchisors might elect to reduce their use of the franchise model in order to protect themselves from legal liabilities the franchise model was created to avoid in the first place. The reduction in the use of the franchise model could have a deleterious effect on job creation and reduce the number of opportunities for small business entrepreneurs to realize their dreams of owning their own business. Small business franchisors could be equally damaged by the ruling. For example, the owner of a fledgling franchise may decide never to expand, lest he or she risk the unthinkable prospect of becoming a joint employer every time a new franchisee signs on.

Alternatively, franchisors may decide, as in the construction industry, that control over their brand is too important, not to mention legally required. Instead of implementing measures to avoid joint-employer status (indeed, in most cases it will be unrealistic for a franchisor to allow franchisees to make their own decisions about store appearance, product type and quality, etc.), franchisors may embrace that status and impose near total control over their franchisees. Franchise owners would be reduced to middle managers and lose the ability to manage their small business free from outside interference.

2. Other Negative Effects on Small Business

The business hypotheticals discussed above illustrate just a few of the many harms the *BFI* test may cause small business owners under federal labor law. But the Board's new test may cause additional fallout in other areas of the law. For instance, other federal agencies have signaled a willingness to adopt the same broad joint-employer test announced in *BFI*. The EEOC submitted an amicus brief to the Board prior to the issuance of *BFI* in which it argued for an expansion of the standard. Employers may safely assume the EEOC will push to expand the concept of joint-employment in Title VII cases. And litigation plaintiffs have already cited to *BFI* in arguing for an expansion of the joint-employer standard in other contexts. Thus, while a finding of joint-employer status before the Board may not automatically relegate a business to that status before other federal agencies or in state or federal court, the *BFI* standard has already inspired employee advocates to push the Board's standard into other areas of the law.

⁴⁶ See, e.g., *Tilden, S.G., Inc.*, 172 NLRB 752 (1968) (franchisor not a joint employer, despite franchise agreement dictating "many elements of the business relationship," because franchisor did not exercise "direct control" over franchisee's labor relations).

The “spillover” effect from *BFI* may have yet additional consequences. For example:

Threshold employer coverage. Many federal labor and employment statutes, such as Title VII of the Civil Rights Act, have small business exceptions in that they only apply to employers with a certain minimum number of employees. A finding that a small business owner is a joint employer with its franchisor, general contractor or other business partner could artificially eliminate those exceptions by forcing the small business owner to count the employees of its business partner in its total employee complement for purposes of coverage under statutes like Title VII.⁴⁷ Many smaller businesses are unprepared for the dramatic increase in administrative burden and litigation expense that would come with coverage under such statutes.

Affordable Care Act Issues. The ACA’s employer mandate requires any employer with 50 or more “full-time equivalent employees” to provide certain minimum levels of health coverage to such employees and their dependents, or face expensive penalties. If small businesses with 49 or fewer employees are deemed to be joint employers with their business partner(s), they may be required to comply with the ACA’s employer mandate requirements. Determining and maintaining compliance will impose administrative burdens that most small employers are not set up to manage effectively.

Blacklisting in Federal Contracting. In July of 2014, the President signed Executive Order 13673, “Fair Pay and Safe Workplaces,” which requires federal contractors and subcontractors to disclose all of their “labor violations” for the 3-year period preceding their submission of a contract bid. The Executive Order covers 14 federal labor and employment laws and their state equivalents and require reporting of un-adjudicated “violations” such as EEOC cause determinations, OSHA charges, notices of wage and hour determinations, and NLRB complaints. The Board’s new *BFI* test could require a bidding contractor to report on the violations of its vendors, suppliers and others with whom it contracts to supply services, even in situations where the bidder does not plan to use those partners in the performance of the federal contract. Thus for example, a small business owner who is required to provide the prime contractor with a report of its own “violations” may be required to report the violations of an unrelated business partner with whom it shares joint-employer status. Thus, *BFI* will exacerbate the administrative difficulty of compliance with the Executive Order

F. The Board’s (and Other Executive Agencies’) Actions Since *BFI* Offer No Comfort to Employers

Proponents of the Board’s new standard have argued that the employer community is overreacting to the *BFI* decision. They contend the test will not have the effect that many have warned it will have, pointing to several recent Board actions that they claim prove the *BFI* test is reasonable and limited to the facts of that particular case. None of these arguments are convincing.

⁴⁷ See EEOC Compliance Manual, Section 2: “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.”

1. Freshii Advice Memorandum

On April 28, 2015, the Board's Division of Advice issued a nonbinding memorandum opinion on whether Freshii, a fast-casual restaurant franchisor, should be held responsible as joint employer for unfair labor practices allegedly committed by one of its franchisees. Applying *BFI* to the facts of the case, the Board's Associate General Counsel opined that Freshii was *not* a joint employer with its franchisee. The Freshii memo has led some to assert that *BFI* is not as overbroad as the employer community claims and that franchisors in particular have nothing to worry about under the new standard. These arguments are misleading. First and foremost, NLRB advice memoranda are not precedential and do not constitute Board law.⁴⁸ The Advice Division's apparent conclusion that Freshii is not a joint employer with its franchisee has no legal impact on any employer besides Freshii itself, and certainly does not bind the full Board, which may have reached a different conclusion altogether.

Second, the facts of the case are not representative of the vast majority of franchise relationships in the United States. The operations manual Freshii provides its franchisees states that its own personnel policies and procedures are not required to be adopted, and its franchise agreement *expressly disclaims all control* over franchisees' labor and employment matters. Moreover, the operations manual's instructions on items as fundamental as menu preparation, food safety regulations, instructions on how to use and clean equipment, and guest service issues, are referred to as mere "guidance."

Obviously, franchisors that impose greater controls over product type and quality, customer experience, and the like, can take no comfort in the Freshii memo. For example, it would be impossible for a five-star hotel brand to provide "optional" input to its franchisees on matters such as cleaning and sanitation standards, availability of certain amenities, and how staff must treat guests, and maintain any realistic expectation of ensuring brand quality. Freshii does nothing to alleviate fears that implementation of such measures could turn the brand owner into a joint employer.

2. Green JobWorks ALJ Decision

On October 21, 2015, the Regional Director of NLRB Region Five issued a Decision and Direction of Election in a representation proceeding finding that ACECO, a licensed demolition and environmental remediation company, was not a joint employer with Green JobWorks ("GJW"), a staffing company that provides demolition and asbestos abatement workers to client construction companies, including ACECO, in the mid-Atlantic region. The facts of the case reflected that GJW's employees were skilled and trained to perform a specific and specialized task for GJW clients, a factor that weighs against employment status under the common law.

Additional relevant facts included the following: ACECO imposed no limitations whatsoever on how much GJW could pay its workers; GJW provided lead workers on ACECO jobsites, who were responsible for documenting worker hours, determining break times, and removing workers from the sites if necessary; ACECO provided safety equipment to its own employees, but not to GJW employees; ACECO could request specific workers but GJW

⁴⁸ See *Kysor/Cadillac*, 307 NLRB 598, 603 (1992) ("advice memoranda do not constitute Board law"); *Geske and Sons, Inc.*, 317 NLRB 28 (1995) (same).

retained ultimate control over where to assign its employees; ACECO's reserved right to request the removal of a GJW employee from the worksite was limited to safety issues or other "reasonable objections" which must be "explicitly stated" by ACECO; the general contractor, not ACECO, had ultimate control over the worksites and the work schedule, thus GJW workers' hours were indirectly controlled by the general contractor. On these facts, the Regional Director found ACECO was not a joint employer with GJW.

While this decision may have caused some temporary relief among those in the employer community, that relief was short-lived. The union in the case filed a request for review of the Regional Director's decision arguing that *BFI* required a finding that ACECO was a joint employer with GJW. Just last week, the Board accepted the union's request for review, strongly signaling its intent to overturn the Regional Director and find that ACECO is indeed a joint employer.⁴⁹ If that turns out to be the case, the Board would obliterate the temporary staffing relationship. The facts in GJW reflect the exercise by ACECO of *virtually no direct control whatsoever* over GJW employees. An adverse decision by the Board would send a message to contractors that leased worker arrangements will always lead to joint-employer status under the Act.

3. McDonald's Unfair Labor Practice Cases

The entire labor relations community – management and labor alike – has been closely following the McDonald's unfair labor practice trial, which began last week and is expected to be one of the largest and most significant Board proceedings in recent memory. The Board's General Counsel, who advocated for a change in the joint-employer standard in *BFI*, has alleged that McDonald's is a joint employer with close to 80 of its franchisees located across the United States and that it should share liability for the franchisees' allegedly unlawful discipline and discharge of employees who participated in union-led protests over their wages and working conditions. For all the reasons discussed above, a finding that McDonald's is a joint employer with its franchisees could have a massive chilling effect on the willingness of franchisors to continue leasing their brands to small business owners across the United States.

As this massive trial begins, McDonald's is likely taking no comfort in the Freshii memo. Indeed, its reasoning apparently has had no impact on the Board's General Counsel, who is pressing forward with the NLRB's version of the "trial of the century" with McDonald's and its franchisees directly in his crosshairs.

4. Other Federal Agency Action

Unfortunately, the Board is not the only executive agency seeking to expand joint-employer liability under federal law. Earlier this year, David Weil, the administrator of the Department of Labor's Wage and Hour Division, issued an Administrative Interpretation that appears to broaden how DOL will determine joint-employer relationships under the Fair Labor

⁴⁹ Member Miscimarra dissented from the Board's grant of review, noting that the Regional Director "applied the standard recently announced in [BFI] . . . as explained in the BFI dissenting opinion . . . I would adhere to precedent requiring proof that a putative joint employer actually exercises 'direct and immediate' control over the essential terms and conditions of employment of individuals in the petitioned-for bargaining unit in a manner that is neither 'limited' nor 'routine.' In my view, the Petitioner has failed to raise a substantial issue warranting review under the pre-BFI precedent." *Green JobWorks LLC*, Case 05-RC-154596 (Mar. 8, 2016)(Miscimarra, dissent).

Standards Act and other federal labor laws.⁵⁰ The DOL guidance distinguishes for the first time between “horizontal” joint-employment – where two entities each separately employ the same employee, but are closely aligned through shared management or other economic factors – and “vertical” joint-employment – where the employee of one business is economically dependent on another business that has contracted with the employee’s actual employer. With respect to the latter, the DOL uses the same “economic realities” test that Congress rejected with respect to the NLRA when it passed Taft-Hartley. Thus, the DOL’s view of joint-employment is (and has been) far more expansive than the standard announced by the Board in *TLI* and *Lareco*.

The guidance is brazenly open about its purpose – to target larger businesses. Weil writes that “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 future compliance.” Roughly translated, Weil is urging his investigators to use the joint-employer theory to pursue the alleged wage and hour violations of small businesses by lumping them together with a larger business partner with “deeper pockets.” But by attempting to drag bigger businesses into the affairs of their suppliers, franchisees and subcontractors, the DOL is advocating for interpretations of federal law that will adversely affect small businesses, for all of the reasons discussed above.

The DOL is not the only other federal agency encouraging its investigators to push the boundaries of joint-employer standards. Shortly before the Board issued its decision in *BFI*, reports surfaced of an internal OSHA memo encouraging investigators to conduct a joint-employer analysis when investigating violations alleged against franchisees. The memo suggests that “a joint employer standard may apply where the corporate entity exercises direct or *indirect* control over working conditions, has the *unexercised potential to control* working conditions or based on the *economic realities*.” The memo goes on to instruct investigators regarding the kinds of information to obtain from subjects of OSHA investigations going forward.

The OSHA memo advocates for the use of virtually the same test announced by the *BFI* majority as well as the “economic realities” test used by the DOL. OSHA practitioners have observed that this standard is much more expansive than the “controlling employer” test traditionally used by OSHA to determine which business is liable for a health and safety violation on a multi-employer worksite.⁵¹ OSHA’s apparent push to adopt the *BFI* test (or worse, the “economic realities” test) as its own would subject many businesses to OSHA liability even where they are unaware of, and have no control over, workplace hazards.

The fact that three federal agencies – the Board, the DOL and OSHA – appear to be pushing for a change in their joint-employer standards at the same time suggests a larger effort by the Executive Branch to expand joint-employer liability in the United States.

⁵⁰ DOL Administrative Interpretation No. 2016-1 (Jan. 20, 2016).

⁵¹ OSHA Directive CPL 2-0.124, “*Multi-Employer Citation Policy*,” December 10, 1999

III. CONCLUSION

The Board “owe[s] a greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that ‘we’ll see how it floats.’”⁵² Unfortunately, that is precisely what the Board has done in *BFI*. Its sprawling and potentially limitless new joint-employer test has left American business grasping in the dark for guidance on how to go forward under the new standard without risking significant liabilities they did not plan for. With the likely extension of the *BFI* standard in cases such as *Green JobWorks* and *McDonald’s* on the horizon, not to mention the efforts of DOL and OSHA to expand their own joint-employer standards, the state of affairs for businesses in this country is only going to get worse.

In an increasingly competitive economic landscape, businesses of all sizes make decisions every day on how to remain successful in relation to their competitors. In many cases, this includes entering into contractual arrangements with outside vendors to administer certain aspects of their business. These relationships allow larger employers to focus on their core entrepreneurial mission, while at the same time creating opportunities for small businesses to flourish.

Sadly, these relationships may become less attractive to both parties – user and supplier, franchisor and franchisee, general contractor and subcontractor – given the uncertainty over whether entering such relationships will bring unanticipated liabilities. Perhaps the biggest problem with the course on which the Board and other executive agencies appear to be headed is that it is fundamentally disconnected from, and tone-deaf to, the realities of American business. The current Board majority, well-intentioned though it may believe itself to be, is issuing decisions that stifle new business growth and mire business owners in endless regulation.

It has to stop somewhere. Congress must intervene and return the Board’s joint-employer standard to the well-understood rule that existed for decades before the issuance of *BFI*. The continued vitality of many longstanding business relationship models, as well as the ability of small business owners to continue to thrive in this country, may well depend on it.

⁵² *BFI*, slip op. at 48 (Miscimarra and Johnson, dissent).