



REDEFINING “EMPLOYER”: HOW THE NLRB PLANS TO TREAT SEPARATE COMPANIES AS ONE

by Michael J. Lotito and Missy Parry

The National Labor Relations Board (NLRB or Board) is poised to completely redefine the definition of employer under the National Labor Relations Act (NLRA).¹ The NLRB wants to expand its definition of employer to make one company an employer of another company’s employees for purposes of NLRA liability and obligations. Currently, the Board finds joint employment only when one company exerts direct and immediate control over employment matters of the other entity’s employees.² The NLRB plans to enlarge its definition of joint employment to include any business that has direct, indirect, or potential control over any employee working conditions. Every business in the United States should be concerned about this new definition of employer.

Two major cases before the NLRB suggest that the Board intends to overturn its 30-year-old precedent regarding the “joint employer” relationship. On April 30, 2014, the NLRB invited *amicus* briefs on whether the Board should adopt a new joint-employer standard in *Browning-Ferris Industries of California, Inc.*³ The case addresses whether Browning-Ferris should be considered a joint employer with Leadpoint, a staffing services company, in a union representation election. The Board’s current standard deems businesses joint employers only when they share direct and immediate control over essential terms and conditions of employment including hiring, firing, discipline, supervision and direction.⁴

In addition, on July 29, 2014, the NLRB’s General Counsel, Richard F. Griffin, Jr., announced that he authorized complaints against numerous McDonald’s franchisees and McDonald’s, USA as joint employers for alleged unfair labor practices.⁵ Between November 2012 and July 29, 2014, 181 charges were filed against McDonald’s franchisees and/or McDonald’s USA. Of those charges, the NLRB authorized 43 complaints against both McDonald’s franchisees and McDonald’s USA. The NLRB General Counsel’s decision to issue complaints against both entities marks a drastic change in NLRB precedent regarding the franchisor/franchisee relationship. The General Counsel will apparently ask the NLRB to impose liability on the franchisor for the labor practices of individual franchisees based on general operational procedures, even when the franchisor exercises no control over the franchisee’s employees.

¹ 29 U.S.C. §§ 151–169.

² *Airborne Express*, 338 NLRB 597(2002); *Flagstaff Medical Center*, 357 NLRB No. 65 (2011) enforced 715 F.3d 928 (D.C.Cir. 2013).

³ See Notice and Invitation to File Briefs, *Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery & FRP-II, LLC. d/b/a/ Leadpoint Business Services*, NLRB Case. No. 32-RC-109684 (filed April 30, 2014). A copy is available at <http://www.nlr.gov/case/32-RC-109684>. The Board is likely to issue its decision in *Browning-Ferris* by the end of 2014.

⁴ See *Lareco Transportation*, 269 NLRB 324 (1984); *TLI, Inc.* 271 NLRB 798 (1984) enforced 772 F.2d 894 (3d Cir. 1985); *N.L.R.B. v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117 (3d Cir. 1982).

⁵ Mr. Griffin previously served as General Counsel for the International Union of Operating Engineers and as a Member of the NLRB. The U.S. Supreme Court found his recess appointment as a Board member unconstitutional in *National Labor Relations Board v. Noel Canning*, 573 U.S. ___, 134 S.Ct. 2550 (2014).

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Since the General Counsel's announcement on July 29, 2014, over 30 additional unfair labor practice charges have been filed against McDonald's franchisees and McDonald's USA as joint employers. In addition, at least 30 new charges have been filed against various other fast food franchises including Taco Bell, Subway, Burger King, Panera Bread, Wendy's and Jack in the Box.⁶ Union Front Organizations (UFO's), often called "worker centers," affiliated with the Service Employees International Union, filed a majority of these new charges. Over 12 charges have been filed against other franchises, including those in the hotel, janitorial and cleaning service industries. Outside the franchise industry, new charges have also been filed concerning alleged joint employment in hospitality services, parking services, automotive, recycling and logistics areas.⁷

The pending NLRB cases signal a seismic shift in the Board's employer definition. The proposed change in the joint-employer rule, without any congressional action, could significantly alter the face of American business and impact every level of the supply chain. Multiple businesses and contractual relationships are based on the current, decades-old standard, which remains endorsed by Congress and the courts.

The NLRB has yet to release any complaints in the McDonald's cases, or any memoranda or decisions outlining its new approach, so we are uncertain what the new rules might be. However, a look at the General Counsel's *Amicus* Brief in the pending *Browning-Ferris* case may well illuminate the underlying rationale behind the complaints.⁸ There, the General Counsel asserts that the Board should abandon its "narrow" joint-employer standard and "return" to the broader "traditional" approach. Mr. Griffin believes companies may effectively control wages by controlling other variables in the business.⁹ He moves the analysis away from day-to-day control over employment conditions to operational control at the system-wide level. He would find joint employment based on direct control, indirect control, potential control and when "industrial realities" make the company a necessary party to meaningful collective bargaining.

According to the General Counsel's Brief, the joint-employer issues arise in two situations: 1) contingent or temporary employment; and (2) commercial relationships structured so that one business entity is in a position to influence the labor relations policies of the other, "such as outsourcing of the function integral to the employer's business or franchising."¹⁰

Mr. Griffin believes the current joint-employer standard inhibits collective bargaining under the NLRA because "user firms" of contingent workforces have limited direct supervision of employees and indirect control over other terms and conditions of employment. According to him, the business can still influence the other company's bargaining position by threatening to terminate its contract and eliminate employees' jobs if their wages and benefits are not below a certain cost threshold. In the franchising setting, franchisors have no direct control over a franchisee's employees. However, Mr. Griffin believes the franchisor can exert significant control over the day-to-day operations of their franchisees by dictating the terms of the franchise agreement.¹¹

The General Counsel urges the Board to adopt a new standard that considers the totality of the circumstances and how employers structure their commercial dealings with each other. Mr. Griffin's official view would redefine who is an employer across multiple industries. As the General Counsel's Brief makes clear, in addition to outsourcing, temporary employees and franchising, he would have the Board pursue joint

⁶ Many of these charges have been filed against companies "doing business as" the franchise. However, given the General Counsel's approach in *Browning-Ferris*, the General Counsel may well treat these "d/b/a" cases as joint employment cases.

⁷ Information regarding these unfair labor practice charges was gathered from publicly available government sources. More specific information regarding the exact nature of the allegations and charges is not available absent a FOIA request in each case.

⁸ See *Amicus* Brief of the General Counsel, *Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery & FRP-II, LLC d/b/a/ Leadpoint Business Services*, NLRB Case. No. 32-RC-109684. (filed June 26, 2014) ("*Amicus* Brief"). A copy is available at <http://www.nlr.gov/case/32-RC-109684>.

⁹ The General Counsel cites David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 THE ECON. & L. REV. 33, 36-37 (2011). Mr. Weil is currently the Administrator of the Wage and Hour Division of the U.S. Department of Labor.

¹⁰ *Amicus* Brief at p. 11.

¹¹ *Amicus* Brief at p. 14.

employment in the transportation, manufacturing, ship-building, janitorial and building trades industries.¹² Mr. Griffin's current joint employment target is fast food franchises, but the implications of his reasoning, if adopted, cross all industry lines.

The new factors the NLRB's General Counsel would consider indicative of joint employment include: (i) controlling the number of employees needed to perform a job or task; (ii) establishing safety rules and standards; (iii) establishing production standards; (iv) determining job duties; (v) providing work instructions relating to the means and manner to accomplish a job or task; (vi) training employees or establishing employee training requirements; (vii) indirectly controlling employees' wages through a commercial agreement; (viii) retaining potential control over employment conditions reserved in commercial agreements; (ix) retaining the right to terminate the relationship; (x) requiring employees to follow rules or handbooks; (xi) imposing highly standardized operational requirements; (xii) owning facilities and equipment where employees perform work; (xiii) requiring operational modification; (xiv) monitoring and auditing operations; and (xv) setting maximum wage rates for employees¹³ These factors are completely unrelated to an employer's day-to-day, direct control of employees' conditions of employment and look only at overall indirect operational control by the separate company.

Despite his claim that his rule returns to the Board's pre-1984 "traditional" approach, in cases dating back over 40 years, the Board *never* treated franchisees and franchisors as joint employers. As far back as the Lyndon Johnson Administration, the Board carefully analyzed whether a 7-Eleven franchisee's use of the trade name and operational system made the franchisor a joint employer. In declining to find joint employment, the Board noted that the critical factor in determining whether joint employment exists is the control the franchisor exercises over the labor relations policy of the franchisee.¹⁴ In another 1968 case involving automobile franchises, *Tilden, S.G., Inc.*, the Board found that standardized operational requirements kept the quality of the brand from being eroded, but did not indicate joint employment under the NLRA.¹⁵ In short, the General Counsel's attempt to use operational control as the main factor for finding joint employment represents a radical departure from decades of unbroken, bipartisan precedent for franchisors and franchisees.

The General Counsel continues to multiply the reach of his proposed joint-employer rule by mapping out the business relationships between companies. In one recent case, the General Counsel sought the enforcement of massive document subpoenas to determine whether two hospital organizations were joint employers for a union representation election.¹⁶ The General Counsel stated the subpoenas were intended to help disclose the organizations' operations and connections. However, the U.S. District Court Judge found that the subpoenas were "extensive, expensive, time-consuming and potentially disruptive" and "lacked proportionality" to the alleged unfair labor practice charges. Nevertheless, because NLRA precedent required the judge to essentially "rubber stamp" the NLRB's actions, he enforced the subpoenas.

Changes in the NLRB's standard also would contradict decades of state court employment law decisions. For example, just last month the California Supreme Court rejected a new agency standard for vicarious liability based on the fact that the franchisee exerted exclusive control over the employees' employment conditions.¹⁷ The Court held imposition and enforcement of a uniform marketing and operational plan do not automatically saddle the franchisor with liability for the franchisee's employment practices. The franchisor will incur liability

¹² The General Counsel also cites Member Liebman's dissent in *Airborne Express*, 338 NLRB 597 (2002) as the rationale for the expansion of the joint employer rule.

¹³ *Amicus* Brief; Member Liebman's dissent in *Airborne Express*, 338 NLRB 597 (2002).

¹⁴ *The Southland Corporation dba Speedee 7-Eleven*, 170 NLRB 1332 (1968).

¹⁵ *Tilden, S.G., Inc.*, 172 NLRB 752 (1968); see also *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 105 (1979) enforced in relevant part 640 F.2d 1094 (9th Cir. 1981).

¹⁶ Memorandum Opinion granting NLRB's Three Applications to Enforce Subpoena Duces Tecum, *National Labor Relations Board v. University of Pittsburgh Medical Center and University of Pittsburgh Medical Center Shadyside*, Case No. 14-1324 (W.D. Pa. filed August 8, 2014).

¹⁷ See *Patterson v. Domino's Pizza, LLC*, ___P.3d___, 2014 WL 4236175 (Cal. Aug. 28, 2014); see also *Knitter v Corvias Military Living, LLC*, Case No. 13-3027 (10th Cir. July 15, 2014).

only if it retained the employer's traditional rights of general control over day-to-day hiring, direction, supervision, discipline, and discharge of the franchisee's employees. Absent evidence of such day-to-day control, the Court dismissed the claims against the franchisor.

The impact of a new joint-employer rule would be widespread. The rule could impose new bargaining obligations on joint employers and give unions the right to strike or picket at all of the businesses' locations, not just the location where a dispute arises. When joint-employer status is established, entities may be liable for each other's unfair labor practices, including unlawful discipline or discharge of employees under the NLRA.

A new joint-employer standard also would increase the likelihood of union "corporate campaigns" against national businesses and pressure smaller businesses, franchisees, suppliers or subcontractors to organize. Union agents and community representatives engaged in corporate campaigns often use the NLRB complaint process as a weapon against employers. Small businesses may be involved in a long, expensive legal battle along with the national business. These small businesses may not be equipped to bear the cost of these fights and could see their businesses negatively impacted as collateral damage.

The five NLRB members may make an official change in the pending *Browning-Ferris* case, but for now the old joint-employer standard continues to be current law. Meanwhile, on September 15, 2014, the Board issued a decision that suggests its willingness to consider indirect control in the joint-employer context.¹⁸ Although the Board did not expressly adopt the General Counsel's approach, Chairman Pearce and Member Hirozawa imputed indirect control by CNN over TVS employees from CNN's commercial contract for labor services. It found that CNN controlled the "hiring, supervision, and direction" of the subcontractor's employees by setting terms in its labor agreement for staffing levels, reimbursements and training costs. The subcontractor established the salary ranges for employees, but the majority found it critical that CNN was the "sole source of funding for employee compensation."¹⁹ Although CNN was never at the bargaining table, the subcontractor consulted with CNN about wage proposals during contract negotiations. The majority rejected CNN's assertion that its supervision of the subcontractor's employees was limited and routine.

While ostensibly relying on the Board's traditional joint-employer standard, the majority's reasoning also relied on "additional factors" in reaching its decision: employees worked in CNN facilities, had CNN email accounts and CNN paid for employee training and equipment; the employees worked exclusively at CNN and performed work at the core of CNN's business; CNN held out the technicians as its own employees to obtain security clearances and press passes. Based in part on these additional, untraditional factors, the majority found CNN and TVS joint employers. The Board ordered CNN to offer employment to 100 former contract employees or substantially equivalent positions. CNN must also make whole 300 workers for any loss of earnings and other benefits.

The new factors relied in the Board's *CNN* subcontractor case—on top of the General Counsel's decision to issue a complaint against one of the country's leading franchisors—place all businesses on notice of what may be coming. If the NLRB does adopt the General Counsel's proposed joint-employer rule, the NLRB will inject itself across multiple industries into complex business relationships whose structure is completely unrelated to labor relations. Since the NLRB's rules apply to union and non-union businesses alike, any attempt by the Board to redefine who counts as an employer should concern each and every employer.

¹⁸ *CNN America, Inc. and Team Video Services, LLC*, 361 NLRB 47 (2014). The unfair labor practice charges in this case were originally filed on March 5, 2004. The case was tried over 82 days from 2007 to 2008. There were 16,000 pages of transcripts and 1,300 exhibits. The ALJ issued his decision on November 19, 2008. The Board's decision was issued almost six years after this decision and over ten years after the filing of the original charges.

¹⁹ The board cited the direct control tests of *Lareco Transportation*, 269 NLRB 324 (1984) and *N.L.R.B. v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117 (3d Cir. 1982). A copy is available at <http://www.nlr.gov/case/05-CA-031828>.