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What Makes Parties Joint Employers? An Analysis of the National Labor Relations Board's Redefining of the "Joint Employer" Standard and Its Potential Effect on the Labor Industry

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What Makes Parties Joint Employers? An Analysis of the National Labor Relations Board's Redefining of the "Joint Employer" Standard and Its Potential Effect on the Labor Industry

Deepti Orekondy*

Multiple cases decided before the National Labor Relations Board ("NLRB") have continuously narrowed the scope of the joint employer doctrine. Most recently, in the case of Browning-Ferris Indus., 362 N.L.R.B. No. 186 (August 27, 2015), the NLRB overturned decades of precedent and adopted a much more expansive standard that reverts the doctrine back to its original understanding in 1965. Prior to this decision, the joint employer doctrine established a joint employer relationship when both entities had meaningful control over the terms and conditions of employment and actually exercised that authority. After Browning-Ferris, the new standard now only requires "indirect" control, regardless of actualization of that authority, over workers for businesses to be considered employers and be responsible for labor disputes and negotiations.

The new standard has far reaching implications for the labor industry and affects the bargaining power and rights of entities all the way down the chain. The changes lead to increased liability for employees, greater bargaining power for unions and employees, and a threat to the franchise business model.

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I. INTRODUCTION

The joint employer doctrine is a federal doctrine that determines whether two entities are both simultaneously considered employers over an employee.¹ When a joint employer relationship exists, “both entities must comply with the applicable laws with respect to the employees at issue and are liable as employers”² After three long decades of precedent establishing a standard for finding a joint employer relationship, the National Labor Relations Board (“NLRB”) has decided the

¹ 29 C.F.R. § 791.2 (2016).

² Dianne LaRocca, *NLRB Joint Employer Redefinition Threatens Franchises*, LAW360 (Jan. 21, 2015, 12:40 PM), <http://www.law360.com/articles/613307/nlr-joint-employer-redefinition-threatens-franchises>.

transformation of the doctrine over the years is baseless, and no longer conforms to the changes in our economy.³

In August of 2015, the NLRB made a startling decision regarding the joint employer doctrine in the case of *Browning-Ferris Indus.*⁴ The result of this decision redefined the doctrine, leaving the labor industry in frenzy with employers worried about increased liability, franchisees concerned about a loss of independence, and labor unions high with greater bargaining power.

Part I of this Comment will discuss the basic concepts necessary to understand the role and impact of the joint employer doctrine on the labor industry. Part II will review the evolution of the joint employer doctrine from 1965 until the present. Part III evaluates possible implications for the labor industry such as the increased responsibility of employers, unions having greater bargaining power, and the new liability placed upon franchisors.

A. *The National Labor Relations Act: What Does It Mean To Be An Employer?*

The National Labor Relations Act ("NLRA") was established by Congress in 1935 with the intent to "protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."⁵ Under the NLRA an employer is defined as "any person acting as an agent of an employer," whether directly or indirectly.⁶ An employee is defined in essence as "any employee, and shall not be limited to the employees of a particular employer, unless [the NLRA] explicitly states otherwise," which includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment," but does not include any individual that is an independent contractor.⁷ Even though the joint employer doctrine is not codified, it is an extension of the NLRA. The status of joint employer is dependent upon whether the putative joint employer has a common law

³ *NLRB's Joint Employer Attack*, WALL ST. J.: OPINION (last updated Aug. 28, 2015, 7:49 PM), <http://www.wsj.com/articles/nlrbs-joint-employer-attack-1440805826>; see also *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 at 1 (Aug. 27, 2015).

⁴ *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 at 1 (Aug. 27, 2015).

⁵ *National Labor Relations Act*, NATIONAL LABOR RELATIONS ACT, <https://www.nlr.gov/resources/national-labor-relations-act> (last visited Jan. 17, 2017).

⁶ 29 U.S.C. § 152(2) (2012).

⁷ 29 U.S.C. § 152(3) (2012).

employment relationship with the employees at issue.⁸ Central to this determination is “the existence, extent, and object of the putative joint employer’s control.”⁹

B. What Is A Union And What Is Its Role In Collective Bargaining?

A union is an organization of employees of a particular workplace that choose to join together to work toward achieving common employment goals.¹⁰ The purpose of forming and joining a union is for employees to collectively try and improve their working conditions, such as wages, hours, and job safety.¹¹ Essentially, unions unite workers and use their strength in numbers to create a voice for the employees and in turn are the vehicles used to negotiate with employers.¹² Unions are valuable tools for employees in all work environments because it allows them to secure equality in all work environments and protects them from overreaching employers.¹³

To understand the benefit of the joint employer doctrine to unions, one must understand the concept of collective bargaining. Collective bargaining is a process which workers, through their union representatives, can negotiate the terms of their employment contracts.¹⁴ Before collective bargaining can occur though, the employees must unionize. Once employees unionize and elections are held to select a union representative, the representative negotiates with the employer on behalf of the employees.¹⁵ The representative works with employers to create a contract, which the employees can vote to accept or reject.¹⁶ The resulting contract is known as the collective bargaining agreement.¹⁷ This agreement is a binding contract.¹⁸ However, it is important to note that

⁸ *Browning-Ferris*, 362 N.L.R.B. at 2.

⁹ *Id.*

¹⁰ *Learn About Unions*, AFL-CIO, <http://www.aflcio.org/Learn-About-Unions> (last visited Jan. 17, 2017).

¹¹ *Id.*

¹² *What Unions Do*, AFL-CIO, <http://www.aflcio.org/Learn-About-Unions/What-Unions-Do> (last visited Jan. 17, 2017).

¹³ *See id.*

¹⁴ *Collective Bargaining Fact Sheet*, AFL-CIO, <http://www.aflcio.org/Learn-About-Unions/Collective-Bargaining/Collective-Bargaining-Fact-Sheet> (last visited Jan. 17, 2017).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 51 C.J.S. *Labor Relations* § 308 (2016).

¹⁸ *Id.*

these agreements do not supersede or nullify any of the rights normally afforded to workers by law.¹⁹

The employer, employees, and unions are all intertwined when it comes to the employer – employee relationship. As a result, all parties are affected when there is a change in the joint employer doctrine. Those who are *now* deemed to be a joint employer under the new standard may be subject to liability and responsibility that they had not originally anticipated when entering into their respective agreements and unions may have additional entities with which it can negotiate.

II. EVOLUTION OF THE JOINT EMPLOYER STANDARD

A. *The “Share or Co-Determine” Standard*

The essence of the joint employer doctrine can be traced back to *Greyhound Corp.* in 1965.²⁰ *Greyhound Corp.* was focused on a union representation issue of a refusal-to-bargain allegation that required a determination of whether two employers, Greyhound Corporation (“Greyhound”) and Floors, Inc. (“Floors”), were joint employers.²¹ On remand from the Supreme Court, the NLRB had determined that Greyhound and Floors were joint employers for purposes of determining collective bargaining units and when the two employers were called upon to engage in collective bargaining they refused.²² The employers believed that the NLRB was incorrect in determining that they were joint employers and as such the designated bargaining unit was not appropriate.²³ Greyhound and Floors contended that Floors was an independent contractor and therefore the sole employer over those workers it placed at the Greyhound terminals.²⁴ Floors alleged that the bargaining unit should consist solely of Floors employees collectively across all the Greyhound terminals or each terminal should consist of separate, individual bargaining units.²⁵

Upon reviewing the service agreements between Greyhound and Floors, the NLRB found two statutory employers to be joint employers of certain workers because they “share[d], or codetermine[d], those matters governing essential terms and conditions of employment.”²⁶ This decision

¹⁹ *Id.*

²⁰ *See* *Greyhound Corp.*, 153 N.L.R.B. 1488, 1490 (1965).

²¹ *Id.* at 1490–91.

²² *Id.* at 1496.

²³ *Id.* at 1490.

²⁴ *Id.*

²⁵ *Greyhound Corp.*, 153 N.L.R.B. at 1490.

²⁶ *Id.* at 1495.

was premised on the common control between the two regarding terms and conditions not limited to but including working hours, scheduling, number of workers needed, manner in which work is completed, and wages.²⁷ The NLRB noted that the substantial influence both employers had over the workers qualified them as joint employers regardless of whether Floors was an independent contractor.²⁸ Therefore, because they were joint employers, the refusal to bargain was an unfair labor practice.²⁹

Although this standard was established, it was not consistently applied until the Third Circuit endorsed it in 1982 in *NLRB v. Browning-Ferris Indus. of PA*.³⁰ In *Browning-Ferris*,³¹ the Third Circuit Court of Appeals was required to determine whether Browning-Ferris Industries of Pennsylvania, Inc. (“BFI”) was a joint employer under the NLRA in order to determine if it was responsible for unfair labor practices.³² The court examined two different standards for determining employer status: the joint employer standard set out in *Greyhound Corp.* and the single employer standard the NLRB had used in *Radio Union v. Broadcast Service of Mobile, Inc.*³³ BFI maintained that the four factor test for a finding of a single employer set forth in *Radio Union* was the correct standard to be applied.³⁴ This test determined whether “two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a ‘single employer.’”³⁵ The four factors for a finding of a single employer include the following: “(1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership.”³⁶

In reviewing *Radio Union* and the additional cases BFI cited, the court in *Browning-Ferris* (1982) determined that the joint employer concept does not require a finding of a single integrated enterprise, and that finding a joint employer relationship assumes that both entities are independent but jointly maintain control over important aspects of the employment

²⁷ *Id.* at 1495–96.

²⁸ *Id.* at 1494–95.

²⁹ *Id.* at 1496.

³⁰ *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 at 12 (Aug. 27, 2015); *see also* N.L.R.B. v. *Browning-Ferris Indus. of PA, Inc.*, 691 F.2d 1117, 1119 (3d Cir. 1982), enforcing 259 N.L.R.B. 148 (1981).

³¹ It should be noted that this *Browning-Ferris* case was from 1982 and was one of the original cases that established the previous standard for the joint employer doctrine. This case is separate from the *Browning-Ferris* case decided by the NLRB in 2015.

³² N.L.R.B. v. *Browning-Ferris Indus. of PA, Inc.*, 691 F.2d 1117, 1119 (3d Cir. 1982), enforcing 259 N.L.R.B. 148 (1981); *see also* *Radio Union v. Broad. Serv of Mobile, Inc.*, 380 U.S. 255 (1965).

³³ *Browning-Ferris Indus.*, 691 F.2d at 1121; *see also* *Radio Union*, 380 U.S. at 255.

³⁴ *Browning-Ferris Indus.*, 691 F.2d at 1121-22; *see also* *Radio Union*, 380 U.S. at 255.

³⁵ *Browning-Ferris Indus.*, 691 F.2d at 1121-22; *see also* *Radio Union*, 380 U.S. at 255.

³⁶ *Browning-Ferris Indus.*, 691 F.2d at 1122; *see also* *Radio Union*, 380 U.S. at 255.

relationship.³⁷ As such, the court maintained that the single employer standard is inappropriate and that the *Greyhound Corp.* “share or co-determine” standard is best applicable.³⁸ The court determined the fact that BFI shared with its “brokers” the responsibility of hiring, firing, establishing work hours, and compensation was substantial evidence to support a finding of shared significant control to determine that the parties were in fact joint employers.³⁹

The 1982 *Browning-Ferris* case served to clarify and untangle the joint employer doctrine by explaining that even though this type of direct authority and control was present, the NLRB did not require that this right be exercised, or that it be exercised in any particular manner.⁴⁰ It established that it was sufficient for a finding of joint employer status to exist even if the employer merely had the *ability* to have direct control over the employees, whether or not it was exercised.⁴¹ After the Third Circuit’s endorsement, the standard was further bolstered when the NLRB adopted it in two subsequent 1984 cases.⁴²

B. Narrowing the Doctrine: Shift from Reserved Control to Actual Exercise of Authority

The joint employer doctrine was again revamped when additional requirements were added that narrowed the joint-employer standard.⁴³ The shift away from the reliance on “reserved control and indirect control as indicia of joint employer status” was evidenced by the *Laerco Transp.* decision with its emphasis and focus on the actual exercise of control.⁴⁴ In this case, the NLRB was required to determine whether Laerco Transportation and Warehouse (“Laerco”) and California Transportation Labor, Inc. (“CTL”) were joint employers in regards to establishing an appropriate unit for collective bargaining.⁴⁵ Laerco contested that the finding of joint employer status was not supported by the record and was a departure from NLRB precedent.⁴⁶ The NLRB maintained the importance of the concept of separate entities sharing or codetermining matters essential to employment, but also established that “there must be

³⁷ *Browning-Ferris Indus.*, 691 F.2d at 1122.

³⁸ *Id.* at 1122-24.

³⁹ *Id.* at 1124-25.

⁴⁰ *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 at 13 (Aug. 27, 2015).

⁴¹ *Id.* at 11.

⁴² *NLRB’s Joint Employer Attack*, WALL ST. J.: OPINION, <http://www.wsj.com/articles/nlrbs-joint-employer-attack-1440805826> (last updated Aug. 28, 2015, 7:49 PM); see *Laerco Transp.*, 269 N.L.R.B. 324 (1984); *TLI, Inc.*, 271 N.L.R.B. 798 (1985).

⁴³ *Browning-Ferris Indus.*, 362 N.L.R.B. at 13.

⁴⁴ *Id.*

⁴⁵ *Laerco*, 269 N.L.R.B. 324 (1984).

⁴⁶ *Id.*

a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.”⁴⁷ Applying these requirements to the facts of the case, the NLRB found that Laerco’s control over CTL employees was “minimal and routine in nature” and was not enough to effectively control the employment of CTL employees.⁴⁸ The major elements of employment and the acquisition and retention of the employees was controlled by CTL.⁴⁹ Therefore, because Laerco did not actively and meaningfully affect the employment of CTL employees, the NLRB found that they were not joint employers.⁵⁰

This requirement of exercising control was actualized in *TLI, Inc.* where the NLRB reinforced the doctrine by restating the “meaningful control” standard from *Laerco Transp.* for a joint employer relationship to exist.⁵¹ In *TLI, Inc.*, the NLRB agreed with the joint employer standard set forth in a prior hearing by the Administrative Law Judge, but concluded that TLI and Crown Zellerback (“Crown”) were not joint employers.⁵² TLI served as the lessor of Crown’s transportation carrier drivers and the judge determined that because Crown shared some control that it was a joint employer.⁵³ Crown contended that it was not a joint employer and that the correct standard to be applied was the four-factor test for the single employer standard.⁵⁴ The NLRB upon review of this decision agreed with the judge that the single employer standard was not applicable because that test is only used to determine if two separate entities establish a single enterprise.⁵⁵ The NLRB agreed with the judge that the correct standard to be utilized was that which was recognized by the Third Circuit, that “where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the [NLRA].”⁵⁶ Although the NLRB agreed on the standard to be applied, it did not agree with the court that Crown was a joint employer with TLI.⁵⁷ The NLRB held that even though Crown did exercise some control over the drivers, the control did not reach the degree of meaningful effect upon the terms and conditions,

⁴⁷ *Id.* at 325.

⁴⁸ *Id.* at 326.

⁴⁹ *Id.* at 325.

⁵⁰ *Laerco*, 269 N.L.R.B. 325 (1984).

⁵¹ *TLI, Inc.*, 271 N.L.R.B. 798 (1985).

⁵² *Id.* at 798–99.

⁵³ *Id.* at 798.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *TLI, Inc.*, 271 N.L.R.B. 798 (1985).

⁵⁷ *Id.* at 799.

and because it lacked authority to hire, fire or discipline as is needed, Crown could not be deemed a joint employer.⁵⁸

These two cases in conjunction embody the transformations of the joint employer doctrine that the NLRB has now reviewed and reconsidered under its new decision in *Browning-Ferris Indus.* in 2015.

C. *Refining of the Joint Employer Doctrine*

Until the recent decision by the NLRB, a joint employer relationship could be established so long as there was the ability for direct exercise of meaningful control and that such control was actually exercised. In August of 2015, in the case of *Browning-Ferris Indus.*, the NLRB determined that with the changes in the economy and the labor industry, a revision of the joint employer standard was necessary. Upon reviewing the precedent, the NLRB found that

[i]f the current joint-employer standard is narrower than statutorily necessary, and if joint-employment arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's 'responsibility to adapt the Act to the changing patterns of industrial life.'⁵⁹

The NLRB then determined that it would be wise to go back to the roots of the joint employer doctrine and revisit the 1965 standard.

1. *Browning-Ferris Indus.* (2015)

At issue in the recent *Browning-Ferris* (2015) case is whether BFI and Leadpoint were considered joint employers. In the process of making such a determination, the NLRB considered the standard for assessing joint employer status under the NLRA. This case arose as a result of a representation petition filed on behalf of workers led by the International Brotherhood of Teamsters, a union, which sought to represent workers employed by a subcontractor, Leadpoint.⁶⁰ The petition asserted that *Browning-Ferris* was a joint employer with Leadpoint because it had contracted with Leadpoint for temporary labor.⁶¹

⁵⁸ *Id.*

⁵⁹ *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 at 15 (Aug. 27, 2015).

⁶⁰ Richard L. Alfred et al., *How Will Browning-Ferris Change the Test for Joint-Employer Status for Union and Non-Union Employers?*, SEYFARTH SHAW: PUBLICATIONS/BLOG POSTS (Aug. 27, 2015), <http://www.seyfarth.com/publications/MA082715-LE>.

⁶¹ *Browning-Ferris Indus.*, 362 N.L.R.B. at 9.

a) Facts

In *Browning-Ferris* (2015), BFI owned and operated a recycling facility within which it employed approximately sixty (60) employees, which were part of an existing separate bargaining unit.⁶² BFI contracted with Leadpoint, a supplier firm, to provide workers to work at the BFI facility.⁶³ BFI and Leadpoint had a temporary labor services agreement that stated Leadpoint was the sole employer of the employees it provides, and that no part of the agreement should be construed to create an employment relationship between BFI and the personnel provided by Leadpoint.⁶⁴ BFI and Leadpoint both had its own supervisors and work leaders at the facility to oversee employees.⁶⁵ BFI had no control over the hiring process of Leadpoint employees, but Leadpoint was to ensure that all hired personnel had the necessary qualifications with the caveat that BFI had the authority to request a certain standard for selection be met or exceeded during Leadpoint's hiring process.⁶⁶

In terms of disciplining employees, Leadpoint maintained sole responsibility to counsel, discipline, evaluate, and terminate employees that were assigned to BFI.⁶⁷ However, BFI retained the right to reject "and discontinue use of any Leadpoint personnel for any or no reason."⁶⁸ As for wages, BFI was to follow a rate schedule where it compensated Leadpoint for each worker, but Leadpoint was responsible for the pay rate and issuance of paychecks to its personnel.⁶⁹ Further, Leadpoint employees were required to sign a waiver stating that they were only eligible for benefits through Leadpoint and were not eligible for any benefits through BFI.⁷⁰

The workflow and process was primarily determined by BFI.⁷¹ BFI was responsible for determining what would be done each day and where employees would be stationed.⁷² To implement BFI's plan, BFI provided Leadpoint with a target number of employees needed for that day and Leadpoint was in charge of assigning specific employees to specific stations.⁷³ If changes needed to be made to the stationing of employees, BFI could direct the Leadpoint supervisors to move employees as

⁶² *Id.* at 2.

⁶³ *Id.* at 3.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Browning-Ferris Indus.*, 362 N.L.R.B. at 3.

⁶⁷ *Id.* at 5.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 6.

⁷¹ *Browning-Ferris Indus.*, 362 N.L.R.B. at 6–7.

⁷² *Id.*

⁷³ *Id.* at 6.

needed.⁷⁴ Both Leadpoint and BFI provided training to Leadpoint personnel.⁷⁵ As for safety, Leadpoint's employees were required to follow BFI safety procedures and BFI had the right to enforce its safety policy upon Leadpoint employees.⁷⁶

b) New Joint Employer Standard

Upon review of the pertinent facts and numerous viewpoints regarding the appropriate standard for finding a joint employer relationship, the NLRB has decided to upend thirty years of precedent and to embrace the 1965 standard endorsed by the Third Circuit finding that "[t]he 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."⁷⁷ In addition, the decision held that the NLRB only requires an employer possess indirect control, and removes the need for exercise of that control.⁷⁸ With this refining and regression of the doctrine, the NLRB ultimately overruled *Laerco Transp.* and *TLI, Inc.*⁷⁹ Now, the NLRB has the standard to be more expansive and as a result, more ambiguous.

III. IMPLICATIONS OF THE NEW JOINT EMPLOYER STANDARD

Redefining the joint employer standard has transformed the scope of the doctrine to encompass a broader range within which to find a joint employer relationship. As a result, the labor industry has become concerned with the potential implications this may have on employers, employees, franchises, and labor unions because now there is greater likelihood that a joint employer relationship will be found.⁸⁰

To restate, after the 2015 *Browning-Ferris* decision the NLRB determined that

⁷⁴ *Id.*

⁷⁵ *Id.* at 8.

⁷⁶ *Browning-Ferris Indus.*, 362 N.L.R.B. at 8.

⁷⁷ *Id.* at 19; *see also* *Greyhound Corp.*, 153 N.L.R.B. 1488, 1495 (1965); *N.L.R.B. v. Browning-Ferris Indus. of PA, Inc.*, 691 F.2d 1117, 1119 (3d Cir. 1982), enforcing 259 N.L.R.B. 148 (1981).

⁷⁸ *Browning-Ferris Indus.*, 362 N.L.R.B. at 2.

⁷⁹ *Id.*

⁸⁰ *NLRB's Joint Employer Attack*, WALL ST. J.: OPINION (last updated Aug. 28, 2015, 7:49 PM), <http://www.wsj.com/articles/nlrbs-joint-employer-attack-1440805826>.

joint-employer status may be found where both entities (1) are employers within the meaning of the common law, and (2) “share or codetermine those matters governing the essential terms and conditions of employment.” This means that joint-employer status will be found where the putative joint-employer actually exercises *direct* or *indirect* control over essential terms and conditions of employment of another entity’s employees, or has simply *reserved* the right to exercise such control.⁸¹

When a joint employer relationship is found, both entities are responsible for “an action due either to their actual pursuit of a common course in violation of the NLRA or merely by virtue of their shared control over labor relation matters.”⁸² With this change in the standard, the NLRB has shifted the test from finding an actual existing joint relationship to deeming employers as joint employers based on what their relationship may be expanded to encompass.⁸³ This means that even the mere *ability to control* is sufficient for a finding of a joint employment relationship, whether or not it’s ever actually exercised. The Board’s decision will impact every sector of the labor industry that has structured their business based on the settled 30-year precedent of employment law with the belief that “absent the direct control necessary for a true employer-employee relationship, the entity will not be a joint employer under the NLRA.”⁸⁴

With the expanded scope within which a joint employer relationship can be found, there is an increased likelihood that more employers will be liable for unfair labor practices, unions will have greater bargaining power, and the essence of the franchise business model may begin to crumble.

A. *Impact on Employers*

Now that there is a greater possibility of finding a joint employer relationship, employers are put in the hot seat. The status of joint employer is not simply a title but carries with it the possibility of increased liability and responsibility. Joint employer status will impact the individual employers on a daily basis because “[t]he joint employer doctrine is applied mostly in unfair labor practice proceedings when two business

⁸¹ Zachary D. Fasman et al., *What Organizations Need to Know Regarding the NLRB’s Revised Joint-Employer Standard*, 22 HR Advisor: Legal & Practical Guidance No. 1 (2016).

⁸² 9 EMP. COORD. LABOR RELATIONS, WESTLAW § 4:27 (Supp. January 2017).

⁸³ Richard L. Alfred et al., *How Will Browning-Ferris Change the Test for Joint-Employer Status for Union and Non-Union Employers?*, SEYFARTH SHAW: PUBLICATIONS/BLOG POSTS (Aug. 27, 2015), <http://www.seyfarth.com/publications/MA082715-LE>.

⁸⁴ *Id.*

entities are charged with dual responsibility for an action due either to their actual pursuit of a common course in violation of the NLRA or merely by virtue of their shared control over labor relations matters.”⁸⁵

Essentially, once two entities are deemed joint employers, they are both considered the primary employer.⁸⁶ As such, employers are now potentially responsible for all of the actions of its contractors and affiliates in regard to their employees.⁸⁷ For example, “if a manager of the supplier employer unlawfully threatened a contract worker concerning activities protected under the NLRA (such as signing a union card), both employers would be liable for that violation.”⁸⁸ Even though the user employer had no part in making the threat, because they are joint employers, the user employer is potentially jointly liable.

Additionally, employers may now be obligated to take part in collective bargaining.⁸⁹ Although this may be a benefit for employees and unions, employers will bear the burden. However, in terms of collective bargaining, the NLRB made clear that “as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control.”⁹⁰ The NLRA “provides that an employer has a duty to bargain in good faith with the labor union representing its workers, must comply with the resulting collective bargaining agreement, and may be subjected to picketing and strikes by its employees.”⁹¹

Ultimately, the change in the joint employer standard creates a state of uncertainty for employers because there is no clear definition for what constitutes “indirect control” and what acts establish sharing or codetermining essential terms of employment.⁹² As noted by the dissent,

⁸⁵ 9 EMP. COORD. LABOR RELATIONS, WESTLAW § 4:27 (Supp. January 2017).

⁸⁶ Russell J. McEwan, *Labor Law Gone Wild: NLRB’s Joint-Employer Decision May Help Unions and Hurt Business*, 29 NO. 15 WESTLAW J. GOV’T CONT., Nov. 2015 at 3.

⁸⁷ *NLRB’s Joint Employer Attack*, WALL ST. J.: OPINION (last updated Aug. 28, 2015, 7:49 PM), <http://www.wsj.com/articles/nlrbs-joint-employer-attack-1440805826>.

⁸⁸ Mark Keenan, *Summary of NLRB’s Browning-Ferris Decision*, NELSON MULLINS: NEWSLETTERS (Sept. 22, 2015), <http://www.nelsonmullins.com/news/newsletters-print.cfm?id=9986B22E-CCA1-62A5-F2747FDD3104DA32>.

⁸⁹ Caroline B. Galiatsos, Note, *Beyond Joint Employer Status: A New Analysis for Employers’ Unfair Labor Practice Liability Under the NLRA*, 95 B.U.L. REV. 2083, 2087 (2015).

⁹⁰ *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 at 16 (Aug. 27, 2015).

⁹¹ Charles H. Kaplan, *What Browning-Ferris Means to Union and Nonunion Employers: A Sweeping Ruling Redefines Joint Employment, Potentially Transforming Labor Relations and Business Relationships*, METROPOLITAN CORP. COUNS.: ARTICLES (Oct. 23, 2015, 4:35 PM), <http://www.metrocorp.counsel.com/articles/33201/what-browning-ferris-means-union-and-nonunion-employers-sweeping-ruling-redefines-joi>.

⁹² Emily S. Miller, *Life After Browning-Ferris: What Employers Need to Know Under the New Joint Employer Regime*, COZEN O’CONNOR: NEWS & RESOURCES (Aug. 31, 2015),

the decision leaves to the Board the discretion to “give dispositive weight to an employer’s control over any essential term and condition of employment in finding a joint employer relationship.”⁹³ Moreover, the dissent was quick to point out that there is no limiting factor in determining which relationships fall within the joint employer status.⁹⁴ With no guidelines, employers are left to rely on the specific facts outlined in the 2015 *Browning-Ferris* decision, though they are not of much help because it was unclear which facts were dispositive in determining the joint employer status.⁹⁵ The lack of a clear definition in the new standard leaves employers to walk on thin ice and take a “hands-off approach” until it’s clear what actions will trigger the joint employer status.⁹⁶ Until then, many employers are going to be caught up in litigation and will have to set the baseline as guidance for their peers.

Furthermore, it is possible that if the new standard is upheld, other agencies such as the EEOC and state agencies will adopt the same or similar definition just as the Department of Labor has, which could lead to even further expanded liability under various federal and state laws.⁹⁷ As an unwelcome result of the unanticipated litigation, employers will put in the spotlight and face scrutiny requiring them to divulge information pertaining to their business practices and employee relations that may cause them functional and financial harm.⁹⁸

B. *Impact on Unions and Employees*

Further, after the NLRB decided the *Browning-Ferris* case in 2015 there was much debate over what this means for unions and newly deemed employers. When unions are brought into the mix they are given the upper hand. Now, when a joint employer relationship is deemed to exist unions will essentially have the opportunity to negotiate with both employers,

<https://www.cozen.com/news-resources/publications/2015/life-after-browning-ferris-what-employers-need-to-know-under-the-new-joint-employer-regime>.

⁹³ Brennan W. Bolt et al., *Five Practical Issues Browning-Ferris Creates for Employers*, LAB. REL. TODAY (Aug. 28, 2015), <http://www.laborrelationstoday.com/2015/08/articles/nlr-boards-decisions/five-practical-issues-browning-ferris-creates-for-employers/>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Mark Keenan, *Summary of NLRB’s Browning-Ferris Decision*, NELSON MULLINS: NEWSLETTERS (Sept. 22, 2015), <http://www.nelsonmullins.com/news/newsletters-print.cfm?id=9986B22E-CCA1-62A5-F2747FDD3104DA32>; see also Alexander J. Passantino et al., *U.S. Department of Labor Expansively Defines Joint Employment Under FLSA*, SEYFARTH SHAW: PUBLICATIONS/ BLOG POSTS (Jan. 20, 2016), <http://www.seyfarth.com/publications/OMM012016-LE>.

⁹⁸ Mark Keenan, *Summary of NLRB’s Browning-Ferris Decision*, NELSON MULLINS: NEWSLETTERS (Sept. 22, 2015), <http://www.nelsonmullins.com/news/newsletters-print.cfm?id=9986B22E-CCA1-62A5-F2747FDD3104DA32>.

regardless of the extent of their participation in those matters under which they have authority to control. As a result, both entities will be required to share in the collective bargaining negotiations and may be obligated to take a seat at the bargaining table when they previously may not have been required to do so.⁹⁹ This places more responsibility on the newly deemed joint employers and imposes a greater risk of liability. Meanwhile, it provides a great benefit for employees and gives unions more power than they have had in the past. The unions now have more opportunity and reach in their bargaining power and can reach above low level managers and attempt to negotiate with parent companies directly. This proves to benefit employees because there is a greater chance that the unions will be able to secure more lucrative terms under the collective bargaining agreements when they have the opportunity to bargain with entities higher up the chain of command.

Over the past year of debate regarding the implications on unions and collective bargaining, the labor industry received some clarity when the NLRB decided *Miller & Anderson*¹⁰⁰ in July of 2016. The NLRB continued its streak of making drastic changes to employment law and overturned precedent regarding collective bargaining units and returned to a prior standard established in *M.B. Sturgis, Inc.*¹⁰¹ (“Sturgis”).

Prior to *Miller & Anderson*, union units were allowed to be composed of mixed workers¹⁰² but such a unit required the consent of both employers involved.¹⁰³ Now, after *Miller & Anderson*, as long as a joint employer relationship is found, a union bargaining unit may be formed “between the actual employees of a business and the employees of a subcontractor without employer consent.”¹⁰⁴ Although this particular issue has fluctuated over the past years, because of the recent *Browning-Ferris* (2015) decision, it has become of heightened importance. Now that the joint employer standard has been loosened and there is greater potential for a joint employer relationship to exist, there is also a greater likelihood of having unions that are composed of a mix of a company’s own employees as well as those of a joint employer.¹⁰⁵ The caveat, however, is that there must be a shared community of interest in order for a single bargaining

⁹⁹ See *NLRB’s Joint Employer Attack*, WALL ST. J.: OPINION (last updated Aug. 28, 2015, 7:49 PM), <http://www.wsj.com/articles/nlrbs-joint-employer-attack-1440805826>.

¹⁰⁰ *Miller & Anderson, Inc.*, 364 N.L.R.B. No. 39, at 2 (Jul. 11, 2016).

¹⁰¹ *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000).

¹⁰² Mixed worker units are units that include both single employer and joint employer employees.

¹⁰³ Sean P. Redmond, *All Mixed Up at the NLRB: The Miller & Anderson Decision*, U.S. CHAMBER OF COM. (Jul. 12, 2016, 5:15 PM), <https://www.uschamber.com/article/all-mixed-the-nlrbs-the-miller-anderson-decision>.

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*

unit composed of both solely and jointly employed workers to be appropriate.¹⁰⁶ The appropriateness will be determined by application of the traditional community of interest factors.¹⁰⁷

After both *Browning-Ferris* (2015) and *Miller & Anderson*, there is a much greater possibility of having mixed bargaining units. As such, in *Miller & Anderson* the NLRB held that a user employer is only required to bargain with unions regarding all the terms and conditions of employment for unit employees it solely employs.¹⁰⁸ However, for those employees who are jointly employed, the employer is only obligated to bargain over the terms and conditions for which it possesses the authority to control, again regardless of whether that control is ever actually exercised.¹⁰⁹ With these recent decisions at play, unions have been given the upper hand and employment law leans towards favoring organized labor.¹¹⁰

However, in the *Browning-Ferris* (2015) decision the dissent was quick to point out that under the NLRA the NLRB is expected to foster the stability of labor relations and “encourage the practice and procedure of collective bargaining.”¹¹¹ From the dissent’s perspective, loosening the joint employer doctrine does not work to achieve this goal, but rather is a step backwards and creates an area of unsettled law when the Supreme Court has stressed the need for certainty.¹¹² The resulting ambiguity of these decisions leaves employers and unions in fear or of later evaluations that lead to labor violations or unfair outcomes.¹¹³

Moreover, with the possibility of multiple employers at the bargaining table, the dissent recognizes the immense problem that has now evolved, which was never contemplated by Congress.¹¹⁴ With multiple employers bargaining with the unions, there is a chance for greater confusion and inability to create a collective bargaining agreement that meets the needs and interests of all parties involved.¹¹⁵ The dissent offers an example of a Cleaning Company that contracts with three separate Clients A, B, and

¹⁰⁶ *Board Decides Miller & Anderson, Returns to Sturgis Standard*, NAT’L LAB. REL. BOARD (Jul. 11, 2016), <https://www.nlr.gov/news-outreach/news-story/board-decides-miller-anderson-returns-sturgis-standard>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Sean P. Redmond, *All Mixed Up at the NLRB: The Miller & Anderson Decision*, U.S. CHAMBER OF COM. (Jul. 12, 2016, 5:15 PM), <https://www.uschamber.com/article/all-mixed-the-nlr-the-miller-anderson-decision>.

¹¹¹ *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 at 37 (Aug. 27, 2015).

¹¹² *Id.* at 37–38.

¹¹³ *Id.* at 38.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

C.¹¹⁶ Under the new joint employer standard, the Cleaning Company is considered a joint employer with each of the Clients A, B, and C.¹¹⁷ If the Cleaning Company's employees choose to unionize, it creates a whole host of problems not limited to the confidentiality between each client and the Company, the interests and needs of each client and the Company in relation to all their employees, and the conflicts that may arise as a result of inconsistency between employment contracts and the collective bargaining agreements.¹¹⁸ These are a few among the many potential issues that arise as a result of the loosened standard. Although as new case law is established some of these issues are resolved—like the *Miller & Anderson* case which resolved the issue of multiple versus single bargaining units—many new issues arise as a result. Ultimately, it leads to muddled interpretations on the part of all parties involved to find a way to mesh these decisions into a coherent and navigable playing field.

C. *Impact on Franchise Businesses*

On a similar note, with unions having greater power over bargaining, franchise businesses are left to scramble because, with a relaxed standard within which to find joint employer status, franchisors can now be “declared the employers or joint employers of their franchisees or their franchisees’ employees.”¹¹⁹ As a result, this has become “a tactic designed to make large franchisors the economic ‘bargaining unit’ with which unions may negotiate on behalf of the franchisees’ employees.”¹²⁰ To understand the impact *Browning-Ferris* (2015) will have on the franchise business industry we must understand how they operate.

1. How Do Franchise Businesses Operate?

The franchise business consists of “a business model that involves one business owner licensing trademarks and methods to an independent entrepreneur.”¹²¹ Here, the business owner being the franchisor and the independent entrepreneur being the franchisee. The relationship between the franchisor and franchisee is governed by a Franchise Agreement that outlines the terms, conditions, privileges, and other important details of

¹¹⁶ *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 at 12 (Aug. 27, 2015).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 38–39.

¹¹⁹ David J. Kaufmann et al., *A Franchisor Is Not the Employer of Its Franchisees or Their Employees*, 34 *FRANCHISE L.J.* NO. 4, at 439 (2015).

¹²⁰ *Id.*

¹²¹ *Franchise Businesses*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/content/franchise-businesses>.

the relationship.¹²² Franchisees typically are responsible for daily tasks and must operate in accordance with the Franchise Agreement.¹²³ In return for the benefit of use of the franchisor's branding and trademarking, the franchisee must agree to meet the quality and standards required by the franchisor.¹²⁴

2. Increased Liability for Franchisors and a Loss of Independence for Franchisees

Although the NLRB did not explicitly state that the new joint employer standard requires that franchisors are joint employers with its franchisees, the dissent established that the decision effectively does just that—even if the potential joint employer only possess indirect control.¹²⁵ If the dissent is correct and franchisors are considered to be joint employers, this will drastically change the franchisor-franchisee relationship and may lead to the decline of the franchise business model.¹²⁶ As a result, there will be a vast impact on the economy because there are nearly nine (9) million Americans who work at franchise businesses.¹²⁷ Previously, franchisee owners were the only party solely responsible for those that they hire, were the only party with which unions could bargain, and were the only party liable for claims of unfair labor practices. Now, with the possibility of franchisors being considered joint employers over the franchisee's employees, the franchisors are considered primary employers.¹²⁸ Consequently, the union has the ability to not only bring the franchisee to the bargaining table but also the franchisor.

This places an increased burden on the franchisor because they now may be indirectly liable for the actions of the franchisee's employees. This shared concept of liability is better understood by considering the doctrine

¹²² *How Franchising Works*, ASHTONS FRANCHISE CONSULTING, <https://www.ashtonsfranchise.com/how-franchising-works>.

¹²³ *Id.*

¹²⁴ James Shirk, *How This New Government Ruling Destroys the Franchise Business Model*, THE DAILY SIGNAL (Aug. 28, 2015), <http://dailysignal.com/2015/08/28/how-this-new-government-ruling-destroys-the-franchise-business-model/>.

¹²⁵ Brennan W. Bolt, Seth Borden, and Richard Hankins, *Five Practical Issues Browning-Ferris Creates for Employers*, LAB. REL. TODAY (Aug. 28, 2015), <http://www.laborrelationstoday.com/2015/08/articles/nlr-decisions/five-practical-issues-browning-ferris-creates-for-employers/>; see also *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 at 45 (Aug. 27, 2015).

¹²⁶ See Brennan W. Bolt, Seth Borden, and Richard Hankins, *Five Practical Issues Browning-Ferris Creates for Employers*, LAB. REL. TODAY (Aug. 28, 2015), <http://www.laborrelationstoday.com/2015/08/articles/nlr-decisions/five-practical-issues-browning-ferris-creates-for-employers/>.

¹²⁷ *Id.*

¹²⁸ See Russell J. McEwan, *Labor Law Gone Wild: NLRB's Joint-Employer Decision May Help Unions and Hurt Bus.*, 29 WESTLAW J. GOV'T CONT. 2 at 3 (2015).

of *respondeat superior*.¹²⁹ Under this doctrine, “an employer is vicariously liable for the negligence of an agent or employee acting within the scope of his or her agency or employment although the principal or employer has not personally committed a wrong.”¹³⁰ Under the theory of *respondeat superior*, joint employers are now fronted with shared liability and risk they never anticipated.

Essentially, the essence of owning a business and having the independence to manage the company as one pleases is undercut by this new joint employer standard. The shared responsibility limits the independence of the franchisee to run the company as they wish because they are no longer able to solely make the decisions regarding their employees.¹³¹ They will likely have to consult with the franchisor, because now that the franchisee’s actions bear weight on the franchisor’s liability, franchisors are more likely to be concerned about the franchisee’s actions, resulting in more corporate control.¹³² Without a finding of joint employer status, franchisee owners could run their business as they wanted, of course in accordance with the Franchise Agreement, but they alone would be responsible for any repercussions or unfair labor violations. Now, franchisee owners who may be deemed joint employers with the franchisors will have to worry about the effect their decisions may have on the franchisor. Similarly, franchisors who may now be held accountable for franchisee actions may set strict policies and guidelines on the actions franchisees may take, essentially undermining the spirit and autonomy of franchise business operations.

With this decision, the franchisor and the franchisee will be required to work together rather than just remaining independent business partners. It is not definite that all franchise businesses will be subject to the joint employment doctrine as there was no definitive mention of the effect on franchise business in the *Browning-Ferris* (2015) decision. However, as the dissent implies, it is likely that most will because the franchisor most often sets the standard of quality and service required. Further, under the new standard this type of control over the employment conditions, whether actually exercised or not, seems sufficient to establish the franchisor as a joint employer of the franchisee employees.¹³³

¹²⁹ David J. Kaufmann et al., *A Franchisor Is Not the Employer of Its Franchisees or Their Employees*, 34 *FRANCHISE L.J.* NO. 4, at 439, 440 (2015).

¹³⁰ 57 *AM. JUR. 2D Municipal, etc., Tort Liability* § 145 (2016).

¹³¹ James Shirk, *How This New Government Ruling Destroys the Franchise Business Model*, *THE DAILY SIGNAL* (Aug. 28, 2015), <http://dailysignal.com/2015/08/28/how-this-new-government-ruling-destroys-the-franchise-business-model/>.

¹³² *Id.*

¹³³ See James Shirk, *How This New Government Ruling Destroys the Franchise Business Model*, *THE DAILY SIGNAL* (Aug. 28, 2015), <http://dailysignal.com/2015/08/28/how-this-new-government-ruling-destroys-the-franchise-business-model/>.

Ultimately, in deciding the *Browning-Ferris* (2015) case the NLRB stated that the previous joint employer standard was no longer reflective of our economic circumstances, especially with the recent increase in contingent employment relationships.¹³⁴ As a result, franchisors no longer have the protection they previously enjoyed and now have to be hyper aware of all the decisions their franchisees are making.¹³⁵ Likewise, franchisees have to walk on eggshells to make sure that they are not going to harm the franchisor while trying to maintain their own autonomy in making decisions for its independently owned franchise. The outcome is going to result in overwhelming litigation with plaintiffs working their way up the chain and chasing after franchisors' "deep pockets."¹³⁶ Moreover, it may lead to the chilling effect of business owners choosing to forgo the franchise model altogether, or otherwise, it may lead to franchisors only granting franchisees to businesses that may be more fiscally reliable and capable of handling the corporate control.¹³⁷

IV. CONCLUSION

As a result of the NLRB's decision to redefine the joint employer standard, businesses must revisit their agreements and assess the possibility of joint employer liability. Although there is no single solution, these relationships and agreements will need to be viewed in light of the new joint employer standard to avoid any unexpected liability.¹³⁸ To avoid such liability and potential responsibility for collective bargaining, businesses can proactively work to modify existing relationships and look for guidance from the anticipated NLRB decisions that are expected to clarify and interpret the new standard. Moving forward, businesses can make sure when creating new relationships that there is clear distinction as to which party is going to be the primary employer responsible for controlling the "essential terms and conditions of employment" so as to avoid the possibility of a joint employment relationship.

The NLRB's recent decisions have created a whirlwind for the labor industry and have everyone on their feet trying to figure out whether they

¹³⁴ See Andrea Wells, *How Employer Joint Liability Is Changing*, INS. J. (Feb. 18, 2016), <http://www.insurancejournal.com/news/national/2016/02/18/398910.htm>.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.*; James Shirk, *How This New Government Ruling Destroys the Franchise Business Model*, THE DAILY SIGNAL (Aug. 28, 2015), <http://dailysignal.com/2015/08/28/how-this-new-government-ruling-destroys-the-franchise-business-model/>.

¹³⁸ Richard L. Alfred et al., *How Will Browning-Ferris Change the Test for Joint-Employer Status for Union and Non-Union Employers?*, SEYFARTH SHAW: PUBLICATIONS/BLOG POSTS (Aug. 27, 2015), <http://www.seyfarth.com/publications/MA082715-LE>.

may now be considered joint employers and preparing for the changes and inevitable rush of litigation that will likely ensue as a result. With new changes on the horizon after the 2016 Presidential elections, the labor industry will have to work together to interpret the NLRB's decisions and put the pieces together to establish the current framework of employment law until the NLRB provides clear guidance on the matter.