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The joint employer standard and the National Labor Relations Board

What is at stake for workers?

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Over the last two years, Republicans in Congress have sought unsuccessfully to block enforcement of the National Labor Relations Board's (NLRB's) joint employer standard, announced in *Browning-Ferris Industries*, 362 NLRB No. 186 (Aug. 27, 2015). While joint employer liability is an issue under other worker protection statutes (including the Fair Labor Standards Act and the Occupational Safety and Health Act), the political debate around this issue has thus far focused on the joint employer standard under the National Labor Relations Act (NLRA). Why has so much attention been focused on joint employer liability in this context?

The reason is that this debate—in the wake of the NLRB's *Browning-Ferris* decision—has been largely driven by corporate lobbyists seeking to keep the cost of labor low by eroding workers' rights to organize and bargain collectively under the NLRA. In this report, we examine the history of the joint employer standard under the NLRA and the implications of its current status for workers and employers.

What are workers' rights under the NLRA? The NLRA is the nation's primary labor law. Enacted by Congress in 1935, it gives workers the rights to organize and join unions and bargain collectively with their employers for better pay, benefits, and working conditions. The National Labor Relations Board (NLRB), an independent federal agency, administers the act. The agency consists of a five-member board, charged with interpreting the law and adapting it to the changing conditions of the workplace, and a general counsel, responsible for the investigation and prosecution of violations of the NLRA.

What is the joint employer standard? When two or more businesses co-determine or share control over a worker's terms of employment (such as pay, schedules, and job duties), then both businesses may be considered to be employers of that worker, or "joint employers." Consider a common employment arrangement in which a staffing agency hires a worker and assigns her to work at another firm. The staffing agency determines some of the worker's terms of employment (hiring, wage rate), but the other firm directs her daily tasks and sets her schedule and hours. Because both entities co-determine and share control over the terms and conditions of her employment, both businesses may be found to be joint employers. Joint employers are responsible, both individually and jointly, to employees for compliance with worker protection laws.

The history of the joint employer standard under the NRLA: The joint employer standard under the NLRA has been established over time through decisions made by the NLRB in administering the NLRA. Prior to 1984, the NLRB had consistently found joint employer status where an entity exercised direct or indirect control over significant terms and conditions of employment, where it possessed the unexercised potential to control such terms and conditions of employment, or where "industrial realities" made it an essential party to meaningful collective bargaining. However, in 1984, the NLRB adopted a new standard for determining joint employer status under the NLRA. In two decisions—*TLI, Inc.*, 271 NLRB 324 (1984), *enfd. mem.*, 772 F.2d 894 (3rd Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984)—the NLRB narrowed the joint employer standard under the NLRA, making it easier for companies to evade joint employer status and thereby evade the requirements of the NLRA. The NLRB provided little explanation or legal doctrine to

support its 1984 decisions.

Since the NLRB's unexplained narrowing of the joint employer standard in 1984, contingent and alternative workforce arrangements (reliance on temporary staffing firms, contractors, and subcontractors to outsource services traditionally performed by in-house workers) have grown dramatically. The most rigorous recent estimates find that the share of workers engaged in alternative work arrangements was 15.8 percent in late 2015.[1] In today's labor market, that translates into roughly 24 million workers.

What this means for collective bargaining: The weakened joint employer standard created an opportunity for employers to avoid the bargaining table by contracting for services rather than hiring employees directly. Firms were thereby able to retain influence over the terms and conditions of employment while evading the obligation to bargain with employees under the NLRA.

In 2015, the NLRB's *Browning-Ferris* decision addressed this issue. In that decision, the board adopted a joint employer standard that requires all firms that control the terms and conditions of employment to come to the bargaining table, ensuring that workers are again able to engage in their right to collective bargaining.

The *Browning-Ferris* decision

Browning-Ferris Industries (BFI) owned and operated a recycling plant, where it employed 60 of its own workers to drive trucks and operate forklifts. But BFI contracted with a staffing agency called Leadpoint Business Services (Leadpoint) to recruit, interview, and hire the more than 200 workers who sorted the recyclable materials and cleaned the plant. The contract between Leadpoint and BFI stated that Leadpoint was the sole employer of the workers it supplied, but their contract placed significant limitations on Leadpoint's autonomy as an employer.

In 2013, the workers who sorted the recyclables and cleaned BFI's facility petitioned the NLRB for a union election. In the petition, they named both Leadpoint and BFI as joint employers, as both firms were necessary for meaningful collective bargaining. BFI and Leadpoint contested the workers' petition, claiming that Leadpoint was the workers' sole employer. But with only Leadpoint at the bargaining table, the workers could not bargain with BFI, the company that determined many conditions of their employment. The workers were concerned, among other things, about the pace at which they were required to sort through recyclable materials. The board found that Leadpoint alone could not meaningfully bargain about such fundamental working conditions as the speed of their work, break times, and safety because BFI reserved control over working conditions on the factory floor in its contract with Leadpoint.

In its 2015 *BFI* decision, the NLRB found that Leadpoint and BFI were joint

employers.[2]

Employer liability under the NLRA: Employers face narrow liability under the NLRA. The act does not provide for monetary penalties against an employer. ***At most, the NLRB can order an employer to bargain with workers, to reinstate an employee fired in violation of the act, to pay back wages to a wrongfully fired employee, or to cease and desist from engaging in conduct that violates the act.*** In spite of this, corporate lobbying groups have claimed that the NLRB's joint employer standard will "significantly alter the face of American business" and "inflict serious damage to our nation's economy."[3] Considered against the liability potentially imposed on employers under the NLRA, these claims are without merit.

Furthermore, under the NLRB's *Browning-Ferris* decision, the joint employer determination remains a fact-based inquiry. This means that the board examines the specific circumstances of each case and reaches a determination based on those considerations. Nothing in the decision implies that all employers in a specific industry will be found to be joint employers under the NLRA. The board has also clearly stated that in cases where an employer is found to be a joint employer, that employer would only be required to bargain with its workforce about the terms and conditions that the employer has enough control over for bargaining to be meaningful.[4]

What about franchise arrangements? Like any joint employer inquiry, the NLRB evaluates franchise arrangements on a case-by-case basis. The determination of joint employer liability is a fact-specific analysis that depends on many factors. Nothing in the *Browning-Ferris* decision specifically addresses the franchise arrangement.

The political debate about franchise liability under the joint employer standard tends to revolve around the impact on small businesses—the franchisees. This is misleading. This is not about franchisee liability—franchis*ees* are already considered employers under the NLRA because they hire and control employees. This is about whether franchis*ers* may now face liability under the *Browning-Ferris* joint employer standard. However, a franchiser only faces liability if it insists on a franchise contract in which it retains control over fundamental terms and conditions of employment. If the terms of a franchise contract allow the franchiser to reserve the right to set rates of pay or scheduling practices, or to approve hiring or disciplinary decisions, the franchiser is a joint employer and must be at the bargaining table in order for workers to engage in meaningful collective bargaining. Otherwise, the franchiser would not be considered a joint employer and would not be required to bargain with employees under the NLRA.

What is this debate really about? This debate has largely been driven by corporate lobbyists dedicated to keeping the cost of labor low. One way to accomplish this is to erode workers' rights to organize and bargain collectively. When workers are able to exercise their rights under the NLRA to organize and bargain collectively, they are able to set stronger pay standards. Workers covered by a collective bargaining agreement earn 13.6 percent more than non-union workers; they are 28.2 percent more likely to be

covered by employer-provided health insurance and 53.9 percent more likely to have employer-provided pensions; and they also enjoy more paid time off with their families.[5]

The majority of American workers would vote for union representation if they could.[6] However, because of the intense opposition of private-sector employers to unions, the number of workers represented by unions has steadily declined over the last several decades.[7] Even when workers are able to organize, they face challenges at the bargaining table if the firms that control rates of pay, scheduling, and health and safety standards are absent because of a weakened standard for determining joint employment. Given the realities of the modern workplace—in which employees often find themselves subject to more than one employer—workers deserve a joint employment standard that guarantees their rights and protections under the NLRA.

Endnotes

1. Lawrence F. Katz and Alan B. Krueger, "The Rise and the Nature of Work Arrangements in the United States," National Bureau of Economic Research Working Paper No. 22667 (September 2016).
2. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).
3. International Franchise Association (IFA), "While Congress Is Away, NLRB Still Plays, Upending Joint Employer Standard for Franchise Businesses" (August 25, 2015).
4. *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. 2 (2015) fn. 7.
5. Economic Policy Institute, *The Benefits of Collective Bargaining: An Antidote to Wage Decline and Inequality* (April 14, 2015).
6. Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever*, Economic Policy Institute Briefing Paper No. 182 (May 16, 2007).
7. Kate Bronfenbrenner, *No Holds Barred—The Intensification of Employer Opposition to Organizing*, Economic Policy Institute Briefing Paper No. 235 (May 20, 2009).