

JOINT EMPLOYER LIABILITY:
EVOLUTION, APPLICATION, AND BEST PRACTICES

Farheen Ibrahim¹ and Cheryl Mullin²

¹ Farheen Ibrahim is an associate attorney at Mullin Law, P.C. where she practices franchise and employment law. She can be reached at farheen.ibrahim@mullinlawpc.com. Laura Lewis and Jennifer Lurette's insightful comments during the editing process proved invaluable.

² Cheryl Mullin is the founding partner of Mullin Law, PC. Her practice focuses on assisting commercial clients achieve their growth objectives through corporate growth, franchising, joint ventures, acquisition, and private investment. She can be reached at cheryl.mullin@mullinlawpc.com.

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I. INTRODUCTION

The franchising and legal world is buzzing with anxiety over potential joint employer liability following the recent aggressive position taken by both the National Labor Relations Board and the Department of Labor against a wide range of entities. This paper aims to address the history and current nature of joint employer liability, political trends affecting policy making, joint employer treatment under the various federal statutes implicated, and best practices for avoiding joint employer liability.

Under the joint employer doctrine of liability, an employee who is formally employed by one employer (the primary employer) may be deemed to be constructively employed by another employer (the secondary employer) if that secondary employer exercises sufficient control over the employee's terms and conditions of employment. Joint employers must comply with federal, state, and local labor and employment laws with respect to "jointly employed" employees who are employed by another employer. In other words, if a primary employer and secondary employer are held to be "joint employers" of the primary employer's employees, the secondary employer is directly liable for labor and employment law violations of the primary employer.

While once a one-off theory of liability under which business were implicated for the sins of another, it has risen to affect numerous industries and business structures under various federal statutes. Joint employer liability can be ascribed under the Fair Labor Standards Act ("FLSA"), Family and Medical Leave Act ("FMLA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), Americans with Disabilities Act ("ADA"), Age Discrimination in Employment Act ("ADEA"), National Labor Relations Act ("NLRA"), Patient Protection and Affordable Care Act ("ACA"), and Occupational Safety and Health Act of 1970 ("OSH Act"), as well as various state and local statutes. Complicating matters more is that the test or standard for determining when a company is acting as a joint employer liability may be different for each one of these statutes and in different jurisdictions. And, liability may be initially determined by an administrative body, and, then upon appeal of the decision to the appellate court in the jurisdiction, the court may apply or interpret the rule a completely different way than the administrative body.

Therefore, it is more important than ever to understand the history and recent activity of joint employer liability. Given that this doctrine is affected by political trends, it is also vital to closely monitor the proposed bills and litigation surrounding joint employer liability.

II. WHO IS AN EMPLOYEE?

The present theories of employer-employee relationships and joint employer liability sprung from the common law theory of agency.³ Simply stated, a person is an employee of an employer if "a person is employed to perform services in the affairs of another and who, with respect to the physical conduct in the performance of the services, is subject to the other's

³ Restatement (Second) of Agency, §§ 220 and 26 (2nd ed. 2010).

control or right to control.”⁴ Under the original common law theory of tort liability, an employer is responsible for the torts of his employee if the tort occurred as the result of conduct within the scope of the employment.⁵

Obviously, common law theory of agency extends beyond the purview of tort law. Most significantly, it has extended into and been modified by the various employment laws enacted over the last century in the United States.⁶ Arriving at the problem today, the terms “employee” and “employer” are not well-defined in the majority of the employment laws governing the employer-employee relationship, muddying the waters and instigating a significant number of lawsuits generated in an attempt to clarify the meaning of the terms.⁷ Further complicating the matter, is the absence of a clear line between who can be categorized as an employee versus an independent contractor, or a temporary staffed employee who is employed by another organization, in this employment relationship with the employer.⁸ On the most basic level, a person is an employee when the employer exercises some level of control or reserves the right of control over the person in the activity performed in the interest of the employer.⁹ The standard that establishes the employer-employee relationship varies by statute and is a fact-intensive determination, discussed further below in Section V of this paper. Consequently, a worker may be considered an employee under a certain statute utilizing one test, while not considered an employee under a different statute utilizing a different test.

A. Common Law Test, also known as the *Reid* Factors

The common law test incorporates traditional agency law principles, which rely heavily on the level of control that an employer exercises over the manner and means by which a worker performs his job.¹⁰ Under this test, when the employer reserves the right to control the result of what is to be achieved as well as the manner and means used to attain the result, then an employment relationship exists.¹¹ Factors elucidated in *Community for Creative Non-Violence v. Reid*, called the *Reid* factors, are often evaluated in the common law test:

- 1) the hiring party’s right to control the manner and means by which the product is accomplished; . . .
- 2) the skill required;

⁴ *Id.* at § 220.

⁵ *See id.*

⁶ Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer and Employee Relationship*, 14:3 U. PA. J. BUS. L. 605, 612-14 (2012).

⁷ *Id.*

⁸ *Id.*

⁹ *See id.*; *see also* Restatement (Second) of Agency § 220.

¹⁰ *See* Restatement (Second) of Agency § 220.

¹¹ *See, e.g., Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340 (11th Cir. 1982).

- 3) the source of the instrumentalities and tools;
- 4) the location of the work;
- 5) the duration of the relationship between the parties;
- 6) whether the hiring party has the right to assign additional projects to the hired party;
- 7) the extent of the hired party's discretion over when and how long to work;
- 8) the method of payment;
- 9) the hired party's role in hiring and paying assistants;
- 10) whether the work is part of the regular business of the hiring party;
- 11) whether the hiring party is in business;
- 12) the provision of employee benefits; [and]
- 13) and the tax treatment of the hired party.¹²

These factors are non-exhaustive and other factors may be considered along with these.¹³ Importantly, these factors cannot be applied in a “mechanistic fashion,” but special weight is often given to the first factor—right to control the manner and means by which the assigned tasks are completed.

B. Economic Realities Test

The economic realities test is another common test to determine whether a worker is an employee. This test focuses on “whether the employee, as a matter of economic reality, is dependent upon the business to which he renders service.”¹⁴ While the courts usually apply a “totality of circumstances” approach to the economic realities test analysis, the court evaluates those circumstances based on several certain factors:

- 1) the degree of control exercised by the alleged employer;
- 2) the extent of the relative investments of the worker and the alleged employer;
- 3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer;
- 4) the skill and initiative required in performing the job; and

¹² 490 U.S. 730, 751–52 (1989).

¹³ *Id.*

¹⁴ *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 505 (5th Cir. 1994).

5) the permanency of the relationship.¹⁵

Again, no single factor is determinative. “Rather each factor is a tool used to gauge the economic dependence of the alleged employee, and each must be applied with this ultimate concept in mind.”¹⁶ Many of the factors used in this test are similar to the common law test, but the economic realities test accords less weight to the control factor than does the common law test under the “totality of circumstances” approach.¹⁷

C. Hybrid Analysis

Some courts utilize a hybrid of the economic realities test and the common law test. The U.S. Court of Appeals for the Fifth Circuit summarized its version of the hybrid test, stating it to be “[t]he right to control an employee’s conduct is the most important component of this test. When examining the control component, we have focused on whether the alleged employer has the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee’s work schedule. The economic realities component of our test focused on whether the alleged employer paid the employee’s salary, withheld taxes, provided benefits, and set the terms and conditions of employment.”¹⁸

III. WHO IS AN EMPLOYER?

In today’s economic climate, it is possible for an employee to have more than one employer. Today’s profile of an employer is very different from even fifty years ago and vastly more complicated than one hundred years ago. An increase in technological innovation, globalization and global competition, and a shift in cultural trends have affected the definition of who is an employer, how workplaces function, and the policies that govern the employer-employee relationship.¹⁹ Circumstances of having multiple employers became more common as the U.S. economy transitioned from manufacturing to service, and more-recently to an information-based economy. Katherine Stone, in *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, advanced a nuanced analysis of the history of the American workplace that helps explain the problem with identifying and defining who is an employer.²⁰

¹⁵ *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008), *cert. denied*, 129 S.Ct.1635 (2009).

¹⁶ *Id.*

¹⁷ *See Usery v. Pilgrom Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976).

¹⁸ *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, fn. 1 (5th Cir. 1997).

¹⁹ Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. Rev. 519 (2001).

²⁰ *See id.*

According to Stone, transference of exclusive skills and knowledge first caused the need for collective bargaining. From the 19th century to the early part of the 20th century, workers possessed exclusive skills, knowledge, and expertise that ensured their employment and provided them bargaining power with manufacturers.²¹ By controlling their skill, these workers controlled the production process, pace of work, their wages, and distribution revenues.²²

Toward the end of this era, manufacturers began to break the workers' monopoly by enlisting industrial engineers to transfer skills and knowledge of production from the workers to the management.²³ Through forthcoming technological advances and cultural advances, the manufacturers gained the upper hand in controlling the workforce, giving rise to employee unions and collective bargaining in an effort to control wages and working conditions.²⁴

Towards the middle of the 20th century, the passage of equal employment laws and other labor-related laws decreased the need for unions, creating non-union workplaces.²⁵ With the rapid decline in unions in the 1980s, management was able to restructure work practices, including employee compensation.²⁶ Compensation was no longer tied to the job role; it was now tied to the person, and as a result, uniformity of compensation declined.²⁷ Moreover, Stone observed that temporary employment provided by staffing agencies began to be the fastest growing portion of the labor market.²⁸

Complicating matters further, as the U.S. entered the 21st century, companies began to contract out to other entities certain functions that would have otherwise been performed within the company.²⁹ As described by Dr. David Weil, the Administrator of the Wage and Hour Division of the U.S. Department of Labor, these secondary entities began breaking away activities and shifting work further from the primary company, leading to a "fissuring" of the workplace.³⁰ Dr. Weil advanced a theory that describes the "fissuring of the workplace," which refers to the breakdown of the traditional large employer where the large employer reduces the number of direct employees through the use of independent contractors, secondary employers through staffing agencies, and franchising.³¹ For example, a business entity might contract out all its janitorial services, which were once performed by employees of the business, to a secondary employer that may provide its own employees to work exclusively at the business entity or may

²¹ *Id.* at 522.

²² *Id.*

²³ *Id.* at 599-609.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 619.

²⁷ *Id.*

²⁸ *Id.* at 623.

²⁹ David Weil, *The Fissured Workplace*, U.S. DEPARTMENT OF LABOR BLOG (October 17, 2014), <http://blog.dol.gov/2014/10/17/the-fissured-workplace/>.

³⁰ *Id.*

³¹ DR. DAVID WEIL, *THE FISSURED WORKPLACE* (Harvard University Press 2014).

contract with independent contractors for the janitorial services. These employees may be unaware or are confused as to the business entity for whom they actually work. This concept and its evolution are discussed in further detail in Section IV below.

A. Common Law Test

Recognizing that it is often difficult to ascertain who may be a worker's "employer," statutes and supporting case law have attempted to provide tests to make this determination. One of those tests is the common law test that utilizes a non-exhaustive, six-factor, fact-intensive analysis of the following:

- 1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- 2) whether and, if so, to what extent the organization supervises the individual's work;
- 3) whether the individual reports to someone higher in the organization;
- 4) whether and, if so, to what extent the individual is able to influence the organization;
- 5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
- 6) whether the individual shares in the profits, losses, and liabilities of the organization.³²

Depending on the statutory framework, courts may also incorporate the economic realities test to form a hybrid test, as discussed in the previous section.³³ It is important to note that individual job titles nor the existence of an "employment agreement" will be determinative in finding that an entity is or is not an employer of a worker; instead, "all the incidents of the relationship" will be considered.³⁴

IV. HISTORY OF JOINT EMPLOYER DOCTRINE

With regard to a joint employer relationship, the Second Restatement of Agency goes one step further in defining the relationship of a servant to two different employers. The Second Restatement defines a jointly employed servant as "a person [who] may be the servant of two masters...at one time as to one act, if the service to one does not involve abandonment of service to the other...[and]...if the act is within the scope of his employment for both....A subservant necessarily acts both for his immediate employer and the latter's master, who is also his own master." The two masters may or may not have a formal agreement between them to jointly employ the servant.³⁵ Similar to the employee-employer relationship, the primary and secondary

³² *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992).

³³ *Magallanes v. Penske Logistics LLC*, 570 F. Supp. 2d 907, 911 (W.D. Tex. 2008).

³⁴ See EEOC Compliance Manual § 605:009.

³⁵ Restatement (Second) of Agency § 226.

employer may be responsible for the torts of the servant even though only the primary employer actually employs the servant.³⁶

This concept expanded into the employment context as the United States shifted to a service-based economy in the second half of the 20th century. Following, with regard to joint employer liability in the employment law context, statutes and corresponding case law have proposed various mechanisms for determining who is and is not a joint employer for imposing liability for statutory violations. Because of the disparity in tests and analysis between the administrative agencies and the courts, the definition of who can be a joint employer is blurred and continues to be elusive, as discussed in Section V. Industries potentially affected by this inconsistency include industries that rely heavily on temporary staffing agencies and professional employer organizations, construction, janitorial, franchising, certain contractors and suppliers, and domestic service.

Much of the recent activity broadening joint labor liability from the Department of Labor (“DOL”) and the National Labor Relations Board (“NLRB”) can be attributed to political trends towards increased worker protection in light of a shift to a service-based economy.

A. Department of Labor Activity

The DOL is tasked with protecting, fostering, and promoting the welfare of wage earners, job seekers, and retirees through monitoring occupational safety, wage and hour standards, collecting and analyzing employment statistics, and managing unemployment services.³⁷ The various agencies within the DOL administer and enforce more than 180 federal laws, affecting 10 million employers and 125 million workers.³⁸ Some of the major statutes that the DOL administers and enforces include the Fair Labor Standards Act (“FLSA”), Occupational Safety and Health Act (“Osh Act”), Family and Medical Leave Act (“FMLA”), workers compensation programs, Employee Retirement Income Security Act, and the Labor-Management Reporting and Disclosure Act.³⁹ The DOL can conduct investigations, with or without an outside complaint first being filed.⁴⁰

³⁶ *See id.*

³⁷ *Our Mission*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/opa/aboutdol/mission.htm> (last visited November 24, 2015).

³⁸ *Summary of the Major Laws of the Department of Labor*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited November 24, 2015).

³⁹ *Id.*

⁴⁰ *Fact Sheet #44: Visits to Employers*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/whd/regs/compliance/whdfs44.htm> (last visited January 2015).

Most important to this discussion is the Wage and Hour Division (“WHD”) of the DOL, whose mission is to enforce federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the FLSA.⁴¹ WHD is headed by the Administrator, currently Dr. David Weil, who was sworn in on May 5, 2014.⁴² Dr. Weil is spearheading the WHD’s campaign of increased enforcement of the FLSA.

In order to understand the underpinning of the current position taken by the WHD and other related agencies, an analysis of *Improving Workplace Conditions Through Strategic Enforcement*, Dr. Weil’s report published to the WHD on May 2010, is necessary. This central report argues that changes in the structure of the economy and in employment relationships require changes in strategic enforcement of certain DOL statutes.⁴³ It also discusses enforcement trends; survey of the workplace landscape; analyses of three specific industries: apparel, food and beverage, and lodging; and proposes enforcement strategies.⁴⁴ As previously discussed, Dr. Weil proposes that the employment structure has fundamentally changed—the basic relationship between the employer and employee has devolved because of the use of subcontracting, outsourcing, and franchising, which has led to “fissuring” of the employment models.⁴⁵

In his May 2010 report, Dr. Weil examined how the perceived fissuring of the workplace has led to vulnerable employees, and he proposes regulatory and enforcement solutions to protect those vulnerable employees. In proposing new strategies, Dr. Weil examined a sampling of food and hotel franchise systems. He suggests that enforcement must focus on “workplaces where labor standards violations occur [franchisees] and also at the higher level of industry structure, where ‘lead firms’ [franchisors] play a key role in setting the competitive environment and employment conditions for employers at ‘lower levels’ [franchisees] of the industry structure.”⁴⁶

Dr. Weil’s proposal to address these issues is to focus on influencing the “lead firms” by (1) reaching out to major brands that have a positive employment reputation and encouraging a cooperative agreement where the lead firms would be committed to reviewing the employment practices of its franchisees when other franchise standards are being reviewed or (2) targeting major brands that have documented histories of systematic violations among franchisees, and instituting broad, coordinated investigations in multiple parts of the country and against

⁴¹ *Wage and Hour Division Mission Statement*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/whd/about/mission/whdmiss.htm> (November 24, 2015).

⁴² *Administrator, Wage and Hour Division*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/whd/about/org/dweil.htm> (last visited November 24, 2015).

⁴³ See DAVID WEIL, PHD, *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT*, A REPORT TO THE WAGE AND HOUR DIVISION at pp.76-77 (Boston University May 2010).

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ *Id.* at 76-77; see *US Labor Department’s Wage and Hour Division and SUBWAY franchisor collaborate to boost restaurants’ compliance with federal labor laws*, WHD NEWS RELEASE (May 8, 2013), <http://www.dol.gov/opa/media/press/whd/WH20130687.htm>.

numerous franchisees to determine system-wide violations so that statutory penalties can be pursued for those violations.⁴⁷

Dr. Weil expands the ideas presented in this report in his 2014 book, *The Fissured Workplace*.⁴⁸ Therein, Dr. Weil argues that the workplace “fissuring” resulted from the intersection of three corporate strategies: 1) the drive to increase revenue which lead companies to focus on core competencies and shift responsibility outside of the company for other operations; 2) reducing overhead costs by shedding employment responsibilities; and 3) developing strategies to make the first and second components work by creating and enforcing brand standards, all while being assisted by technological advances that make monitoring the actions of others much easier.⁴⁹ He goes on to posit that fissuring has undermined compliance with the law, contributed to increases in accidents and injuries due to problems associated with production coordination, and has shifted the economic gain from increased production efforts from the work force to the investors, thereby creating even greater economic disparities between the two groups.

Used as examples in Dr. Weil’s works are detailed analysis of the franchise models for the food and beverage structures, commercial cleaning and lodging industries, and how violations are endemic to these structures. In the janitorial industry, for example, franchisees are required to fulfill contracts that are drafted and negotiated by the franchisor, and these contracts often do not produce compensation that meets minimum wage requirements. When asked how an industry structured in this manner can survive, Dr. Weil explains that survival is possible because of: 1) the franchisor being profitable; 2) high turnover rate of franchisees who buy into the system; and 3) the propensity for franchisees to violate labor standards to fulfill contracts to sustain their business.

Dr. Weil advocates for increased and more efficient enforcement of existing employment laws and the creation of additional legislation to address the problems he identifies. He posits that existing workplace legislation should be reformed to broaden the responsibility of larger companies who engage in fissuring activities by arguing that if the company controls the quality, production, and delivery of services, then they should also bear the responsibility for employment issues.

⁴⁷ *Supra*, n. 40 at 78.

⁴⁸ DAVID WEIL, PHD, *THE FISSURED WORKPLACE* (Harvard University Press 2014).

⁴⁹ *Id.* at 11.

B. National Labor Relations Board Activity

The National Labor Relations Board (“NLRB”) is an independent federal agency that enforces the National Labor Relations Act (“NLRA”), which protects the rights of employees to act together in order to address workplace conditions, with or without a union.⁵⁰ The NLRA applies to most private sector employers, including manufacturers, retailers, private universities, and healthcare facilities.⁵¹ Traditionally, the NLRB has assisted unions in advocating for their members with their respective employers. However, recent trends show that the NLRB is becoming increasingly active and expanding its reach to non-union workplaces.

As the administrative body enforcing the NLRA, the NLRB investigates charges, facilitates settlements, conducts hearings, decides cases, and enforces orders stemming from those cases.⁵² The NLRB General Counsel is responsible for investigating and prosecuting unfair labor practices cases and for supervising NLRB field officers’ processing of cases.⁵³ Unlike a typical case in litigation before a conventional court, NLRB hearings are subject to their own rules and procedures.⁵⁴

An employer may be involved in an NLRB proceeding if a person (typically an employee or union but not an employee of the NLRB) files a complaint, called a charge, against the employer before the NLRB.⁵⁵ Notably, unlike the DOL, the NLRB cannot direct investigations against any employer without a charge first being filed. The Regional Director of the field office that receives the charge will then investigate the claims made. If the Regional Director determines that the claims have merit and that the charge should be pursued, he or she issues a formal complaint in the name of the NLRB stating the unfair labor practices and serves the complaint on the relevant parties.⁵⁶ This charge contains a notice of hearing before an administrative law judge, including the date and time of the hearing.⁵⁷ The complaining individual cannot advance in the NLRB proceedings if the Regional Director declines to issue a

⁵⁰ *What We Do*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/what-we-do> (last accessed December 2, 2015).

⁵¹ *Jurisdictional Standards*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last accessed December 2, 2015). Among those exempted are federal, state, and local governments, employers who employ only agricultural laborers, and employers subject to the Railway Labor Act. *Id.*

⁵² *See, supra*, n. 44.

⁵³ *The General Counsel*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/who-we-are/general-counsel/richard-f-griffin-jr> (last accessed December 2, 2015).

⁵⁴ *Rules and Regulations*, NATIONAL LABOR RELATIONS BOARD, https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf (last accessed December 2, 2015).

⁵⁵ *Id.* at § 102.9.

⁵⁶ *Id.* at § 102.15.

⁵⁷ *Id.*

formal complaint based on his or her facts.⁵⁸ However, the NLRB administrative judge's decision may be appealed to a five-judge panel within the NLRB, called the "Board," who issues the final decision. This decision may be appealed to the court of appeals of the relevant jurisdiction, which has the authority to set aside, enforce, or remand all or part of the case.⁵⁹ The U.S. Supreme Court may review appeals from the courts of appeals.⁶⁰

The NLRB has used three standards for joint employer liability in the last 50 years: pre-1984 standard,⁶¹ post-1984 standard,⁶² and the August 2015 *Browning-Ferris* standard (discussed in Section V.A.).⁶³ The post-1984 standard for determining whether or not a party is a joint employer was whether the party had direct and immediate control over the employee.⁶⁴ On June 26, 2014, Richard F. Griffin, Jr., the current General Counsel of the NLRB,⁶⁵ submitted an amicus brief arguing for a change to the post-1984 joint employer standard applied by the NLRB.⁶⁶ Griffin proposed a return to the pre-1984 standard, which he argues was a much broader standard for determining whether a joint employer relationship existed.⁶⁷ Under the pre-1984 standard, an entity could be a joint employer if 1) it exercised direct or indirect control over working conditions of the employee, 2) it had the potential to control those working conditions; or 3) meaningful bargaining could not exist if it were not the joint employer of the employee.⁶⁸

⁵⁸ See *id.* at § 102.19. The Supreme Court of the United States, in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959), provided that state and federal courts must yield exclusive jurisdiction to the NLRB whenever the conduct forming the basis of the actions in state courts is in an area that is subject to NLRB jurisdiction, is either protected or "arguably" protected by Section 7 of the NLRA, or is prohibited or "arguably" prohibited by Section 8 of the NLRA (called the "*Garmon* rule"). In other words, a claimant cannot bring a cause of action for a NLRA violation in a trial court and must seek relief through the NLRB, absent qualifying for two very narrow exceptions. See *id.*

⁵⁹ *The NLRB Process*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/resources/nlr-process> (January 14, 2016).

⁶⁰ *Id.*

⁶¹ See *In re Floyd Epperson*, 202 NLRB 23 (1973); *Indus. Personnel Corp. v. NLRB*, 657 F.3d 226, 229 (8th Cir. 1981) (upholding *B.F. Goodrich Co.*, 250 NLRB 1139 (1980)); *Jewell Smokeless Coal Corporation and Subsidiaries*, 170 NLRB 392 (1968).

⁶² See *Laerco Transportation et al.*, 269 NLRB 324 (1984); and *TLI, Inc, et al.*, 271 NLRB 798 (1984).

⁶³ See *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery & FPR-II, LLC. d/b/a Leadpoint Business Services*, N.L.R.B. Case 32-RC-109684 (August 27, 2015).

⁶⁴ *Airborne Express*, 338 NLRB 597 n.1 (2002).

⁶⁵ Since being appointed as the General Counsel on November 4, 2013, Griffin has actively engaged in initiating changes to several long-standing NLRB precedents, including targeting Section 7 rights and employer e-mail systems, the application of *Weingarten* rights in non-union settings, and Section 10(j) remedies. Two memoranda issued by Griffin in 2014 highlights his initiatives and policy objectives for his four-year term. *Mandatory Submissions to Advice*, Office of the General Counsel, Memorandum GC 14-01 (Feb. 25, 2014); *Affirmation of the 10(j) Program*, Office of the General Counsel, Memorandum GC 14-03 (Apr. 30, 2014).

⁶⁶ *Amicus Brief of the General Counsel*, NATIONAL LABOR RELATIONS BOARD (June 26, 2014), <http://apps.nlr.gov/link/document.aspx/09031d45817b1e83>.

⁶⁷ *Id.* at 1-2.

⁶⁸ *Id.* at 2.

Griffin premised his argument for returning to the pre-1984 standard to reflect the original intent of the NLRA and to advance the NLRB's primary policy and purposes. He continued to opine that the NLRA was enacted to address employees' inability to effectively bargain with the employer for workplace improvements and the refusal of employers to bargain collectively.⁶⁹ A return to the pre-1984 standard would reinforce this purpose by bringing potential joint employers to the table for collective bargaining purposes. Griffin then proposed a standard that included three elements that would be indicative of a joint employer relationship: 1) indirect control over certain terms and conditions of employment;⁷⁰ 2) potential to control the terms and conditions of employment as being sufficient;⁷¹ and 3) the potential to control terms and conditions of employment be based not on specific contractual privileges but rather on the "industrial realities" of certain business relationships.⁷²

Additionally, in the same Amicus Brief, Griffin addressed franchising systems. He argued that the franchising structure can avoid joint employer status under the post-1984 standard, which inhibits meaningful collective bargaining.⁷³ According to Griffin, franchisors often exert significant control over the day-to-day operations of their franchisees, including dictating the number of workers to be employed at the franchised location and the number of hours each employee works.⁷⁴ Further, while franchisors may claim that they have no influence over the wages franchisees pay to their employees, Griffin argued that franchisors effectively control wages by controlling every other variable in the franchised business except wages. The franchisor exerts additional control through current technological advances that allow franchisors to closely monitor employment practices of the franchised business such as employee work schedules, wage reviews, customer service, collection of employment applications for the franchisee, and managing human resources programs—all of which Griffin contended goes beyond protection of the franchisor's product or brand.⁷⁵

Following, Griffin advocated for a finding of joint employment in the franchise context if, "under the totality of circumstances, including the way the separate entities have structured their commercial relationship, to determine if the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence."⁷⁶ Griffin proposed that control over the following terms and conditions of employment would make an employer an essential party to collective bargaining: employee personnel issues; the number of employees needed to perform a job or task; establishing employee work hours, schedules, work week length, and shift hours; employee

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 19-20.

⁷¹ *Id.* at 21.

⁷² *Id.* at 21-22.

⁷³ *Id.* at 14-16.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 17.

grievances, including administration of any collective bargaining agreement; authorizing overtime; establishing safety rules and standards, production standards, break and/or lunch periods, assignment of work and determination of duties; work instructions relating to the means and manner to accomplish a job or task; training employees or establishing employee training requirements, vacation and holiday pay and leave policies; hiring; discipline; and discharge.⁷⁷

V. REQUIREMENTS FOR JOINT EMPLOYMENT UNDER FEDERAL EMPLOYMENT STATUTES

A. NLRA

Recent complaints brought by the NLRB General Counsel against various employers in several industries support Griffin's stated goal of addressing the fissured workplace, extending Dr. Weil and the WHD's initiatives. To predict the direction that the NLRB is taking, examination of several cases and standards must be undertaken. In short, there is no bright line rule with regard to joint employer liability; complaints are examined on a case-by-case basis to determine whether joint employer liability exists, with the analysis being very fact intensive, and possible outcomes vary from jurisdiction to jurisdiction. With regard to whether all franchise relationships will result in joint employer liability for the franchisor, the answer appears to be in the negative.

i. *The CNN America, Inc. decision and the actions against McDonald's USA, LLC*

Before mid-2014, the NLRB consistently took the position that franchisor-franchisee relationships did not give rise to joint employer liability. This trend changed with Griffin's amicus brief to the *Browning-Ferris* case (which, incidentally, did not involve a franchise) in which he advocated for a new joint employer standard for franchise systems.

On July 29, 2014, the General Counsel of the NLRB announced that it had investigated alleged violations of the NLRA by McDonald's franchisees as a result of activities surrounding employee protests.⁷⁸ In issuing its complaints, the General Counsel announced that some alleged violations were merited while others were not, and that the NLRB named the franchisor, McDonald's USA, LLC as a joint employer respondent in the 43 cases where the complaint was authorized.⁷⁹

⁷⁷ *Id.* at 18-19.

⁷⁸ *NLRB Office of the General Counsel Authorizes Complaints against McDonald's Franchisees and Determines McDonald's, USA, LLC [sic] is a Joint Employer*, NATIONAL LABOR RELATIONS BOARD (July 29, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds>.

⁷⁹ *Id.*

In September 2014, while *Browning-Ferris* was still pending and the McDonald's complaints were being investigated, the Board considered whether or not a joint employment relationship was present in *CNN America, Inc.*⁸⁰ In this case, the Board held that CNN and Team Video Services (*TVS*) — a former subcontractor of CNN — were joint employers.⁸¹ The dispute arose when CNN decided to cancel a subcontract agreement with TVS. TVS employees, who were unionized, operated the electric equipment in CNN's Washington D.C. and New York studios.⁸² Upon cancellation of the contract with TVS, CNN did not bargain with the TVS employees' union regarding the decision to terminate the contract or the effects of that decision, refused to recognize or bargain with the union, and then hired all of the non-unionized employees for in-house positions.

The majority found that CNN had violated the NLRA by failing to bargain with the union because CNN was a joint employer, announcing that joint employer status would be found when entities “share or codetermine those matters governing the essential terms and conditions of employment with the putative employer[,] meaningfully affect[ing]...matters relating to the employment relationship ‘such as hiring, firing, discipline, supervision and direction.’”⁸³ The majority considered additional factors such as CNN providing floor space to TVS in the CNN building, CNN providing email accounts to TVS's employees, CNN supplying all equipment used by TVS's employees, TVS employees performing work that was the core of CNN's business and worked exclusively for CNN, and CNN granting TVS employees security clearance and requiring them to wear CNN badges.⁸⁴ Interestingly, as the dissent pointed out, CNN did not have any role in hiring, firing, disciplining, discharging, promotion, or evaluating TVS employees, and CNN did not actively co-determine the TVS technicians' other terms and conditions of employment; but, these factors did not impact the majority's ruling.⁸⁵

In November 2014, the General Counsel advised that the NLRB would “continue to exempt franchisors from joint-employer status to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand.”⁸⁶ But, on December 19, 2014, the General Counsel announced that he would issue 86 complaints against McDonald's, with 13 of those cases involving allegations of

⁸⁰ 361 NLRB No. 47 (2014).

⁸¹ *Id.* at 1.

⁸² *Id.* at 2.

⁸³ *Id.* at 3.

⁸⁴ *Id.* at 8.

⁸⁵ *Id.* at 36.

⁸⁶ *Letter to John Kline and Phil Roe from Richard Griffin*, NATIONAL LABOR RELATIONS BOARD (November 4, 2014), <http://www.bakerdonelson.com/files/Uploads/Documents/GC-Response-Education-and-Workforce-Committee.pdf>.

joint employer liability against McDonald's USA, LLC.⁸⁷ Essentially, these claims were premised on McDonald's and its franchisees retaliating against its employees who participated in demonstrations demanding representation and a wage increase to \$15 an hour.

In support of McDonald's USA, LLC's joint employer liability, the General Counsel made concise and conclusory allegations in the NLRB complaint arguing that joint employer liability existed based on McDonald's USA, LLC's control over franchisees' labor relations policies. After the NLRB consolidated the complaints by region, McDonald's USA, LLC moved for a bill of particulars, or in the alternative, to strike the joint employer allegations and dismiss the complaint, arguing that the complaint was vague and relied on conclusory allegations which did not provide sufficient notice of the new joint employer theory proposed by Griffin.

On January 22, 2015, the administrative law judge denied McDonald's USA, LLC's motion. On August 14, 2015, two weeks before *Browning-Ferris* was decided, the Board upheld the administrative law judge's decision and found that the allegations in the complaint were sufficient.⁸⁸ McDonald's is putting up a fight, but the fear is that the NLRB will try to apply the new Browning-Ferris standard for joint employer liability to the McDonald's line of cases.

ii. *The new Browning-Ferris standard for joint employer liability*

The NLRB issued its decision in *Browning-Ferris* on August 27, 2015.⁸⁹ Browning-Ferris ("BFI") operated a recycling business that directly employed 60 employees.⁹⁰ It also used Leadpoint, a subcontractor, to provide an additional 150 staff members to sort recyclable materials from waste and to clean the facility.⁹¹ Under the services agreement between the two companies, the Leadpoint employees were to be screened, hired, disciplined, and supervised by Leadpoint but allowed BFI to involve itself in hiring, discipline, scheduling, and wages of the employees. Notably, the agreement prevented Leadpoint from paying its employees more than BFI, required Leadpoint applicants to undergo drug testing and prohibited Leadpoint from hiring workers that BFI had already rejected, provided BFI the right to discontinue use of Leadpoint employees, and permitted BFI to control the productivity pay of Leadpoint employees and timing of their shifts.⁹²

⁸⁷ *NLRB Office of General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers*, NLRB OFFICE OF PUBLIC AFFAIRS (December 19, 2014), <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against>.

⁸⁸ *McDonald's USA, LLC, A Joint Employer, et al.*, 362 NLRB No. 168 (Aug. 14, 2015).

⁸⁹ *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery & FPR-ll, LLC. d/b/a LeadpointBusiness Services*, N.L.R.B. Case 32-RC-109684 (August 27, 2015).

⁹⁰ *Id.* at 1.

⁹¹ *Id.*

⁹² *Id.* at 17-19.

The Teamsters union sought to represent a mix of Leadpoint and BFI employees as a unit and claimed that BFI and Leadpoint were joint employers of the Leadpoint staff. The regional director of the NLRB issued a decision finding Leadpoint was the sole employer of its staff, finding that BFI did not exert sufficient control over Leadpoint's workers to make BFI a joint employer. Leadpoint appealed the decision, upon which the General Counsel of the NLRB submitted the June 2014 amicus brief, discussed above.

As way of the procedural history of the case, the union filed the petition in this matter on July 23, 2013.⁹³ Shortly thereafter, on August 16, 2013, the Regional Director issued its decision, holding that Leadpoint is the sole employer in question.⁹⁴ The union, under the NLRB rules, requested a review of the Regional Director's decision.⁹⁵ The review was accepted by the Board, which stated that the Regional Director's decision raises substantial issues warranting review and invited interested parties to submit amici briefs addressing the issues raised in this matter.⁹⁶

In a 3-2 decision, the Board rejected the regional director's finding. According to the Board, it was returning to the pre-1984 broader standard of the joint employer doctrine, thereby overturning the post-1984 standard. The Board stated that two or more entities would be joint employers of an employee if: 1) they are both employers within the meaning of the common law; and 2) they share or codetermine those matters governing the essential terms and conditions of employment.⁹⁷

The Board changed two points with regard to determining whether the putative employer held the necessary control over terms and conditions of employment were expressly overturned. First, the Board stated, "[w]e 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."⁹⁸ In other words, "[r]eserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employer inquiry."⁹⁹ Further, where an employer has reserved a contractual right to set specific terms or conditions of

⁹³ *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery & FPR-II, LLC. d/b/a Leadpoint Business Services*, N.L.R.B. Case 32-RC-109684 (July 23, 2013).

⁹⁴ *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery & FPR-II, LLC. d/b/a Leadpoint Business Services*, N.L.R.B. Case 32-RC-109684 (August 16, 2013).

⁹⁵ *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery & FPR-II, LLC. d/b/a Leadpoint Business Services*, N.L.R.B. Case 32-RC-109684 (September 3, 2013).

⁹⁶ *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery & FPR-II, LLC. d/b/a Leadpoint Business Services*, N.L.R.B. Case 32-RC-109684 (April 30, 2014).

⁹⁷ *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery & FPR-II, LLC. d/b/a Leadpoint Business Services*, N.L.R.B. Case 32-RC-109684 (August 27, 2015), at 15.

⁹⁸ *Id.* at 2.

⁹⁹ *Id.*

employment for the supplier employer’s workers, “it retains the ultimate authority to ensure that the term in question is administered in accordance with its preferences.”¹⁰⁰

Second, it is no longer necessary to demonstrate that a statutory employer’s control is exercised directly or immediately; indirect control, such as control exercised through an intermediary, can be sufficient in order to establish the statutory employer as a joint employer.¹⁰¹ In other words, “[w]here 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.”¹⁰²

In this case, the Board found that “BFI communicated precise directives regarding employee work performance through Leadpoint’s supervisors. We see no reason why this obvious control of employees by BFI should be discounted merely because it was exercised via the supplier rather than directly.”¹⁰³ Applying its new standard to the facts of this case, the Board held that BFI, which owned and operated the recycling facility, was a joint employer of workers who performed sorting work in the facility that were supplied by and employed by Leadpoint. The Board based its holding on the user employer’s control over several terms and conditions of employment, including hiring, firing, and discipline;¹⁰⁴ supervision, direction of work, and hours;¹⁰⁵ and wages.¹⁰⁶

In explaining the shift toward this “new” standard, the Board stated that the post-1984 standard could not keep pace with the changes in the diversifying American workforce, citing as an example that 2.87 million American workers are now employed through temporary agencies, which is two percent of the workforce, an increase from only 1.1 percent in 1990.¹⁰⁷ The Board explained “[i]t is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace. Such an approach has no basis in the Act or in federal labor policy.”¹⁰⁸

Notably, in footnote 120 of the decision, the majority disagrees with the dissent’s assertion that this decision “fundamentally alters the law” with regard to the employment relationships that exist in the franchise structure, among others.¹⁰⁹ The majority emphasizes that

¹⁰⁰ *Id.* at 13.

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 18.

¹⁰³ *Id.* at 21.

¹⁰⁴ *Id.* at 22.

¹⁰⁵ *Id.* at 23.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 15.

¹⁰⁸ *Id.* at 25.

¹⁰⁹ *Id.* at fn. 120.

the common-law test requires them to review all the relevant control factors that are present in determining the terms of employment, and declines to address the issue of franchisor liability in this decision.¹¹⁰

Following the Board decision, an NLRB election was held to determine whether the workers would be represented by Teamsters.¹¹¹ Teamsters won and was certified as the exclusive bargaining representative of the employees.¹¹² However, BFI refused to recognize the union and bargain with Teamsters, arguing that it is not an “employer” under the NLRA of the unit employees. Consequently, the General Counsel issued a new complaint on October 23, 2015, alleging that BFI, a joint employer, has violated Section 8(a)(1) and (5) of the NLRA by refusing Teamster’s request to recognize and bargain following its certification.¹¹³ On November 13, 2015, the General Counsel filed a motion for summary judgment, to which BFI, while admitting its refusal to bargain, asserted that it had no obligation to bargain with Teamsters since it is not an “employer” of the unit employees.¹¹⁴ On January 12, 2016, the Board issued a unanimous decision finding that BFI violated the NLRA and issued a cease-and-desist order.¹¹⁵ Soon thereafter, on January 20, 2016, BFI petitioned the U.S. Court of Appeals for the District of Columbia for review of the Board’s January 12, 2016 decision.

iii. The Freshii Decision

On April 28, 2015, while *Browning-Ferris* was being considered, and amidst the McDonald’s controversy, the Office of the General Counsel issued an Advice Memorandum on whether Nutritionality, Inc. (“Nutritionality”), a franchisee of the Freshii franchise system, is a joint employer with Freshii Development, LLC (“Freshii”) and/or Freshii’s franchise development agent (“Development Agent”).¹¹⁶ The General Counsel advised that the Freshii franchise system did not create joint employer liability between the franchisor and franchisee under either the *CNN America* standard or his June 26, 2014 amicus brief for *Browning-Ferris*.¹¹⁷

Freshii grants franchisees, such as Nutritionality, the right to own and operate a Freshii fast-casual restaurant chain.¹¹⁸ Nutritionality operated a single Freshii store in Chicago and

¹¹⁰ *Id.*

¹¹¹ *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery & FPR-II, LLC. d/b/a Leadpoint Business Services*, N.L.R.B. Case 32-CA-160759 (January 12, 2016), at 15.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Advice Memorandum, NLRB Office of the General Counsel, *Nutritionality, Inc. d/b/a Freshii*, Cases'1 3-CA-134294, et al. (April 28,2015)

¹¹⁷ *Id.* at 1.

¹¹⁸ *Id.*

employs between five and nine employees.¹¹⁹ In summer of 2014, Nutritionality terminated one employee, and disciplined and terminated a second employee, for attempting to unionize at this location.¹²⁰ Upon a complaint being made to the NLRB, the regional NLRB office found merit for unfair labor practices against Nutritionality, but sought an advisory opinion on whether Freshii or the Development Agent should also be found as joint employers of the terminated Nutritionality employees.

In this memorandum, the General Counsel looked at the Freshii franchise agreement, the operations manual, tools, and oversight of Nutritionality by Freshii, the Development Agent's involvement in training, labor relations, and Freshii's involvement with Nutritionality regarding the alleged unfair labor practices.¹²¹ To establish joint employer liability, the memorandum required "a business entity [to] meaningfully affect matters relating to the employment relationship 'such as hiring, firing, discipline, supervision, and direction.'"¹²² Further, the General Counsel also considered other factors, as provided by the NLRB in the *CNN America* decision, such as "employer's involvement in decisions relating to wages and compensation, the number of job vacancies to be filled, work hours, the assignment of work and equipment, employment tenure, and an employer's involvement in the collective bargaining process."¹²³

The memorandum provided analysis under two standards for its rational in finding no joint employer liability. First, it examined the facts under the Board's "current standard," and found the following facts indicative of lack of joint employer liability:

- (1) it was explicit that the Freshii system standards did not include any personnel policies or procedures;
- (2) the franchise agreement stated that Freshii "neither dictates nor controls labor or employment matters for franchisees and their employees...";
- (3) although the operations manual provides guidance on human resource matters, Nutritionality was not required to use the guidance;
- (4) although the Freshii provides a sample employee handbook, Nutritionality was not required to use the handbook;
- (5) Nutritionality was solely responsible for hiring, discipline and termination of their employees;
- (6) Nutritionality was solely responsible for setting employee salary and benefits;
- (7) Freshii was not involved in Nutritionality's scheduling and setting work hours of its employees although Freshii provided guidance on how to calculate labor costs to ensure that franchisees are not over or under staffed;
- (8) Freshii did not require that franchisees use its guidance for scheduling employees;

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 2-5.

¹²² *Id.* at 6.

¹²³ *Id.*

- (9) although training was required for owners and managers of the franchised locations, the training provided were recommendations that were not required to be followed by franchises; Freshii did not meaningfully affect Nutritionality's employees' terms and conditions of employment through its contractual right to terminate the franchise agreement; and
- (10) Freshii did not provide guidance to Nutritionality even after the franchisee-owner asked Freshii, via the Development Agent, for advice on the employee union situation that gave rise to the NLRB complaint against Nutritionality.

Under the General Counsel's proposal of reverting to the pre-1984 standard,¹²⁴ the Memorandum found that Freshii did not significantly influence the working conditions of Nutritionality's employees, *i.e.*, it has no involvement in hiring, firing, discipline, supervision, or setting wages.¹²⁵ Because Freshii does not directly or indirectly control or otherwise restrict the employees' core terms and conditions of employment, meaningful collective bargaining between Nutritionality and any potential collective-bargaining representative of the employees could occur in Freshii's absence.¹²⁶ Arguably, the Board's finding that collective bargaining can occur without Freshii is the difference between this decision and the McDonald's USA, LLC potential joint employer liability in the McDonald's investigations.

iv. The Green Jobworks Decision

On October 21, 2015, the NLRB revisited the new *Browning-Ferris* joint employer standard in *Green Jobworks, LLC/ACECA, LLC*.¹²⁷ The Regional Director found that the union failed to establish specific, detailed, and relevant evidence demonstrating a joint employer relationship between Green Jobworks and ACECO. Green JobWorks is a staffing company that provided temporary staff to ACECO, which was a demolition and remediation contractor.¹²⁸ Both entities entered into a services agreement where Green JobWorks was responsible for 1) employee recruitment, hiring, counseling, discipline, and discharge; 2) establishing, calculating, and paying employee wages; 3) providing workers compensation insurance and fulfilling unemployment compensation obligations; 4) making legally-required employment law disclosures to its employees, 5) exercising human resources supervision of its contracted employees; 6) fulfilling the employer's obligations for unemployment compensation; and 7)

¹²⁴ "Under that standard, the Board finds joint employer status where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence. This approach makes no distinction between direct, indirect and potential control over working conditions and results in a joint employer finding where "industrial realities" make an entity essential for meaningful bargaining." *Id.* at 9.

¹²⁵ *Id.* at 10.

¹²⁶ *Id.*

¹²⁷ N.L.R.B. Case 05-RC-154596 (October 21, 2015).

¹²⁸ *Id.* at 2-3.

maintaining personnel and payroll records for the contracted employees.¹²⁹ Further, Green JobWorks provided the hardhats, safety vests, safety glasses, steel-toed boots, respirators, and filters to its employees while ACECO provided its own employees with the same equipment.

The local union filed the original petition seeking to represent employees of Green JobWorks, including those that were contracted to ACECO and claimed that ACECO should be found a joint employer. The Regional Director, however, held that there was insufficient evidence to make such a finding.¹³⁰ The Regional Director relied on the *Browning-Ferris* 2-prong standard. Further, the Regional Director “identified that the putative employer’s reserved authority to control terms and conditions of employment, even if not exercised, is probative of a joint-employer relationship, as is the actual exercise of that control.”¹³¹ The Regional Director’s decision included consideration of factors such as hiring, firing, discipline, supervision and direction as “essential terms and conditions of employment,” but the Regional Director stated that it would recognize other examples of terms and conditions of employment in conducting a joint-employer analysis.”¹³²

Therefore, after considering the evidence before it, the Regional Director found that Green JobWorks and ACECO were separate business entities. Factors most relevant to this decision were that 1) different management independently set and paid wages, maintained payroll records, withheld payroll taxes, and provided workers’ compensation for their own employees, which was elucidated in the services agreement between the two parties;¹³³ 2) ACECO exercised limited influences on the wages of its contracted employees;¹³⁴ 3) although ACECO supervisors assigned tasks and supervised Green JobWorks employees, ACECO supervisors did not show the Green JobWorks employees how to perform the work or exercise “near-constant oversight” over them;¹³⁵ and 4) ACECO was an inappropriate party to collective bargaining because it did not exhibit control as to “bargainable issues,” such as occupational safety measures, employee break times, and the speed and productivity of work.¹³⁶

v. *Potential impact on the franchise system*

¹²⁹ *Id.* at 5-6.

¹³⁰ *Id.* at 8.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 11.

¹³⁵ *Id.* at 12.

¹³⁶ *Id.* at 13. On January 5, 2016, Green JobWorks filed a Request for Review of the Regional Director’s decision for review of the Regional Director’s findings regarding the appropriate bargaining unit, requesting that the bargaining unit should be all laborers and asbestos removal employees who work for Green JobWorks at all work locations and not just those workers who perform work for one of its contractors on several job sites in the District of Columbia. *Green JobWorks, LLC*, N.L.R.B. Case 05-RC-154596 (January 5, 2016).

The McDonald's situation shows a shift in how unions have traditionally functioned in the United States. While a nationwide fast food workers campaign was formed to seek benefits such as higher wages and employee benefits, it did not seek unionization *per se*. Instead, it sought to fight for traditional union benefits and mobilized employees in a non-union workplace to utilize the NLRB's enforcement and investigative authority to achieve its goals. This paired especially well with the NLRB's more recent goals of expanding its reach into non-union workplaces.

At this time, with the fast-evolving political and legal landscape, it is difficult to predict exactly how these changes will evolve or impact the franchise model. What is apparent is that NLRB will conduct a fact-intensive analysis of the level of franchisor involvement in the employment relationship when applying the joint employer standard, as evidenced by the *Freshii* decision. However, this decision still did not create a bright line rule, and only offered guidance as to what factors may be considered. Further, the General Counsel has expressed explicitly that franchisors who exhibit control related to their legitimate interest in protecting the quality of their product or brand would not be considered joint employers with their franchisees. But, in the event that a franchisor's control expands beyond brand protection and is found to be a joint employer then it may be required to participate in collective bargaining with its franchisees' employees, a duty that has not existed before the current shifts in policy. And so, that franchisor can be liable for the NLRA violations of its franchisees. As the decisions from the NLRB's investigation of McDonald's USA, LLC and its franchisees emerge, greater clarity may be provided as to franchisor joint employer liability.

B. FLSA, FMLA, and MSPA

The FLSA and the FMLA are worker protection acts. The FLSA introduced the 40-hour work week, established the national minimum wage, guaranteed time-and-a-half for overtime in certain jobs, and prohibited child labor.¹³⁷ The FMLA requires employers to provide employees with unpaid, job-protected leave for qualified medical and family reasons. Both statutes are under the purview of the WHD. The Migrant and Seasonal Agricultural Worker Protect Act ("MSPA") "protects migrant and seasonal workers by establishing employment standards related to wages, housing, transportation, disclosures and recordkeeping," and requires farm labor contractors to register with the DOL.¹³⁸

Under the FLSA, an "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee,"¹³⁹ and an "employee" is defined as "any

¹³⁷ *Compliance Assistance – Wages and Fair Labor Standards Act*, UNITED STATES DEPARTMENT OF LABOR – WAGE AND HOUR DIVISION, <http://www.dol.gov/whd/flsa/> (last accessed December 3, 2015).

¹³⁸ *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, UNITED STATES DEPARTMENT OF LABOR – WAGE AND HOUR DIVISION, <http://www.dol.gov/whd/mspa> (last accessed February 2, 2016).

¹³⁹ 29 U.S.C. 203(d).

individual employed by an employer."¹⁴⁰ The FMLA explicitly adopts the same definition of employee as the FLSA.¹⁴¹

The WHD examined joint employer liability generally under the FLSA in Fact Sheet 79E.¹⁴² Under Fact Sheet 79E, “[a] single individual may be simultaneously considered an employee of more than one employer under the FLSA. In such cases, the employee’s work for the joint employers is considered as one employment for purposes of the Act, and the joint employers are individually and jointly responsible for FLSA compliance, including paying not less than the minimum wage for all hours worked during the workweek and, if applicable, overtime compensation for all hours worked over 40 in the workweek.”¹⁴³

Additionally, The FLSA sets out three situations in which “a joint employment” relationship likely exists:

- (1) the primary and secondary employers have an arrangement to share the employees’ services or interchange employees;¹⁴⁴
- (2) one employer acts directly or indirectly in the interest of the other employer in relation to the employees at issue;¹⁴⁵ or
- (3) the employers share control of the employees because one employer controls, is controlled by or is under common control with the other employer.¹⁴⁶

On January 20, 2016, Dr. Weil published the first Administrator’s Interpretation of the year (“January 2016 Administrator’s Interpretation”), which specifically addressed joint employment under the FLSA and MSPA, in an effort to offer additional guidance for the treatment of joint employment under these two statutes.¹⁴⁷ Dr. Weil opined that the “concepts of employment and joint employment under the FLSA and MSPA are notably broader than the common law concepts of employment and joint employment, which look to the amount of control that an employer exercises over an employee. Unlike the common law control test, which analyzes whether a worker is an employee based on the employer’s control over the worker and not the broader economic realities of the working relationship, the ‘suffer or permit’ standard

¹⁴⁰ 29 U.S.C. 203(e)(1).

¹⁴¹ 29 U.S.C. § 2611(3).

¹⁴² *Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA)*, UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION (Revised June 2014), accessed at <http://www.dol.gov/whd/regs/compliance/whdfs79e.htm> (citing 29 C.F.R. 791.2(a)).

¹⁴³ *Id.*

¹⁴⁴ 29 CFR 791.2(a).

¹⁴⁵ 29 CFR 791.

¹⁴⁶ 29 CFR 500.20(h).

¹⁴⁷ Administrator’s Interpretation No. 2016-1, *SUBJECT: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act*, UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION (Revised June 2014), accessed at http://www.dol.gov/whd/flsa/Joint_Employment_AI.htm (hereinafter “Administrator’s Interpretation No. 2016-1”).

broadens the scope of employment relationships covered by the FLSA.”¹⁴⁸ He draws a parallel between the “suffer and permit” phrasing used by the FLA with similar phrasing used in state laws regulating child labor, which were “designed to reach businesses that used middlemen to illegally hire and supervise children.”¹⁴⁹ Summarily, he argued that the expansive definition of “‘employ’ as including ‘to suffer or permit to work’ rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible.”¹⁵⁰

To determine whether an entity would qualify as a joint employer of a worker, Dr. Weil offers two analyses: horizontal and vertical joint employment.¹⁵¹ Horizontal joint employment analyzes the relationship and association between two or more entities that are technically separate but are related or overlapping employers, focusing on the relationship of the employers to each other. In the event that a joint employment relationship is established between the two entities, then the employee’s work for the two employers during the workweek is considered as “one employment” and the employers are jointly and severally liable for compliance of the FLSA, including complying with overtime compensation for all hours worked in excess of 40 hours.¹⁵²

Alternatively, the vertical joint employment analysis looks at whether the employee of an intermediary employer is also employed by a secondary entity, the potential joint employer.¹⁵³ This inquiry applies to situations whether one employer has contracted a worker out to another entity to provide the entity with labor and/or perform some of its core functions, such as hiring and payroll.¹⁵⁴ In the vertical joint employment analyses, the focus is on the worker’s relationship with the potential joint employer and whether the employer jointly employs the worker, as opposed to the relationship between the two employers as in the horizontal employment analyses.¹⁵⁵ The MSPA regulations contain these seven economic realities factors in the context of a farm labor contractor acting as an intermediary employer for a grower, which the courts have utilized in their vertical joint employment scenarios in FLSA cases: “1) directing, controlling, or supervising the work performed; 2) controlling employment conditions; 3) permanency and duration of the relationship; 4) repetitive and rote nature of work; 5) integral to business; 6) work performed on premises; 7) performing administrative functions commonly performed by employers.”¹⁵⁶

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citing *Antenor v. D & S Farms*, 88 F.3d 925, 929 n. 5 (11th Cir. 1996)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* (citing 29 C.F.R. 791.2(a)).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

i. *Court Analyses*

Courts have extended the examination of joint employer liability under the FLSA. The Supreme Court of the United States, in 1947, attempted to address the issue of who is an “employer” in an FLSA claim in *Rutherford Food Corp. v. McComb*.¹⁵⁷ In this case, meat boners working in a slaughterhouse were employed by a supervisor as independent contractors, and the slaughterhouse contended that the boners were not employees so they were not eligible for overtime.¹⁵⁸ The Court disagreed with this argument and looked at the “circumstances of the whole activity,” reasoning that because the meat boners worked on a production line, the contracts for each meat boner were essentially identical, the meat boners used the slaughterhouse’s plant and equipment, and the meat boners did not perform work at other slaughterhouses, that the meat boners were employees of the slaughterhouse under the FLSA.¹⁵⁹ While this is not a “joint employer” case, later decisions cite to this seminal case in deciding joint employer cases.¹⁶⁰

As with other joint employer standards, joint employment is a fact intensive analysis under the FLSA, which was intended to prevent entities from creating “shell” organizations to avoid statutory responsibilities of complying with wage and overtime requirements.¹⁶¹ Unfortunately, there is no uniform test for evaluating joint employer liability under the FLSA. The FLSA Fact Sheet 79E used the economic realities test to determine if an employment relationship exists.¹⁶² The ultimate question is whether the employee is economically dependent on the employer, and factors considered include, but are not limited to:

- (1) “whether a possible employer has the power to direct, control, or supervise the worker(s) or the work performed;
- (2) whether a possible employer has the power to hire or fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the worker(s);
- (3) the degree of permanency and duration of the relationship;
- (4) where the work is performed and whether the tasks performed require special skills;
- (5) whether the work performed is an integral part of the overall business operation;
- (6) whether a possible employer undertakes responsibilities in relation to the worker(s) which are commonly performed by employers; and

¹⁵⁷ 331 U.S. 722 (1947).

¹⁵⁸ *Id.* at 723-25.

¹⁵⁹ *Id.* at 730.

¹⁶⁰ *See Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 70 (2d. Cir. 2003) (arguing that *Rutherford* was essentially a joint employer case “because the Court held that the slaughterhouse was a joint employer of the boning supervisor, who was responsible for “hiring workers, managing their work, and paying them.”)

¹⁶¹ *Id.* at 76.

¹⁶² *Id.*

(7) whose equipment is used; and who performs payroll and similar functions.”¹⁶³

As discussed above, the January 2016 Administrator’s Interpretation offers more guidance as to the appropriate analyses for joint employer liability under the FLSA. Each federal circuit seems to utilize its own test in determining joint employer liability under the FLSA, as described in this section. However, the January 2016 Administrator’s Interpretation specifically calls out court analyses that address only or primarily the potential joint employer’s control (power to hire and fire, supervision and control of conditions or work schedules, determination of rate and method of pay, and maintenance of employment records) as inconsistent with the FLSA.¹⁶⁴ Therefore, while it is not yet apparent how the January 2016 Administrator’s Interpretation will play out, it is important to keep it in mind while encountering potentially inconsistent precedent found in the various circuits:

a. First and Ninth Circuits

The First¹⁶⁵ Circuit has adopted the *Bonnette* Test,¹⁶⁶ which considers “whether the alleged employer:

- (1) had the power to hire and fire the employees,
- (2) supervised and controlled employee work schedules or conditions of employment,
- (3) determined the rate and method of payment, and
- (4) maintained employment records.”¹⁶⁷

While not intended to be a rigid test, the court explained that it is a “useful framework.”¹⁶⁸ In addition to *Bonnette*, the Ninth Circuit has incorporated other factors into its joint employer analyses from the pre-1997 version of the MSPA joint employment regulation, and the eight economic realities factors set forth in *Torres-Lopez*, 111 F.3d 633, 640-41 (9th Cir. 1997).¹⁶⁹ The January 2016 Administrator’s Interpretation, more or less, approves of these and other formulations of the economic realities factors to determine the employee’s economic dependence on a potential joint employer.¹⁷⁰

¹⁶³ *Id.*

¹⁶⁴ See Administrator’s Interpretation No. 2016-1, *supra*, at n. 147.

¹⁶⁵ See *Cavallaro v. UMass Mem. Health Care, Inc.*, 971 F. Supp. 2d 139, 142 (D. Mass. 2013) (citing *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998).

¹⁶⁶ *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

¹⁶⁷ *Id.* at 1470.

¹⁶⁸ *Id.*

¹⁶⁹ See *Perez v. Lantern Light Corp.*, 2015 WL 3451268, at *17 (W.D. Wash. May 29, 2015).

¹⁷⁰ See Administrator’s Interpretation No. 2016-1, *supra*, at n. 147.

b. Second Circuit

The Second Circuit has reasoned that the *Bonnette* test was not sufficient because it did not account for “functional control,” as referred to in *Rutherford*. Therefore, the *Zheng* court considered six factors beyond those elucidated in *Bonnette*:

- (1) whether a worker used an alleged employer's premises and equipment;
- (2) whether the subcontractor had a business that could or did operate as a unit in conjunction with more than one theoretical joint employer;
- (3) whether the worker performed a "discrete linejob" that is integral to the alleged joint employer's "process of production;"
- (4) whether the subcontractor can transfer its contract to other subcontractors without material changes to the contract;
- (5) the degree the alleged joint employer supervised the workers' work; and
- (6) whether the workers worked exclusively for the alleged joint employer.¹⁷¹

c. Third Circuit

The Third Circuit utilizes the joint employer test employed in *N.L.R.B. v. Browning-Ferris Indus. of PA.*, 691 F.2d 1117, 1123 (3d Cir. 1982) (“NLRB test”).¹⁷² Under this analysis, “where two or more employers exert significant control over the same employees—whether 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 under the FLSA.”¹⁷³ In *In re. Enter.*, the Third Circuit recognized the use of the *Bonnette* test, opining that this test ultimately evaluated whether the potential joint employer exerts significant control over the employees at issue, which is “quite similar” to the NLRB test.¹⁷⁴ However, the January 2016 Administrator’s Interpretation disagrees with this analysis, arguing that “this approach is not consistent with the breadth of employment under the FLSA” because “addressing only the potential employer’s control is unduly narrow and cannot be reconciled with the ‘suffer and permit’ language in the FMLA, which necessarily reached beyond traditional agency law.”¹⁷⁵

¹⁷¹ *Zheng*, 355 F.3d at 70.

¹⁷² *In re Enter. Rent-A-Car Wage & Hour Empl. Practices Litig.*, 683 F.3d 462, 468 (3d Cir. Pa. 2012).

¹⁷³ *Id.* at 468 (internal citations omitted).

¹⁷⁴ *Id.*

¹⁷⁵ Administrator’s Interpretation No. 2016-1, *supra*, at n. 147 (internal quotations omitted).

d. Fourth and Eleventh Circuit

While it has not explicitly determined that test would be used, the Fourth Circuit appears to have adopted a hybrid of the *Bonnette* test and the *Zheng* factors.¹⁷⁶ The Eleventh Circuit has adopted the seven-part hybrid test that mirrors the *Bonnette* test and the *Zheng* factors, which are:

- (1) the nature and degree of control the alleged employer had over the employee;
- (2) the degree of supervision;
- (3) the right to "hire, fire, or modify the terms of employment;"
- (4) the right to determine the rate and method of pay;
- (5) whether the alleged employer determined pay roll;
- (6) whether the work was performed on facilities owned by the alleged employer; and
- (7) whether the alleged employer owned the equipment.¹⁷⁷

e. Fifth Circuit

The Fifth Circuit relies on the economic realities test to determine whether an entity is a joint employer by evaluating whether the alleged employer:

- (1) possessed the power to hire and fire the employees;
- (2) supervised and controlled employee work schedules or conditions of employment;
- (3) determined the rate and method of payment; and
- (4) maintained employment records.¹⁷⁸

f. Sixth, Seventh, Eighth, Tenth, and DC Circuits

These circuits have either not adopted a specific analysis for joint employer liability or have not yet meaningfully examined this issue under the FLSA.

With regard to joint employer liability under the FMLA, some circuits have found no distinction in the joint employer analysis for FMLA and FLSA.¹⁷⁹

ii. Franchising industry and other large industry compliance

There is no doubt that the DOL has been aggressively pursuing large violators of the FLSA. For example, in October 2015, the DOL obtained a joint-employment judgment where DirectTV was ordered to pay \$395,000 in back wages and damages to 147 cable installers, in

¹⁷⁶ See, e.g., *Jennings v. Rapid Response Delivery, Inc.*, 2011 U.S. Dist. LEXIS 65862, at *3 (D. Md. June 15, 2011); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683 (Md. 2010).

¹⁷⁷ See *Phillips v. M.I. Quality Lawn Maint., Inc.*, 2011 WL 666145 at *4 (S.D. Fla. 2011).

¹⁷⁸ *Orozco v. Plackis*, 757 F.3d 445, 453 (5th Cir. 2014).

¹⁷⁹ See *Brown v. Arizona*, CV-09-2272-PHX-GMS, 2011 WL 2911054 at *2 (D. Ariz. July 20, 2011).

Washington, whom DirectTV claimed were subcontractors.¹⁸⁰ In this matter, investigators found that Advance Information Systems, a company that DirectTV engaged to provide installers, was paying employees on a piece-rate basis.¹⁸¹ This payment scheme only paid for successful installations and did not pay for unsuccessful installations, for travel time, or for time in the office, which effectively resulted in hourly rates falling below the federal minimum wage.¹⁸² DirectTV claimed that it did not employ these installers, and therefore, was not responsible for the violations. But, the WHD established that DirectTV had fissured the installers' employment relationship to avoid liability and showed that the installers worked only on DirectTV installations, had all conditions of employment specified by DirectTV, drove DirectTV vans, and wore DirectTV uniforms.¹⁸³ In addition to the monetary judgment, "DirectTV also must require its contractors to comply with the FLSA, require specific terms on travel reimbursements, and give all of its Washington installers a copy of the court's decision. The judgment also orders DirectTV to hire a monitor to report on the installers' employment conditions, and to conduct a nationwide review of its contractors' contracts to ensure FLSA compliance."¹⁸⁴

This activity has also spelled trouble for the franchise industry. According to CNNMoney's analysis of the data collected by the WHD, Subway franchisees were found to be in violation of wage and hour rules in more than 1,100 investigations from 2000 to 2013.¹⁸⁵ In response, the WHD has teamed up with Subway Sandwiches & Salads LLC, the franchisor, to increase compliance with federal labor laws.¹⁸⁶ Subway corporate, while not found to be a joint employer, is facilitating education of franchisees, offering additional resources to franchisees, and amending internal documents to promote increased compliance.¹⁸⁷ Instead of the WHD cracking down on each individual franchisee to pay back-wages, damages, and penalties, potentially ruining the franchisee's business and hurting the franchise system, the WHD hopes that this alternative approach to increase compliance will benefit all parties and the economy as a whole.¹⁸⁸

¹⁸⁰ *US Labor Department obtains joint employment judgment ordering DirectTV to pay \$395K in back wages and damages to 147 cable installers in Washington*, U.S. DEPARTMENT OF LABOR NEWS BRIEF (October 22, 2015), accessed at <http://www.dol.gov/opa/media/press/whd/WHD20152036.htm>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Subway leads fast food industry in underpaying workers*, CNNMONEY (May 1, 2014), <http://money.cnn.com/2014/05/01/news/economy/subway-labor-violations/>.

¹⁸⁶ *See, supra*, n. 43.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; The WHD does pursue individual franchisees, such as McDonald's franchisee Cheung Enterprises LLC for unpaid wages, which resulted in an award of \$211,000 in unpaid wages, damages, and penalties following an investigation. *See Former McDonald's franchisee agrees to pay nearly \$211,000 in unpaid wages, damages and penalties following US Labor Department investigation*, U.S. DEPARTMENT OF LABOR (February 18, 2014), <http://www.dol.gov/opa/media/press/whd/WHD20140136.htm>.

This partnership, however, has not prevented litigation where Subway Sandwiches & Salads LLC (the franchisor) and its franchisees have been joined under the joint employer theory for franchisee violations of the FLSA.¹⁸⁹ In *Bacon*, while the court has not yet submitted its opinion on whether the franchisor is culpable under the FLSA, it did deny the franchisor's motion to dismiss plaintiff's claims regarding joint employer liability, stating that "[t]hese facts are sufficient to permit the inference that the defendants may operate a single, integrated enterprise that is a "joint employer" for the purposes of the FLSA. After the parties engage in discovery, they will be better prepared to make their cases, and present evidence regarding this factual determination."¹⁹⁰

The U.S. Court of Appeals for the Fifth Circuit has specifically opined on this decision. In *Orozco*, while declining to find enough evidence to satisfy the economic realities test, the Court warned that the decision does not imply that franchisors can never qualify as an FLSA employer of the franchisee's employees.¹⁹¹ Notably, the Fifth Circuit emphasized that certain provisions in franchise agreements addressing franchisee compliance with policies and procedures of the franchisor is not enough to establish joint employer liability,¹⁹² which is similar to the position held by the General Counsel of the NLRB.

To date, franchisors have not been found to be a joint employer with an entity responsible for FMLA violations. However, depending on the nature of their relationships with individual employees, separate business entities may be regarded as joint employers for FMLA coverage purposes so that the employees of each business are collectively counted toward the 50-employee threshold required for the FMLA to apply.¹⁹³ *Cuff v. Trans States Holdings, Inc.* examined this very issue.¹⁹⁴ In this case, United Airlines contracted with other firms for regional air services under the "United Express" brand.¹⁹⁵ Two of those suppliers under this brand were also sued as co-defendants by the plaintiff, who claimed that he was wrongly fired by one of the suppliers for taking leave despite the initial denial of this request for leave under the FMLA.¹⁹⁶ The FMLA only applies if the employer has at least 50 employees within 75 miles of the requesting worker's place of work; the plaintiff's employer only had 33 employees.¹⁹⁷ The trial court's finding, which was affirmed by the Seventh Circuit, was that the plaintiff was eligible for FMLA leave because the co-defendants, who collectively employed more than 50 employees, were joint employers of the plaintiff. The Seventh Circuit also upheld the jury's award for

¹⁸⁹ *Bacon v. Subway Sandwiches & Salads LLC*, 2015 U.S. Dist. LEXIS 19572 (E.D. Tenn. Feb. 19, 2015).

¹⁹⁰ *Id.* at *9.

¹⁹¹ *See Orozco*, 757 F.3d at 453.

¹⁹² *See id.*

¹⁹³ *See* 29 U.S.C. § 2611(2)(B)(ii).

¹⁹⁴ 768 F.3d 605, 606 (7th Cir. 2014).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 609.

¹⁹⁷ *Id.* at 610.

attorneys' fees, which were more than seven times greater than the jury's award for compensatory damages.¹⁹⁸

C. OSH Act

There is growing concern that the worker protection objectives of Dr. Weil and the WHD will spill over into enforcement of the OSH Act. The OSH Act's purpose is to protect workers' safety and health through safe working conditions at work. This act is enforced by the Occupational Safety Health Administration ("OSHA"), which is under the purview of the DOL.¹⁹⁹ The administrator of OSHA is the Assistant Secretary of Labor for Occupational Safety and Health, David Michaels. OSHA's administrator answers to the Secretary of Labor, who is a member of the cabinet of the President of the United States.

Under the OSH Act, "employer" is very broadly defined as "a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State."²⁰⁰ Employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce."²⁰¹ The OSH Act covers all employees, regardless of their title, status or means of compensation. Independent contractors are not covered under the OSH Act. However, the "controlling employer" has a general duty to furnish a safe worksite for its own employees as well as employees of another employer on a multi-employer work site.

OSHA has primarily concerned itself with worksites where there are a number of different employers and types of employees, such as construction jobsites. With regard to deciding who is and is not a joint employer, OSHA will first categorize each of the relevant employers at a multiemployer worksite based on their respective roles: creating, exposing, correcting or controlling. A single employer may fall into more than one category. Once OSHA categorizes an employer, the agency will evaluate whether the employer met its obligations under OSHA requirements. If OSHA determines that the employer did not meet its obligations, the employer will be cited. The categories are:

- (1) *Creating employers*: employers whose workers create a hazardous condition that violates an OSHA standard. Employers are citable even if the only employees exposed are those of other employers at the site.
- (2) *Exposing employers*: employers whose workers are exposed to a hazard on a multiemployer worksite. Only exposing employers can be cited for a general duty clause violation. If the exposing employer created the violation, it is citable as a creating employer. If the violation was created by another employer, the exposing

¹⁹⁸ *Id.* at 611.

¹⁹⁹ *About OSHA*, UNITED STATES DEPARTMENT OF LABOR, <https://www.osha.gov/about.html> (accessed on December 2, 2015).

²⁰⁰ 29 USC 652 §3(5).

²⁰¹ 29 USC 652 §3(6).

employer is citable only if it knew of the hazardous condition or “failed to exercise reasonable diligence” to discover the condition and then failed to take steps consistent with its authority to protect its employees. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to ask the creating and/or controlling employer to correct the hazard, inform its employees of the hazard or take reasonable alternative protective measures. In extreme circumstances, the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

- (3) *Correcting employer*: employers whose workers are engaged in a common undertaking on the same worksite as the exposing employer, and responsible for correcting the hazard. The correcting employer can be cited if it does not exercise reasonable care in preventing and discovering violations and does not meet its obligations to correct hazards even if none of its workers were exposed to the hazard.
- (4) *Controlling employers*: employers who have general supervisory authority over the worksite, including the power to correct safety and health violations or require others to correct them. Control can be established by contract or, by the exercise of control in practice in the absence of contractual provisions.

OSHA guidance states that staffing agencies and host employers are jointly responsible for maintaining a safe work environment for temporary workers and that both employers could be held responsible for unsafe conditions.²⁰² To ensure that there is a clear understanding of each employer's role in protecting employees, OSHA recommends that the temporary staffing agency and the host employer set out their respective responsibilities for compliance with applicable OSHA standards in their contract.²⁰³ Including such terms in a contract will ensure that each employer complies with all relevant regulatory requirements, thereby avoiding confusion as to the employer's obligations.

In March 2015, McDonald's workers filed 28 complaints with OSHA for various workplace hazards, such as high risk of burns from inadequate safety equipment and risk of falling from greasy, slippery floors.²⁰⁴ While the press-release discussing the complaint does not allege joint-employer liability, it does state that even employees at corporate-owned stores report the same health and safety hazards as workers in franchised locations. While it remains to be seen whether OSHA will attempt to apply joint employer liability toward McDonald's corporate for the violations of its franchisees, it is worth noting that OSHA recognizes the concept of joint

²⁰² *Protecting Temporary Workers*, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, https://www.osha.gov/temp_workers/ (accessed on December 3, 2015).

²⁰³ *Id.*

²⁰⁴ *Burned! McDonald's Workers Nationwide File OSHA Complaints Alleging Hazardous Working Conditions*, FIGHTFOR15.ORG (March 16, 2015), <http://fightfor15.org/wordpress/wp-content/uploads/2015/03/Fight-for-15-Press-Release.pdf>.

employer liability to protect temporary workers caught in between their staffing agency employer and the host employer.²⁰⁵

D. Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, and Age Discrimination in Employment Act

The purpose of these anti-discrimination statutes is to protect against discrimination related to age, disability, sex, sexual orientation, race, color, national origin, religion, and acts of retaliation, harassment, and hostile work environments resulting from discrimination. The Equal Employment Opportunity Commission (“EEOC”) evaluates claims brought by claimants against their employers through a “Charge of Discrimination.” The EEOC then conducts an investigation into the claims in order to determine whether the claimant’s allegations have merit. In the event that the EEOC finds merit, the EEOC may bring a claim of discrimination against the claimant’s employer on the claimant’s behalf in a trial court of appropriate jurisdiction. In the event that the EEOC does not find that there is any merit to the allegations or if the EEOC declines to take the case even if it finds the allegations have merit, it will issue a “Notice of Right to Sue,” without which the claimant may not bring an independent claim against his or her employer in the trial courts.

There is no helpful statutory definition of who is an employee and who is an employer. The EEOC Compliance Manual states that the statutes define an “employee” as “an individual employed by an employer.”²⁰⁶ It recognizes that an employee may have more than one employer, defining a “joint employer” as “two or more employers that are unrelated or that are sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer.”²⁰⁷ To determine whether an employer-employee relationship exists, the Manual more-or-less adopts the common law test where the right to control is viewed as a relative factor, judged by the employer’s authority to use it rather than its actual exercise.²⁰⁸

Courts in numerous jurisdictions have applied joint employer liability in the context of various employment discrimination cases. The tests used to impugn liability vary according to the jurisdiction. For example, the U.S. Court of Appeals for the Fifth Circuit evaluates Title VII employer status under the four-part *Trevino* test, which involves consideration of (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control, placing “highest importance on the second factor,

²⁰⁵ See *Policy Background on the Temporary Worker initiative (Memorandum)*, Occupational Safety and Health Administration, UNITED STATES DEPARTMENT OF LABOR (July 15, 2014), accessed at https://www.osha.gov/temp_workers/Policy_Background_on_the_Temporary_Worker_Initiative.html.

²⁰⁶ *EEOC Compliance Manual*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1> (citing 42 U.S.C. § 2000e(f) (Title VII); 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 12111(4) (ADA)).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

rephrasing and specifying it so as to boil down to an inquiry of ‘what entity made the final decisions regarding employment matters related to the person claiming discrimination.’”²⁰⁹ To determine joint employer liability, the U.S. Court of Appeals for the Sixth Circuit looks at the entity’s ability to hire, fire, or discipline employees, affect their compensation and benefits, and direct and supervise their performance.²¹⁰ The Eleventh and Third Circuits apply a similar test as the Sixth Circuit.²¹¹

Presently, there is no uniform guidance as to what joint employer liability may mean for franchisors, although more guidance is expected near future. In the past, plaintiffs in discrimination suits have sought to include franchisors through joint employer liability with mixed results, which are a product of the fact intensive analysis necessary under various jurisdictional standards.²¹²

E. Patient²¹³ Protection and Affordable Care Act

The purpose of the ACA is to increase the quality and affordability of health insurance, lower the uninsured rate by expanding public and private access to insurance coverage, and to reduce the costs of healthcare for individuals and the government.²¹⁴ The ACA requires employers, who employ 50 or more full-time employees, offer its employees the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored healthcare plan. The agency enforcing the ACA is the IRS.

The ACA Final Rule defines “employee” as an individual who is an employee under the common law control standard under Treas. Reg. § 31.3401(c)-1(b). Further, the Treasury Regulations state that the employer-employee relationship exists when “the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done ... the right to

²⁰⁹ *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 344 (5th Cir. 2007).

²¹⁰ *EEOC v. Skanska USA Building=, Inc.*, 550 Fed. Appx. 253 (6th Cir. 2013).

²¹¹ *Graves v. Lowery*, 117 F.3d 723 (3rd Cir. 1997); *Virgo v. Riviera Beach Associates, Ltd.*, 30 F.3d 1350 (11th Cir. 1994).

²¹² See *Angela M. Courtland, Plaintiff, v. GCEP-Surprise, LLC, an Arizona limited liability company; Buffalo Wild Wings International, Inc., a corporation; and Buffalo Wild Wings, Inc., a corporation, Defendants*, Business Franchise Guide (CCH) P 15, 101; *Gray v. McDonald's USA, LLC*, 874 F. Supp. 2d 743 (W.D. Tenn. 2012); *Bricker v. R&A Pizza, Inc.*, 804 F. Supp. 2d 615 (S.D. Ohio 2011); *Myers v. Garfield & Johnson Enterprises, Inc.*, 679 F.Supp.2d 598 (E.D. Pa. 2010); *Hatcher v. Augustus*, 956 F. Supp. 382, 392 (E.D. N.Y. 1997); and *Perry v. Burger King Corp.*, 924 F. Supp. 548, 554 (S.D. N.Y. 1996).

²¹³

²¹⁴ *The Affordable Care Act*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, <http://www.hhs.gov/healthcare/about-the-law/read-the-law/index.html> (accessed on December 3, 2015).

discharge is also an important factor indicating that the person possessing that right is an employer.”²¹⁵

In spite of this definition, it is unlikely that the IRS will delve into the joint employer issue as it does not have a similar mission as the DOL. The IRS has stated in the past, informally, that neither the Internal Revenue Code, regulations, formal guidance, nor any binding court precedent recognizes joint employment for federal employment tax purposes.²¹⁶ Since this is the first year of mandatory compliance, the issue of joint employer liability for failure to comply with the ACA has not yet been explored.

VI. POLITICAL ACTIVITY SURROUNDING THE PROPOSED PROTECTING LOCAL BUSINESS OPPORTUNITY ACT

In light of the recent shift in joint employer liability standards, franchisors and franchisees alike are urging legislators to approve proposed legislation recently introduced in Congress in an effort to protect the traditional franchise system. On September 9, 2015, in response to the *Browning-Ferris* decision, the Protecting Local Business Opportunity Act (“H.R. 3459”) was introduced in the House by the Education and The Workforce Committee and in the Senate by the Health, Education, Labor and Pensions Committee.²¹⁷ This act would temper the Board’s decision in *Browning-Ferris* by amending the NLRA to limit joint employer findings to situations where there is evidence that two or more employers share control over employees that is “actual, direct, and immediate.” Essentially, the act will create a distinction between an employee’s primary employer and any secondary companies with which they may work alongside. The International Franchise Association’s attempt to add the policy rider to address the joint employer issue was removed from the Consolidated Omnibus Appropriations bill, in spite of bipartisan support among House and Senate lawmakers.²¹⁸

State legislatures are acting much more quickly. Texas, Tennessee, and Louisiana have already passed legislation to combat franchisor liability for franchisees’ employees. The Senate Bill 652, enacted by Texas on September 1, 2015, generally prohibits franchisors from employment claims of its franchisees and its employees and amends the Texas Labor Code so that the franchisor is not considered an employer with respect to its franchisees and franchisees’ employees.²¹⁹ Under this bill, the franchisor is not considered an employer for any purpose such as employment discrimination, wage and hour violations, minimum wage violations,

²¹⁵ Treas. Reg. § 31.3401(c)-1(b).

²¹⁶ Memorandum, Office of the Assistant Chief Counsel, Department of the Treasury, No. 200017041 (March 3, 2000).

²¹⁷ H.R. 3459, 114th Cong. (2015).

²¹⁸ Press Release, *IFA Disappointed After Congress Fails To Protect Small Business in Omnibus*, International Franchise Association, <http://www.franchise.org/ifa-disappointed-after-congress-fails-to-protect-small-business-in-omnibus> (December 15, 2015).

²¹⁹ *Bill SB 652, Legislative History, TEXAS LEGISLATURE ONLINE*, <http://www.capitol.state.tx.us/billlookup/history.aspx?legsess=84r&bill=sb652> (January 14, 2016).

professional employer organization law, unemployment liability, workers compensation liability, and workplace safety violations.²²⁰ Franchisors are not above all liability as the bill does not prohibit employment claims against a franchisor that exhibits control over the franchisee and/or employees if the control is beyond what is necessary to protect the franchisor's brand and trademarks.²²¹ Michigan, Wisconsin, and Virginia have proposed similar legislation in response to the NLRB new joint employer standard.²²²

VII. BEST PRACTICES TO AVOID A FINDING OF JOINT EMPLOYER LIABILITY

As a franchisor or business entity that utilizes secondary employers, it can be difficult to determine whether the benefits of exercising control over franchisees or using the secondary employer at issue outweigh the cost of potential liability as a joint employer. The answer will depend on jurisdiction, the level of control the franchisor wants to exhibit over the franchisee, the specific function the primary business entity wishes to delegate to the secondary employer, the tolerance for risk associated with the current system within the organization, the state law, and applicable federal laws. While nothing can eliminate all risk, it is important to try to minimize existing risk within the organization and to remain updated on joint employer activity across the various channels of liability.

The NLRB's *Freshii* decision is instructive on the level of control franchisors may exert over the franchisee without being implicated as joint employers of the franchisees' employees. Summarily, franchisors should:

- (1) review their definition of the "operations manual" and any other standards. Narrowly define the manual or system standards as one document, which gives the franchisor more control as the content. Franchisors should also exclude any employment related information, separately provide employment related training and information as "options" only and not requirements, and make specific disclaimers about the purpose of the manual (*i.e.*, to maintain consistency of the brand and not to control the franchisees' day-to-day operations);
- (2) review the franchise agreement to determine whether any statements attempt to control the franchisees' employment relationship with its employees. Consider including a disclaimer to the effect that "[Franchisor] neither dictates nor controls labor or employment matters for franchisees and their employees and franchisees should seek the advice of independent legal counsel to assist them with employment matters related to their franchised business." Consider conducting an internal audit (or

²²⁰ Tex. S.B. No. 652, 84 Leg., R. (2015).

²²¹ *See id.*

²²² Megha Shah, State Legislatures React to NLRB's Broad Joint Employer Standard, GREENSFELDER, <http://franchisingdistributionblog.greensfelder.com/state-legislatures-react-to-nlrbs-broad-joint-employer-standard/> (December 28, 2015).

- utilize a consultant, such as legal counsel) to remove any unnecessary controls over franchisees from the franchise program;
- (3) if the franchisor provides guidelines with regard to human resources matters to its franchisees, including an employee handbook, refrain from making the use of that material mandatory. Likewise, franchisors should not get involved in the hiring, firing, disciplining, controlling pay and benefits, and scheduling of its franchisees' employees, or provide guidance on those matters (that the franchisee may feel compelled to follow), or get involved in any labor relations activity. Franchisors should remain silent or decline to provide an opinion;
 - (4) franchisors should generally refrain from getting involved in the day-to-day supervision of its franchisees' employees. If the franchisor provides software or training with regard to determining staffing levels, it should be limited to educational purposes and the franchisor should not require the franchisee to follow any directives in the training or use the staffing software provided;
 - (5) review franchisor's policies to determine whether it is indirectly affecting its franchisees' ability to set compensation and other terms and conditions of employment of its employees;
 - (6) review franchisor's policies to determine whether it involves itself in screening, analyzing, or approving employment applications for franchised locations, if collecting resumes on behalf of franchisees at corporate locations or on the company website is an option;
 - (7) educate franchisees on employment laws and compliance, and require the franchisees to "operate in compliance with all laws." These laws include, but are not limited to, the FLSA, FMLA, Osh Act, ERISA, Title VII, ADA, ADEA, and the ACA. Consider suggesting that franchisees utilize a Professional Employer Organization, a Human Resources consultant, or an independent attorney who could assist franchisees with compliance;
 - (8) franchisors should consider including an indemnification clause in the franchise agreement for any liability arising from labor or employment law violations or investigations, including acts and omissions of both the franchisee and franchisee's employees;
 - (9) franchisors should consider requiring Employer Practices Liability Insurance ("EPLI") of its franchisees, which aims to greatly aid the franchisee with expenses related to employment claims brought by their employees. In turn, this may discourage potential plaintiffs from also suing the franchisor under joint employer liability to reach "deeper pockets"; and
 - (10) review all documents, marketing material, pay stubs, and other material bearing the franchisor's trademark to determine whether it may cause confusion as to the franchisor-franchisee relationship if the franchisee uses that document for its purposes. For example, consider including disclaimers on marketing material that state that each franchise is independently owned and operated. Ensure that the pay stubs and checks given to franchisees' employees do not bear the franchisor's corporate entity's name or logo, and instead, should clearly identify the franchisee's business entity, to avoid confusion as to which entity employs the employee.

With regard to employers who utilize staffing agencies and/or outsource certain functions of their business, the risk of liability is quite high. The DOL and NLRB seem determined to crack down on the “fissuring” of the workplace; therefore, these employers must be even more vigilant in minimizing their risks. Because evaluation of these risks is a fact intensive analysis, it is difficult to define bright line rules. However, based on the investigations currently being performed, the employers could audit certain aspects of their business based on the most common themes:

- (1) the primary employer should focus on whether the core activities of the business are being outsourced to a secondary employer. If so, the primary employer should determine how much control it has over employees provided by the secondary employer (“staffed employees”) and whether the secondary employer is compliant with all employment laws;
- (2) the primary employer should determine whether its own employees and staffed employees intermingle in tasks and managerial units. The primary employer should avoid a situation where the staffed employees are managed by the employer’s managers;
- (3) the primary employer should determine whether it controls, or has the right to control, the staffed employees’ terms and conditions, pay, and other aspects of employment, directly or indirectly;
- (4) the primary employer should refrain from intermingling payroll records, workers’ compensation programs, human resources, and other employment support systems with the secondary employer;
- (5) the primary employer should refrain from switching employees to independent contractors without materially changing the job description of the worker at issue; and
- (6) the primary employer should refrain from participating in or contributing to any labor relations activity of the staffed employees and direct all inquiries to the secondary employer.

VIII. CONCLUSION

These are confusing times for the various industries that utilize outsourced labor, as well as for the franchise world. Battles are being fought on several different fronts, with the DOL and NLRB leading the charge, and on different battlegrounds, including on the administrative level and in the courts. While it is impossible to predict how joint employer liability will look in the future, large employers and franchisors could take steps to add additional layers of protection. One of the best mitigators of risk is compliance with the law. When secondary employers, staffing agencies, or franchisees with whom the franchisor or business is affiliated comply with the law, joint employer liability can be of limited concern. Where compliance cannot be confirmed, distinct separation between the entities while affirmatively renouncing any actual or reserved control over the others’ employees could reduce liability. Most importantly, employers and franchisors must keep abreast of developments in joint employer liability standards to ensure compliance and to reduce risk.