

International Franchise Association
50th Annual Legal Symposium
May 7-9, 2017
JW Marriott
Washington, DC

Update on Joint Employer

Stephen Hagedorn
Jani-King International, Inc.
Addison, TX

Michael Lotito
Littler Mendelson, PC
Washington DC & San Francisco, CA

John Matter
Papa John's International, Inc.
Louisville, KY

Adam Wit
Hilton Worldwide
Chicago, IL

Update on Joint Employer

I. Introduction

The concept of "joint employment" has evolved over the years. The idea of holding multiple entities jointly responsible for the same employees is certainly logical in specific circumstances. If more than one entity co-determines the means and methods of a worker's job, it follows that both could be deemed jointly or at least partially responsible for an employer's obligations. However, over the past eight years, the definition of joint employment has been stretched to the point of being unwieldy and unworkable.

Under a broad reading of joint employment, an entity might not have any control over the factors that lead to the liability itself. This is particularly true in the franchise industry, where franchisees are expected to have a certain degree of autonomy over the day-to-day operations of the business, while the franchisor must necessarily control certain factors to protect its brand and ensure uniformity of product and operations. If franchisors are held liable for the misconduct of individual franchises, they will be forced to maintain a level of involvement that detracts from a franchisee's business independence and authority. In addition, the logistics of monitoring all franchise operations will necessarily lead to a decrease in their number.

The expansion of joint employment has become an increasingly politicized issue, working its way into agency decisions and sub-regulatory guidance. Although the 2015 National Labor Relations Board (NLRB or "the Board") decision in *Browning-Ferris Industries*¹ was a pivotal case that fundamentally and profoundly changed the joint-employer standard under the National Labor Relations Act (NLRA), it was just one of several steps the Obama administration took to expand the scope of joint employment. The U.S. Department of Labor (DOL) and the U.S. Equal Employment Opportunity Commission (EEOC) have also had a hand in molding the current tests. State legislatures, in turn, have taken notice, enacting their own laws to better delineate the employment relationship.

Some clarity to this issue could be on the horizon. The Trump administration is expected to seat government officials with a better understanding of the workplace. Alex Acosta, Trump's latest pick to helm the DOL, was a former member of the NLRB. Although his tenure on the Board was relatively brief, he served as one of the three Republican members on the five-member panel. Philip Miscimarra, the Board's acting Chair, issued a scathing dissent in *Browning-Ferris*. Neil Gorsuch, the new U.S. Supreme Court Justice, has been somewhat critical of agency overreach. In essence, the administration is poised to view this issue with fresh eyes.

¹ *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (Aug. 27, 2015).

The following provides an overview of how joint employment developed as a concept, discusses the NLRB's seminal *Browning-Ferris* decision and its aftermath, highlights other federal agency activities surrounding joint employment, reviews recent cases governing joint employment under federal and state law, details how states have reacted to these changes, and previews what is in store for employers in the coming years under the new administration.

II. Background on Joint Employment

The modern-day concept of joint employment is rooted in agency principles, statutory provisions, federal agency guidance and initiatives, and case law.

Agency Principles

The determination of which entity is an employer or joint employer stems from the English common law of agency. In essence, a principal is bound by the authorized actions of the agent.² This can be done by express, implied, or apparent authority. The common law of agency provides a structural framework for determining which entity employs an individual, which becomes important when assessing whether a second entity jointly employs that same individual.

The U.S. Supreme Court has time and again considered the application of the common-law agency principle in determining whether an employment relationship exists:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.³

² Restatement of Agency (Third) § 1.01 Agency Defined. Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

³ *Community for Creative Non Violence v. Reid*, 490 U.S. 730, 751-752 (1989).

If a statute does not define the employment terms, the Court "presumes that Congress means an agency law definition unless it clearly indicates otherwise."⁴ Stated differently, if a statute does not define whether an entity "employs" an individual, courts will look to agency principles to assess whether an employment (or joint employment) relationship exists using the common-law agency, multi-factor, fact-specific inquiry into who controls the "manner and means" of the work.

Statutory Principles

As noted above, if Congress has specifically included language delineating the employment relationship, such provisions supersede agency principles. The federal Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) contain such provisions. Both statutes define "employ" as "to suffer or permit to work."⁵ This definition has been interpreted to widen the scope of who is considered a joint employer, as it does not focus merely on the degree of control over the employee's work.⁶

Both statutes' implementing regulations further flesh out this concept with respect to joint employment:⁷

A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that

⁴ *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992); see also *Town & Country, Elec., Inc.*, 516 U.S. 85 (1995) (applying common law agency principles to determine who is an employer under the NLRA).

⁵ 29 U.S.C. § 203(g) (FLSA). Under the MSPA, the term "employ" has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act. 29 U.S.C. § 1801, *et. seq.*

⁶ See *Darden*, 503 U.S. at 326 (FLSA's "suffer or permit" standard for employment "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.").

⁷ See: <https://www.dol.gov/whd/flsa/jointemployment.htm>.

the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.⁸

Under the MSPA:

The definition of the term employ includes the joint employment principles applicable under the Fair Labor Standards Act. The term joint employment means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist.⁹

Judicial application of the above standards to specific scenarios, however, shows just how complex joint-employer determinations can be.

Court Interpretations

The volume of case law interpreting the FLSA and MSPA statutory provisions and implementing regulations is quite large. A full discussion of cases determining joint employment under these laws and their state counterparts is beyond the scope of this paper. The following discussion is limited to relatively recent case law in this area to provide an overview of the current state of joint-employer jurisprudence.¹⁰

⁸ Joint Employment Relationship Under Fair Labor Standards Act of 1938, 29 C.F.R. § 791.2(a).

⁹ 29 C.F.R. § 500.20(h)(5).

¹⁰ In addition, courts have applied different tests in finding joint employment under Title VII or other statutes. For a brief overview of some of the statutory and judicial interpretations of joint employment, see Appendix A to this paper: Statutory and Case Definitions Related to Joint Employment.

Circuit Courts of Appeal Use Varying Standards

In general, to determine whether a joint-employer relationship exists, most federal courts of appeal have used a four-part test to examine whether the alleged joint employer: 1) had the power to hire and fire employees; 2) supervised and controlled employee work schedules or conditions of employment; 3) determined employee pay rate and method of payment; and 4) maintained employment records. This test was first articulated in the Ninth Circuit case *Bonnette v. California Health and Welfare Agency*, in which the appellate court ultimately found that the state agency was the employer for FLSA purposes because it exercised “considerable control over the nature and structure of the employment relationship.”¹¹ The Ninth Circuit later expanded these so-called “*Bonnette*” factors to include other criteria to consider an employer’s “indirect” control over the workers at issue, and assess the “economic reality” of the joint employment relationship.¹²

Some courts continue to rely on the four-factor test used in *Bonnette*,¹³ while others have expanded on the factors or created multi-part tests. The Second Circuit, for example, uses three sets of factors to guide its determination of whether a joint employment relationship exists.¹⁴

¹¹ *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

¹² See, e.g., *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997) (in addition to following the *Bonnette* factors, the court considered a non-exhaustive list of factors to evaluate the “economic reality” of a joint-employer relationship); *Moreau v. Air France*, 343 F.3d 1179 (9th Cir. 2003) (in addition to *Bonnette* criteria, the court examined eight other factors, including whether the premises and equipment of the employer are used for the work, whether the employees had a business organization that could or did shift as a unit from one worksite to another, whether the work was piecework and not work that required initiative, judgment or foresight, and whether there was permanence in the working relationship, among others).

¹³ See, e.g., *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (applying the *Bonnette* factors).

¹⁴ See *Greenawalt v. AT&T Mobility, LLC*, 642 Fed.Appx. 36 (2d Cir. 2016) (“The first test, derived from *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), looks to whether a putative employer exercises ‘formal control’ over a worker. See *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003). Because *Carter* defines employment more narrowly than FLSA requires, satisfying this test is sufficient, but not necessary, to show joint employment. *Id.* at 71. The second test, set out in *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988), focuses on whether ‘the workers depend upon someone else’s business . . . or are in business for themselves,’ *id.* at 1059, and thus is ‘typically more relevant for distinguishing between independent contractors and employees,’ *Velez v. Sanchez*, 693 F.3d 308, 326 (2d Cir. 2012), than for determining by whom workers who are assumed to be employees are employed.”). The third test, first developed in *Zheng*, weighs six factors in determining whether an entity exercises “functional control” over the workers at issue. These factors include

The Sixth and Seventh Circuits, meanwhile, appear to use a modified set of *Bonnette* factors in evaluating a potential joint employment relationship under the FLSA.¹⁵

Most recently, the Fourth Circuit held courts must first apply a two-part test to determine whether an entity is a joint employer, followed by a separate six-factor analysis. In *Salinas v. Commercial Interiors, Inc.*,¹⁶ the appellate court created a standard that differs from those applied in the other circuits, and appears to expand joint-employer liability under the FLSA.¹⁷

Generally, the Fourth Circuit applies a “two-step framework for analyzing FLSA joint employment claims, under which courts must first determine whether two entities should be treated as joint employers and then analyze whether the worker constitutes an employee or independent contractor of the combined entity.”¹⁸ However, unlike other circuit courts, before *Salinas* the Fourth Circuit refrained from identifying “specific

whether the entity’s premises and equipment were used for the putative employees’ work; whether the purported contractors had a business that could or did shift as a unit from one putative joint employer to another; the extent to which the putative employees performed a discrete line-job that was integral to purported joint employer’s process of production; whether responsibility under the contracts could pass from one subcontractor to another without material changes; the degree to which the entity or its agents supervised the putative employees’ work; and whether the putative employees worked exclusively or predominantly for the entity.

¹⁵ In *EEOC v. Skanska USA Bldg., Inc.* 550 Fed.Appx 253, 256 (6th Cir. 2013), the court stated: “To determine whether an entity is the plaintiff’s joint employer, we look to an entity’s ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance.” In *EEOC v. Illinois*, 69 F.3d 167, 169 (7th Cir. 1995), the Seventh Circuit used a five-part modified set of *Bonnette* factors determine “whether the putative employer exercised sufficient control, and whether the ‘economic realities’ are such that the putative employer can be held liability under Title VII.” These five factors included (1) the extent of the company’s control and supervision over the employee; (2) the kind of occupation and nature of skill required, including whether skills were acquired on the job; (3) the company’s responsibility for the costs of operation; (4) the method and form of payment and benefits; and (5) the length of the job commitment.

¹⁶ *Salinas v. Commercial Interiors, Inc.*, No. 15-1915, 2017 WL 360542 (4th Cir. Jan. 25, 2017).

¹⁷ For a more detailed discussion of this case, see Nina Markey And Andrew Rogers, *Fourth Circuit Decision Establishes New Six-Factor Test for Determining Joint Employment under the FLSA*, Littler Insight (Feb. 21, 2017),

<https://www.littler.com/publication-press/publication/fourth-circuit-decision-establishes-new-six-factor-test-determining>.

¹⁸ *Salinas*, 2017 WL 360542, at *9.

factors” to guide that analysis.¹⁹ In *Salinas*, the Fourth Circuit clarified the proper test to apply and provided several factors for courts should consider when applying it.²⁰

The plaintiffs in this case installed drywall for J.I. General Contractors, a subcontractor to defendant Commercial Interiors. The suit was brought against both entities as joint employers for alleged violations of state and federal wage and hour law. Because the two entities were joint employers, the plaintiffs argued, the hours worked for both should have been aggregated for wage and hour law compliance purposes. The lower court had granted the contractor's motion for summary judgment, applying a five-factor analysis that focused on the “legitimacy of the contracting relationship” between the general and subcontractor and whether the entities “intended to evade federal and state wage and hour laws.”²¹

The Fourth Circuit reversed, clarifying that the legitimacy of the business relationship between the two entities is not dispositive of joint employment status. Moreover, the court rejected the Ninth Circuit's *Bonnette* factors and other circuits' “economic realities” tests. Instead the Fourth Circuit announced its own new test, which finds joint employment status where: “(1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of a worker's employment and (2) the two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor.”²² The appellate court also set forth six non-exclusive factors that district courts “should” consider when applying the test:

- (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
- (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
- (3) The degree of permanency and duration of the relationship between the putative joint employers;
- (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
- (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
- (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried

¹⁹ *Id.*

²⁰ *Id.* at *10.

²¹ *Id.* at *3

²² *Id.* at *18.

out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.²³

Applying this test, the Fourth Circuit rejected Commercial Interiors' argument that its relationship with J.I. was "nothing more or less than the contractor-subcontractor relationship which is normal and standard in the construction industry."²⁴ Whether the two entities "engaged in a 'traditional,' 'normal,' or 'standard' business relationship has no bearing on whether they jointly employ a worker for purposes of the FLSA."²⁵ Instead, the Fourth Circuit concluded that the defendants jointly employed the plaintiffs for purposes of the FLSA and remanded the case for further proceedings.²⁶

In essence, the Fourth Circuit's new standard all but rejects the "economic realities" and similar tests in favor of a test that is more consistent with the DOL regulations and less favorable for employers.

The bottom line is that the joint-employer assessment under state and federal wage and hour law differs by jurisdiction, making this designation particularly difficult for multi-state employers. It is possible, however, that a joint employment case could make it before the Supreme Court, where the Justices would have the opportunity to create some much-needed clarity and consistency to the joint-employer test under the FLSA.

Litigating FLSA Joint-Employer Cases

From a litigation standpoint, the FLSA is structured in a manner that makes it difficult for related entities, especially franchisors, to remove themselves from the proceedings.

The burden of proof is low at the initial pleadings stage. All plaintiffs must do is allege sufficient facts that make it plausible a franchisor is their joint employer. For example, in *Ocampo v. 455 Hospital LLC*,²⁷ the following allegations were sufficient for the court to believe it was plausible a hotel franchisor was a joint employer: the hotel required pre-opening and employment training for franchisee employees; the franchisor could inspect a hotel at any time; the franchisor required certain records be kept; the franchisor established standards, specifications, and policies for construction, furnishing, operation, appearance, and service of a hotel; the franchisor required a specific software system be used to track revenue and operations; the franchisor could change the manner in which a hotel operated; scheduled and unannounced audits and inspections were regularly performed; the franchisor could terminate a franchise if quality assurance requirements were not met.

²³ *Id.* at **10-11.

²⁴ *Id.* at *15.

²⁵ *Id.*

²⁶ *Id.* at *18.

²⁷ 2016 U.S. Dist. LEXIS 125928 (S.D.N.Y. Sep. 14, 2016).

A plaintiff's evidentiary burden slightly increases when attempting to certify a class under the FLSA, but conditional certification is normally granted. For example, in *Meller v. Wings Over Spartanburg, LLC*,²⁸ the court was inclined to deny the plaintiffs' request to certify a class of servers at all restaurant locations because the two named plaintiffs worked at one location and did not put forward any information concerning policies or practices at other restaurants. However, because the franchisor's opposition papers noted the complained-of policy was applied at other locations, the court granted the parties additional time to conduct discovery to determine whether other franchisee- and franchisor-owned restaurants engaged in similar practices.

In contrast, on March 29, 2017, a federal court in New York declined to conditionally certify a nationwide collection action against Papa John's International on the grounds the plaintiffs failed to satisfy their burden of showing the company maintained a common policy or plan that violated the FLSA.²⁹ The plaintiffs sued the franchisor as a joint employer with the franchisees alleged to have failed to properly reimburse their delivery drivers for expenses. While the court did not reach the merits of the joint employer allegation, this case shows how plaintiffs pursuing collective actions are increasingly naming the franchisor along with or instead of the entity responsible for paying the workers who brought the complaint in the first instance.

The burden increases if either party moves for summary judgment. In *Pope v. Espeseth, Inc.*,³⁰ the court granted the defense's motion for summary judgment on whether a window-cleaning franchisor was a joint employer of a franchisee's employees. In granting the franchisor's motion for summary judgment dismissing it from the lawsuit, the court examined whether the franchisor exercised control over the plaintiff's working conditions. The *Bonnette* factors were used in making this determination under the FLSA—i.e., whether the franchisor (1) had the power to hire and fire employees; (2) supervised and controlled employee work schedules or conditions of payment; (3) determined the rate and method of payment; and (4) maintained employment records.³¹

The plaintiffs conceded half the requirements for establishing joint employment – the power to hire and fire employees, and maintaining employment records – did not exist. Instead, the plaintiffs contended that the requisite degree of control was exercised by the franchisor's control of the franchisee's employee work schedules via an employment manual. The court noted, however, that franchisees were not required to adhere to the terms of the employee manual, and the franchisee in fact deviated from the manual's recommendations in various ways. The plaintiffs were unable to show that providing an employee manual indicated the franchisor had the "control or direction of

²⁸ 2016 U.S. Dist. LEXIS 35792 (D.S.C. Mar. 21, 2016).

²⁹ *Durling, et al. v. Papa John's International, Inc.*, Case No. 7:16-CV-03592 (S.D.N.Y. Mar. 29, 2017).

³⁰ 2017 U.S. Dist. LEXIS 4928 (W.D. Wis. Jan. 11, 2017).

³¹ *Id.*, slip op. at 8, citing *Moldenhauer v. Tazwell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008).

any person employed at any labor or [was] responsible directly or indirectly for the wages of another."³²

In *Gessele v. Jack in the Box, Inc.*,³³ the court granted the defendant's motion for summary judgment on whether a fast food franchisor was a joint employee of a franchisee's employees under the Ninth Circuit's broader tests. Under the initial four-part test, the court found the franchisor did not have hiring or firing power, and was not responsible for or involved in work schedules, hours of employment, salaries, insurance, fringe benefits, or hours of work of the franchisee's employees. There was evidence the franchisor played some role in the franchisee's operations, but not enough for the court to find a joint employment relationship. Though the franchisee had to use the franchisor's payroll system and the franchisor sent data to a franchisee's payroll provider, this "ministerial function" was insufficient to show control over labor relations. Also, providing nonmandatory advisory materials relating to a franchisee's HR and training to some of a franchisee's managerial staff did not establish control over employees. Finally, ownership of the equipment and premises was not enough (several corporate-owned restaurants were franchised to the franchisee).

As noted, many joint employment determinations are made under state law. In *Ochoa v. McDonald's Corp.*,³⁴ for example, the court examined whether a franchisor was a joint employer under California law. To qualify as an employer under California's labor and employment statutes and/or regulations, a franchisor must exercise control over employees' wages, hours or working conditions, suffer or permit employees to work, or create a common law employment relationship by generally controlling employees' employment. Alternatively, an "ostensible agency" relationship could be created if employees reasonably believe the franchisor has authority based on the franchisor's actions, and the employees are not negligent in their reliance. The court found franchisor control over franchisee employees lacking, differentiating between a franchisor's ability to control a franchisee and its ability to control the franchisee's employees. Although the franchisor could "exert considerable pressure on its franchisees," the court held its "strength as a franchisor do[es] nothing to negate or call into question the dispositive fact that the authority to make hiring, firing, wage, and staffing decisions at the [franchisee's] restaurants lies in [the franchisee] and its managers — and in them alone." Based on similar logic, the court found the franchisor did not suffer or permit the franchisee's employee to work or engage them to work. However, the court held the plaintiffs' ostensible agency argument was not without merit. The plaintiffs believed the franchisor was their employer because, e.g., they wore its uniform, served its food in its packaging, received paystubs and orientation materials marked with its name and logo, and applied for a job through its website.

In a separate wage and hour lawsuit involving the McDonald's franchise, however, a California federal court granted the franchisor's motion for summary

³² *Id.*, slip op. at 11, *citing* Wis. Stat. § 104.01(3)(a).

³³ 2016 U.S. Dist. LEXIS 172061 (D. Or. Dec. 13, 2016).

³⁴ 133 F. Supp. 3d 1228 (N.D. Cal. 2015).

judgment on the grounds the franchisee workers could not support their arguments that the state labor code's definition of employer extends to franchisors as joint employers.³⁵ In this case, a purported collective action filed under California's Unfair Competition Law and the Private Attorney General Act alleged the franchisor, as a joint employer with its franchisees, miscalculated wages, failed to provide meal and rest breaks, underpaid employees, and failed to reimburse workers for uniform maintenance in violation of California's Unfair Competition Law and the California Labor Code Private Attorney General Act.

In granting the franchisor's motion on all claims based on Labor Code violations, the court emphasized the state's wage statutes apply only to employers that actually control the workers' terms and conditions of employment, not to those who "ostensibly" control them. According to the court, "[t]o ignore the [state Industrial Welfare Commission's] decision to limit the definition of 'employer' to those who, through an agent, control workplace conditions would be to rewrite the law."³⁶

Litigation interpreting joint employment under federal and state wage and hour law will no doubt continue.

Agency Guidance/Initiatives

If the determinations of joint employment under federal and state law were not complex enough, the DOL has muddied the waters by issuing guidance and pursuing policies that expand joint employment.

Dr. David Weil, the Wage and Hour Administrator under President Obama, has been a strong proponent of the so-called "fissured workplace" theory.³⁷ According to this theory, certain employment models such as franchising, the use of independent contractors, the use of temporary workers, and the evolution of "alternative" employment arrangements common in the on-demand economy have led to rampant labor and employment law violations. As a solution, the DOL and related agencies have tried to broaden the scope of joint employment to increase the liability umbrella.

Over the past year, the Wage and Hour Division (WHD) has taken steps to expand the scope of joint employment in certain industries. Notably, on January 20, 2016, the WHD released an Administrator's Interpretation (AI)³⁸ concerning joint employment under the FLSA and MSPA. Whether an employer is deemed a joint

³⁵ *Salazar v. McDonald's Corp.*, Case No. 14-cv-02096-RS (N.D. Cal. Mar. 10, 2017).

³⁶ *Id.*, slip op. at 6.

³⁷ See Dr. David Weil, *The Fissured Workplace*, U.S. Dept. of Labor Blog (Oct. 17, 2014), <https://blog.dol.gov/2014/10/17/the-fissured-workplace/> (last visited Jan. 12, 2017).

³⁸ DOL, *Administrator's Interpretation No. 2016-1: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act* (Jan. 20, 2016), available at https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm.

employer has significant repercussions for liability purposes, particularly with respect to wage and hour law.³⁹ As noted in the AI:

When two or more employers jointly employ an employee, the employee's hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for purposes of calculating whether overtime pay is due.⁴⁰

Although the AI admits, "[c]ertainly, not every subcontractor, farm labor contractor, or other labor provider relationship will result in joint employment,"⁴¹ the WHD is surprisingly candid in revealing the purpose of the AI—to expand statutory coverage of the FLSA to small businesses and collect back wages from larger businesses:

Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations.⁴²

To further these goals, the WHD states in the AI: "The concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA."⁴³

For the first time, the WHD in the AI differentiates between "horizontal" joint employment and "vertical" joint employment, and provides guidance on assessing each category. According to the AI, horizontal joint employment exists "when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee."⁴⁴ An example of such an arrangement, per the AI, "may include separate restaurants that share economic ties and have the same managers controlling both restaurants."⁴⁵ Home health care

³⁹ Tammy D. McCutchen and Michael J. Lotito, *DOL Issues Guidance on Joint Employment under FLSA*, Littler Insight (Jan. 20, 2016), <http://www.littler.com/publication-press/publication/dol-issues-guidance-joint-employment-under-flsa>. See also Fact Sheet #35: Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA) <https://www.dol.gov/whd/regs/compliance/whdfs35.htm> (revised Jan. 2016).

⁴⁰ *Administrator's Interpretation No. 2016-1*, *supra* note 38 at 2.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*, citing *Chao v. Barbeque Ventures, LLC*, 2007 WL 5971772, at *6 (D. Neb. Dec. 12, 2007).

providers that share common management would also be considered horizontal joint employers, according to the AI.⁴⁶

Per the AI, the following factors may be relevant when analyzing the degree of association between, and sharing of control by, potential horizontal joint employers:

- who owns the potential joint employers (i.e., does one employer own part or all of the other or do they have any common owners?);
- do the potential joint employers have any overlapping officers, directors, executives, or managers;
- do the potential joint employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs);
- are the potential joint employers' operations inter-mingled (for example, is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for);
- does one potential joint employer supervise the work of the other;
- do the potential joint employers share supervisory authority for the employee;
- do the potential joint employers treat the employees as a pool of employees available to both of them;
- do the potential joint employers share clients or customers; and
- are there any agreements between the potential joint employers.⁴⁷

The AI describes vertical joint employment, on the other hand, as occurring when an employee of one employer (an "intermediary employer") is economically dependent on another employer (referred to in the AI as a "potential joint employer").⁴⁸ For example, a company that uses temporary workers provided by a staffing company could be determined to be in a "vertical" joint employment relationship with the staffing agency.

According to the AI, unlike in horizontal joint employment relationships "where the association between the potential joint employers is relevant," determining joint employment in vertical joint employment situations involves an examination of the "economic realities of the relationships" between the worker and the hiring entity to assess whether the worker is economically dependent on that entity.⁴⁹

The AI acknowledged that the "economic realities" factors vary by court, but claim that "any formulation must address the 'ultimate inquiry' of economic dependence."⁵⁰

⁴⁶ *Id.*, citing *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 918 (9th Cir. 2003).

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 5.

⁴⁹ *Id.*

⁵⁰ *Id.* at 13.

In essence, the DOL appears to have abandoned the established regulations⁵¹ under the FLSA regarding joint employment in favor of the nebulous "economic realities" test in evaluating the relationship between or among the entities at issue. As noted, the application of this test varies by jurisdiction, and is far from a bright-line standard. The AI refers to the seven economic reality factors describe in the MSPA regulations (which do not, as a legal matter, apply to the FLSA): (1) directing, controlling, or supervising the work performed; (2) controlling employment conditions; (3) permanency and duration of 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.⁵²

In an accompanying Q&A document, the DOL addressed this AI's impact on the franchise industry. In response to a question about whether the AI was about franchises, the document asserts:

No. This AI is intended for a wide range of industries where a business relies on others to supply the labor that performs the business' work — that is where WHD is increasingly encountering the possibility of joint employment. The form of business organization, such as a franchise, does not necessarily indicate whether joint employment is present. Indeed, the existence of a franchise relationship, in and of itself, does not create joint employment.

Rather, WHD evaluates all potential joint employment relationships using the same analysis.

Based on our investigative experience, there are many workers, including those who work for a franchised business, who have multiple jobs with multiple employers who are not joint employers. Ultimately, of course, whether a particular franchisee and franchisor jointly employ a worker is based on the facts of each situation and must be made on a case-by-case basis applying the analyses discussed in the AI.⁵³

⁵¹ Under the DOL regulations, joint employment exists in three circumstances: (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. 29 C.F.R. §.791.2(b).

⁵² *Administrator's Interpretation No. 2016-1*, at 11-12.

⁵³ DOL, Joint Employment AI: Questions and Answers, *available at* https://www.dol.gov/whd/flsa/Joint_Employment_AI_faq.htm#5.

While the AI is not binding, such documents can be influential in attempts to expand the scope of joint employment. Its fate, however, is uncertain now that a new administration is in place. It is possible the DOL, under new leadership, will rescind this AI and return to the pre-existing test that focused more on actual interdependence of two or more entities than a broad "economic realities" test.

Notably, the above tests do not apply to joint-employer assessment under other statutes, including the National Labor Relations Act.

III. *Browning-Ferris* and its Ensuing Havoc

Determining joint employment under the NLRA is crucial for assessing an entity's labor law coverage and its ensuing responsibilities. For decades, employers were able to rely on a body of law that set a relatively clear standard for joint employment. The Board's decision in *Browning-Ferris* reversed course.

Pre-*Browning-Ferris*

Long-standing NLRB policy was that two employers were found to be joint employers only when the two entities exerted such direct and significant control over the same employees that they shared or co-determined matters governing the essential terms and conditions of employment. Relevant factors in making this assessment included the right to hire, terminate, discipline, supervise and direct the employees. In applying this test, administrative agencies and courts generally found that the control exercised by the putative joint employer must be actual, direct and substantial—not simply theoretical, possible, limited or routine.

Several NLRB cases created this framework. Back in 1984, the NLRB issued two decisions that addressed the joint-employer issue. In *Laerco Transportation*⁵⁴ and *TLI*,⁵⁵ the Board explained that joint employment exists when "two or more business entities are in fact separate, but ... they share or codetermine those matters governing the essential terms and conditions of employment."⁵⁶ "To establish this relationship, there must be evidence that one employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction of the other employers employees."⁵⁷

Consistent with the common law of agency, joint employment therefore exists when a second entity works with the "primary" employer to co-determine the essential

⁵⁴ 269 NLRB 324 (1984).

⁵⁵ 271 NLRB 798 (1984).

⁵⁶ *Laerco*, 269 NLRB at 325; *TLI*, 271 NLRB at 803. See also *Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (determining joint employment depends on whether the companies "exercised common control over the employees.")

⁵⁷ *AM Property Holding Corp.*, 350 NLRB 998, 999-1000 (2007), citing *Laerco*, 269 NLRB at 325.

terms and conditions of employment, such as work hours, compensation, day-to-day job duties, etc.⁵⁸

For decades, the Board recognized that having the ability to indirectly control some aspects of the employees' terms and conditions of employment was not sufficient; the control must actually be exercised.⁵⁹ Moreover, even direct control exercised in a "limited and routine" manner, such as exercising the right under a contractual provision to approve the employer's hires, "is insufficient to show the existence of a joint-employer relationship."⁶⁰

Browning-Ferris upended three decades of this established precedent.

The Decision

The question in this case⁶¹ was whether Browning-Ferris Industries (BFI) was a joint employer with Leadpoint, a staffing services company, in a union representation election covering Leadpoint's employees. The Board concluded that BFI and Leadpoint were joint employers under the representation petition filed by Teamsters Local 350. In finding that BFI was a joint employer with Leadpoint, the Board relied on BFI's indirect control and reserved contractual authority over essential terms and conditions of employment of the Leadpoint-supplied employees. In essence, the Board imposed a new "indirect control" joint-employer standard.⁶²

The Board majority asserted that it was required to revisit the joint-employer standard because the primary function and responsibility of the Board is to apply "the general provisions of the Act to the complexities of industrial life." The Board majority found the Board's current joint-employer standard "narrower than statutorily necessary."⁶³ According to the Board, the definition of employer should encompass as many employment relationships as possible to foster collective bargaining.⁶⁴ Under the new standard:

⁵⁸ See *NLRB v. Browning-Ferris*, 691 F.2d 1117, 1122-25 (3d Cir. 1982) (The essential analysis hinges on "ether a putative joint employer's control over the employment matters is direct and immediate.").

⁵⁹ *Airborne Express*, 338 NLRB 597(2002); *AM Property Holding Corp.*, 350 NLRB 998 (2007).

⁶⁰ *AM Property Holding Corp.*, 350 NLRB at 1000.

⁶¹ *Browning-Ferris Industries (BFI) Newby Island Recyclery*, 362 NLRB 186 (2015).

⁶² See Michael Lotito, Maury Baskin and Missy Parry, *NLRB Imposes New "Indirect Control" Joint Employer Standard in Browning-Ferris*, Littler Insight (Aug. 28, 2015), <http://www.littler.com/publication-press/publication/nlr-imposes-new-indirect-control-joint-employer-standard-browning>.

⁶³ *Browning-Ferris*, slip op. at 11.

⁶⁴ *Id.* at 13.

The Board may find that two or more statutory employers are joint employers of the same statutory employees if they “share or codetermine those matters governing the essential terms and conditions of employment.” In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining. Central to both of these inquiries is the existence, extent, and object of the putative joint employer’s control. Consistent with earlier Board decisions, as well as the common law, we will examine how control is manifested in a particular employment relationship. We reject those limiting requirements that the Board has imposed— without foundation in the statute or common law—after *Browning-Ferris*. We will no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.⁶⁵

In sum, having the *authority alone* to control the terms and conditions of employment is sufficient to show an entity is a joint employer. It is not required that the entity actually have exercised that potential authority to render it a joint employer. No longer is *direct and immediate* exercise of control necessary. This turns *Laerco* and *TLI* on their heads, as those cases added the exercise of control and direct and immediate control requirements.

In a lengthy dissent, Members Philip Miscimarra and Harry Johnson asserted that the Board made sweeping changes to the definition of employer and injected uncertainty into business relationships.⁶⁶ The dissenters contend that the majority’s new test does not return to pre-1984 standards. Instead, according to Miscimarra and Johnson, the majority imposed a never-before-seen test that extends far beyond the congressional intent of the NLRA. The dissent argued the majority’s test will find joint employment if there is any evidence of indirect control, even when no evidence of direct control exists. The dissent also asserted that the Board replaces a long-standing and predictable test with an ambiguous test that imposes far-reaching consequences and liability.⁶⁷

The dissent further contended that the Board’s change in the rules for employers will have a substantial impact on the economy. Specifically, they claim, the majority’s test will foster bargaining instability by introducing too many conflicting interests on the

⁶⁵ *Id.* at 2. (internal citations omitted).

⁶⁶ *Id.* at 21.

⁶⁷ *Id.* at 22.

employer's side. The dissent concluded that the new joint-employer test will fundamentally alter the law for user-supplier, lessor-lessee, parent-subsidary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor and contractor-consumer business relationships.⁶⁸

The dissent predicted that the majority's changes will make entities subject to new joint bargaining obligations, expand liability for unfair labor practices and breaches of collective bargaining agreements, and subject employers to economic protest activity that would have previously been unlawful secondary activity.⁶⁹ In addition, the jurisdictional standards will combine the commercial data from both joint entities, which will extend jurisdiction to some small businesses.⁷⁰

As expected, the company has filed an appeal of the Board's decision with the U.S. Court of Appeal for the District of Columbia Circuit.⁷¹ The appeals court heard oral arguments on March 9, 2017. At the time of publication, the matter is still pending.

Repercussions of Decision

The most immediate and obvious outfall of this decision is that the NLRB began to file claims against parent companies and franchisors as joint employers with the entities that allegedly committed unfair labor practices. The consolidated complaints filed against franchisor McDonald's for the alleged labor law violations of its various franchisees is telling.⁷²

In December 2014, the Board issued 13 complaints against McDonald's franchisees and their franchisor, McDonald's USA, LLC, as joint employers. The complaints allege that the franchisor and certain franchisees violated employees' rights at various locations by "making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of

⁶⁸ *Id.* at 23.

⁶⁹ *Id.* at 22.

⁷⁰ *Id.* at 28.

⁷¹ *Browning-Ferris Industries of California Inc. v. National Labor Relations Board et al.*, case numbers 16-1028, 16-1063 and 16-1064 (D.C. Cir.) (appeal filed

⁷² See Press Release, NLRB, *NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer* (July 19, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds>; see also Michael J. Lotito, *NLRB GC Files First Lawsuit Against Franchisor as Joint Employer*, Littler ASAP (Dec. 19, 2014), <http://www.littler.com/publication-press/publication/nlr-gc-files-first-lawsuit-against-franchisor-joint-employer>; and Michael J. Lotito and Missy Parry, *The NLRB Refuses to Require its General Counsel to Explain the Joint Employer Case Against McDonald's*, Littler ASAP (Aug. 17, 2015), <http://www.littler.com/publication-press/publication/nlr-refuses-require-its-general-counsel-explain-joint-employer-case>.

employment."⁷³ More than two years later, litigation over this issue is still pending.⁷⁴ The franchisor and its franchisees, however, have agreed to let the Board decide the joint-employer status issue in cases pending in two regions before litigating the remaining charges, which will be held in abeyance until the Board rules. Additional information can be found on the NLRB case page: <https://www.nlr.gov/case/02-CA-093893>

The fast-food franchise has also been subjected to separate joint-employer lawsuits in the wage and hour context.

The McDonald's litigation was one of the outcomes feared by the dissenters in *Browning-Ferris*. A franchisor necessarily has the potential to control a number of basic terms and conditions of employment at its franchises, as it needs to regulate its brand and ensure a consistent level of service or product. But actual control over the day-to-day operations of the franchise is exerted by each individual franchisee. Holding a franchisor liable for the goings-on at its multiple franchise locations is untenable. If franchisors are now potentially liable for the day-to-day operations of their franchises, they will necessarily (a) decrease in number; and (b) exercise more control over these operations to the detriment of the small business owner (e.g., result in less autonomy for the franchisee). Doing so harms the business model itself, and could have a drastic impact on the economy.

According to the 2007 U.S. Census Bureau, franchise establishments in the United States employed approximately 7.8 million people, with a combined annual payroll of \$154 billion.⁷⁵ As published in more recent data, in 2015 there were an estimated 780,000 franchise establishments in the United States, which employed nearly nine million people, and accounted for about 3% of the U.S. gross national product (\$523 billion).⁷⁶

The expansion of joint employment under the NLRA is not limited to franchises. A divided Board recently denied an IT staffing provider and other telecommunications entities' motion to quash subpoenas that the Board's general counsel sought to determine whether the entities are joint employers.⁷⁷ In his dissent, acting Chair Philip Miscimarra said, "I believe that a subpoena seeking documents pertaining to an alleged joint-employer and/or single-employer status of a charged party 'requires more . . . than

⁷³ *NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers* (Dec. 19, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against>.

⁷⁴ More information about the NLRB litigation in the McDonalds' case can be found on the NLRB's case page: <https://www.nlr.gov/case/02-CA-093893>.

⁷⁵ U.S. Census Bureau, [Economic Census Report](#), "Franchise Statistics: 2007."

⁷⁶ *Impact on Franchise Businesses of NLRB Actions Treating a Franchisor as a Joint Employer*, IHS Economics, April 10, 2015.

⁷⁷ *RPT Communications LLC et al. and Communications Workers of America*, No. 29-CA-182088 (Order dated Mar. 15, 2017).

merely stating the name of a possible single or joint employer on the face of the charge."⁷⁸ In this case, Miscimarra claimed he "would find that the General Counsel has failed to articulate an objective factual basis for subpoenaing documents regarding the possible joint employer and single employer relationship between" the entities at issue.⁷⁹

Small businesses are watching such litigation closely, and are also monitoring Congress to see whether the change in administration will result in legislation to better align the definition of joint employment with prior long-standing definitions.

Should this issue wind its way to the U.S. Supreme Court, employers might have a new ally on the Court. On April 10, 2017, Neil Gorsuch was sworn in as the new Supreme Court Justice to replace the late Justice Antonin Scalia on the nine-member bench. Gorsuch, like Scalia, is a strict constitutional constructionist and disfavors regulatory overreach. Although it is impossible to predict how Judge Gorsuch would rule in *Browning-Ferris* if that case were to eventually be heard, he generally gives deference to long-standing precedent.

IV. Other Agencies

The NLRB is not the only federal agency to have espoused an expansive reading of joint-employer coverage. As previously discussed, the DOL's WHD issued a contentious AI that set forth a far-reaching interpretation of "horizontal" and "vertical" joint employment. In addition, the EEOC, as well as the DOL's Occupational Safety and Health Administration (OSHA), have similarly indicated their views that joint employment should be found in increasingly broader circumstances.

EEOC

The Equal Employment Opportunity Commission has long supported an expansive view of joint employment. Notably, the Commission submitted *amicus* briefs to the NLRB in the *Browning-Ferris* decision⁸⁰ and with the D.C. Circuit for the appeal.⁸¹

When the case was before the NLRB, the EEOC urged the Board adopt the same joint-employer standard that the EEOC uses: "The EEOC's standard is more

⁷⁸ *Id.*, citing *Dolchin Pratt, LLC d/b/a Jimmy John's Gourmet Sandwiches*, 05-CA-135334 (Nov. 6, 2015).

⁷⁹ *RPT Communications*, at 3.

⁸⁰ Brief Of The Equal Employment Opportunity Commission As Amicus Curiae, *Browning-Ferris* 3C-RC-109684 (filed June 15, 2014), <https://www.eeoc.gov/eeoc/litigation/briefs/browning.html>

⁸¹ Brief Of The United States Equal Employment Opportunity Commission As Amicus Curiae In Support Of Respondent/Cross-Petitioner And In Favor Of Enforcement, *Browning-Ferris Industries of California, Inc. v. NLRB*, Nos. 16-1028, 16-1063, 16-1064 (D.C. Cir.) (amicus filed Sept. 14, 2016).

flexible, more readily adaptable to evolving workplace relationships and realities, and more consistent with the goals of remedial legislation such as Title VII and the NLRA."⁸²

According to the EEOC, the definitions of "employer" in Title VII and the NLRA are virtually identical. *Compare* 42 U.S.C. § 2000e(b) (Title VII) with 29 U.S.C. § 152(2) (NLRA). "Accordingly, the EEOC's interpretation of Title VII is relevant to the proper interpretation of the NLRA."⁸³

In its Summary of the Argument in the *amicus* filed with the D.C. Circuit, the EEOC explains:

The EEOC's longstanding joint-employer test is relevant to the appropriate standard under the NLRA because Title VII is based upon the NLRA, the statutes' definitions of "employer" are virtually identical, and both Title VII and the NLRA are remedial in nature. The EEOC has consistently applied a flexible, multi-factor test, based on traditional agency principles under common law, to determine whether an entity has sufficient control over the terms and conditions of employment to qualify as an employer. No one factor is determinative and not all factors apply in any given case.

Among the relevant considerations, the EEOC's joint-employer test looks at an entity's right to control the terms and conditions of employment, as well as its indirect control of the terms and conditions of employment. These factors are also part of the NLRB's newly articulated test. While their weight differs from case to case, they are part of the totality of the circumstances.

Contrary to *Browning-Ferris's* argument, the EEOC's flexible test is neither vague nor unworkable. Courts have extensive experience applying the EEOC's test and the EEOC is unaware of any case suggesting that a bright-line rule would be better. Flexibility is important because employment relationships take many forms. The NLRB's new test acknowledges this reality.⁸⁴

The EEOC, however, "does not inquire into joint employer status unless there is reason to believe that an entity knew or should have known of discrimination by another

⁸² Brief Of The Equal Employment Opportunity Commission As Amicus Curiae, *Browning-Ferris* 3C-RC-109684 (filed June 15, 2014), <https://www.eeoc.gov/eeoc/litigation/briefs/browning.html>.

⁸³ *Id.*

⁸⁴ Brief Of The United States Equal Employment Opportunity Commission As Amicus Curiae In Support Of Respondent/Cross-Petitioner And In Favor Of Enforcement, *Browning-Ferris Industries of California, Inc. v. NLRB*, Nos. 16-1028, 16-1063, 16-1064 (D.C. Cir.) (amicus filed Sept. 14, 2016).

entity and failed to take corrective action within its control.”⁸⁵ Therefore, the EEOC's inquiry into the joint employment relationship is not as expansive as the NLRB's.

The EEOC's recent revised Strategic Enforcement Plan also notes that the agency intends to focus on “issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.”⁸⁶

While this is not specific, it can be gleaned that the EEOC will pay particular attention to the joint employment issue, particularly with regard to areas where "nontraditional" employment relationships exist.

In addition, the EEOC's view of joint employment has worked its way into the agency's enforcement guidance. On November 18, 2016, the EEOC released final enforcement guidance on national origin discrimination.⁸⁷ The EEOC had not comprehensively addressed national origin discrimination since 2002. The final guidance replaces the existing EEOC Compliance Manual, Volume II, Section 13: *National Origin Discrimination*, issued in December 2002. The revised guidance discusses Title VII's prohibition on national origin discrimination as applied to a wide variety of employment situations, and includes several employer suggestions that may reduce the risk of national origin discrimination claims.

One of the notable differences between the final guidance and the EEOC's guidance published in 2002 is that the new guidance proposes an expansive joint employer definition. According to the EEOC:

Staffing firms, including temporary agencies and long-term contract firms, also are covered as employers by Title VII when each has the statutory minimum number of employees and has the right to exercise control over the means and manner of a worker's employment (regardless of whether they actually exercise that right). If both a staffing firm and its client employer have the right to control the worker's employment and have the statutory minimum number of employees, then they would be covered as “joint employers.”⁸⁸

⁸⁵ *Id.* p. 6, fn. 2.

⁸⁶ EEOC, *Strategic Enforcement Plan*, Fiscal Years 2017–2021 (Oct. 17, 2016), <https://www1.eeoc.gov/eeoc/plan/sep-2017.cfm?renderforprint=1>.

⁸⁷ EEOC, *Enforcement Guidance on National Origin Discrimination*, No. 915.005 (Nov. 18, 2016), available at <https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm>. See also Kevin M. Kraham and Eunju Park, *EEOC Issues Enforcement Guidance on National Origin Discrimination*, Littler ASAP (Nov. 29, 2016), <http://www.littler.com/publication-press/publication/eeoc-issues-enforcement-guidance-national-origin-discrimination>.

⁸⁸ *Enforcement Guidance on National Origin Discrimination*, Section III.A.

This formulation of the joint employment standard appears to be borrowed from the *Browning-Ferris* decision.

OSHA

The WHD is not the only DOL agency to push the joint employment envelope. In 2013, the Occupational Safety and Health Administration announced the formation of a Temporary Worker Initiative,⁸⁹ which places a high priority on inspecting employers that use temporary workers.

In the "Joint Responsibility" section of the Initiative's webpage, OSHA claims:

While the extent of responsibility under the law of staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host responsible for maintaining a safe work environment for temporary workers - including, for example, ensuring that OSHA's training, hazard communication, and recordkeeping requirements are fulfilled.

OSHA could hold both the host and temporary employers responsible for the violative condition(s) - and that can include lack of adequate training regarding workplace hazards. Temporary staffing agencies and host employers share control over the worker, and are therefore jointly responsible for temporary workers' safety and health.⁹⁰

Additionally, in a July 15, 2014 memorandum,⁹¹ OSHA reiterated its position that the host employer and staffing agency are joint employers of the temporary workers.

In a separate internal memo that was leaked, OSHA addressed "whether for purposes of the OSH Act, a joint employment relationship can be found between the franchisor (corporate entity) and the franchisee so that both entities are liable as employers under the OSH Act."⁹² The memorandum provides questions for an inspector to help in the determination of whether the entity and its franchisee are in a joint employment relationship.

The focus on franchisors in the joint employment context was subsequently the subject of a September 23, 2015 Senate Committee hearing. During that hearing,

⁸⁹ OSHA, *Protecting Temporary Workers*, https://www.osha.gov/temp_workers/.

⁹⁰ *Id.*

⁹¹ OSHA, *Policy Background on the Temporary Worker Initiative* (July 15, 2014), https://www.osha.gov/temp_workers/Policy_Background_on_the_Temporary_Worker_Initiative.html.

⁹² OSHA, International Memorandum, *Can Franchisor (Corporate Entity) and Franchisee be Considered Joint Employers*, available at http://edworkforce.house.gov/uploadedfiles/osha_memo.pdf.

lawmakers questioned why OSHA chose to focus on joint employment instead of health and safety.⁹³

V. Federal Response

In response to the changes in joint employment, particularly to the NLRB's *Browning-Ferris* decision, lawmakers in the 114th Congress introduced the Protecting Local Business Opportunity Act (H.R. 3459, S. 2015).⁹⁴ Both bills contain the following language:

SEC. 2. TREATMENT OF JOINT EMPLOYERS.

Section 2(2) of the National Labor Relations Act (29 U.S.C. 152(2)) is amended by adding at the end the following: "Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act only if each employer shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate."

Hearings were held, but both failed to advance given the prior White House's likely veto. If a similar measure is reintroduced in 2017, however, there might be a very different outcome.

VI. State Attorneys General

State attorneys general have taken notice of the federal government's actions over the past two years. On August 11, 2015, Wisconsin Attorney General Brad Schimel, along with five other state attorneys general (CO, MI, NV, SC, UT), wrote a letter to the NLRB asking it to abandon its intended change to the joint-employer standard:

As the chief legal officers in our states, we are concerned with the efforts by the National Labor Relations Board (NLRB) to redefine the legal standard used to determine joint-employer status. This change could significantly disrupt commercial relationships between franchisors and their franchisees, employers and their subcontractors, and potentially even between businesses and their suppliers and vendors.

⁹³ Senate HELP Committee, Press Release, *Alexander: Labor Department Changing Workplace Safety Laws to "Destroy the American Dream for Owners of the Nation's 780,000 Franchise Locations"*, (Sept. 23, 2015), <http://www.help.senate.gov/chair/newsroom/press/alexander-labor-department-changing-workplace-safety-laws-to-destroy-the-american-dream-for-owners-of-the-nations-780000-franchise-locations>.

⁹⁴ H.R. 3459, 114th Cong. (2015); S. 2015, 114th Cong. (2015).

The NLRB's current standard is clear and therefore provides certainty. Under the current standard, unless a company shares direct and immediate control over the terms and conditions of employment with another company, it is not a joint employer. This clarity has allowed business models that facilitate growth, flexibility, and innovation. In turn, this has led to franchised businesses and specialized subcontractors providing millions of jobs to workers throughout the nation.

A new joint-employer standard, particularly as enunciated by the NLRB's General Counsel in the *Browning-Ferris* case, would negatively affect these successful business models. Instead of a clear standard of direct and immediate control, employers would be faced with a vague and unworkable "economic realities" test. If adopted, this test will expose companies to liability for workers they don't actually employ, make it more difficult to determine how to structure relationships with other businesses, and compromise one of the core purposes of the National Labor Relations Act - to promote the flow of commerce.

We are very concerned with the impact this would have on our states as we attempt to attract new businesses and create new jobs. Overturning a standard that has been in place and worked for more than 30 years will harm our businesses and lead to fewer jobs. We urge you to leave the existing joint-employer standard unchanged.⁹⁵

Meanwhile, some states with Democratic leadership have taken the opposite stance. On May 23, 2016, for example, New York Attorney General Eric Schneiderman filed suit in New York state court against Domino's Pizza, Inc. and three of its New York franchisees as joint employers, alleging wage theft.⁹⁶

VII. State Legislatures

While federal legislation to clarify the joint employment standard failed in 2016, state lawmakers were more successful. A handful of states have adopted laws that clarify the joint employment standard, and/or that franchisors are not joint employers of their franchisee's employees. The following briefly outlines those enacted statutes, as well as ones currently pending.

⁹⁵ Letter to The Honorable Mark Pearce, NLRB, dated Aug. 11, 2015, *available at* http://ag.nv.gov/uploadedFiles/agnv.gov/Content/News/PR/PR_Docs/2015/2015-08-11_NLRB_Letter.pdf.

⁹⁶ Press Rel., A.G. Schneiderman Announces Lawsuit Seeking To Hold Domino's And Its Franchisees Liable For Systemic Wage Theft, N.Y. Att'y Gen. Office (May 24, 2016), <https://web.archive.org/web/20160603152015/http://www.ag.ny.gov/press-release/ag-schneiderman-announces-lawsuit-seeking-hold-dominos-and-its-franchisees-liable>; *People v. Domino's Pizza, Inc. et al*, Petition (N.Y. Sup. Ct.) (filed May 23, 2016) (hereinafter "Petition"), <https://goo.gl/28RDtH>.

Enacted State Laws

Arizona (HB 22) (effective July 6, 2017)

This measure, enacted on March 21, 2017, clarifies, for purposes of the state's labor and employment laws, that a franchisor is not an employer or co-employer of either a franchisee or an employee of the franchisee, unless the franchisor agrees, in writing, to assume the role of the employer or co-employer of the franchisee or the employee of the franchisee. Further, the new law clarifies that an owner of a trademark or service mark is not an employer or co-employer of a person licensed to use the mark unless the owner of the mark agrees, in writing, to assume such a role.

The law adopts the definitions of "franchisee" and "franchisor" as defined under federal law. Thus, a franchisee is any person who is granted a franchise, and a franchisor is any person who grants a franchise and participates in the franchise relationship.

Arkansas (SB 695) (effective Aug. 4, 2017)

This law, enacted on April 6, 2017, specifies that neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor or subfranchisor. The measure explains that a franchisor "will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation."

Georgia (SB 277) (effective Jan. 1, 2017)

Georgia enacted the Protecting Georgia Small Businesses Act, which took effect on January 1, 2017. This law amends Georgia law to clarify that a franchisor is not the employer of the franchisee or the franchisee's employees. The law adopts the definitions of franchise, franchisee, and franchisor defined under federal law. Thus, a franchisee is any person who is granted a franchise, and a franchisor is any person who grants a franchise and participates in the franchise relationship. Unless otherwise stated, the definition of "franchisor" includes subfranchisors. For purposes of this definition, a subfranchisor is a person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance.

This law does not apply to the definition of employer under the workers' compensation statute.

Indiana (HB 1218) (effective July 1, 2016)

This Indiana law amends the state's franchise statute to clarify that the franchisor is not an employer or co-employer of a franchisee the franchisee's employees unless

the franchisor agrees, in writing, to assume the role of an employer or co-employer of the franchisee or the franchisee's employees.

Kentucky (SB 151) (effective June 26, 2017)

Kentucky recently enacted a law that amends Kentucky's definition of "employee" to clarify that a franchisor is not the employer of the franchisee or the franchisee's employees for purposes of the state's wage and hour, workplace safety, workers' compensation, unemployment insurance, and fair employment practices statutes. The law adopts the definitions of "franchise," "franchisee," and "franchisor" as defined under federal law. Thus, a franchisee is any person who is granted a franchise, and a franchisor is any person who grants a franchise and participates in the franchise relationship.

Louisiana (HB 464) (effective Aug. 1, 2015)

Louisiana was one of the first states on board with a law to clarify that "neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose, notwithstanding any voluntary agreement between the U.S. Department of Labor and a franchisee."

Under the terms of this law, an employee of a franchisee may be an employee of the franchisor if the franchisor participates in controlling essential terms and conditions of employment such as 1) hiring, 2) firing 3) discipline, 4) supervision, and 5) direction. This measure took effect on August 1, 2015.

Michigan

There are several laws that have been enacted in Michigan that address this issue.⁹⁷ Six bills have been signed into law since December 2015 that are designed to protect franchisors in the wake of the uncertainty created by the *Browning-Ferris* decision. The specific laws are:

- **(SB 493)** (effective Dec. 23, 2015): This bill clarifies that a franchisor is not deemed the employer of the franchisee's employees under the Michigan Worker's Disability Compensation Act unless both:
 - The franchisee and franchisor share in the determination of or codetermine the matters governing the essential terms and conditions of the employee's employment; and

⁹⁷ See William J. Vincent and Sarah Simmons, *Michigan Franchisors Not Joint Employers of Employees of Franchisees Absent Agreement*, Littler ASAP (Mar. 24, 2016), <http://www.littler.com/publication-press/publication/michigan-franchisors-not-joint-employers-employees-franchisees-absent>.

- The franchisee and franchisor both directly and immediately control matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction.
- **(SB 492)** (effective Dec. 23, 2015): This law similarly clarifies that under the Michigan Franchise Investment Act, a franchisee is the sole employer of workers for whom it provides a benefit plan or pays wages, except as otherwise specifically provided in the franchise agreement.
- **(HB 5073)** (effective Feb. 23, 2016): This law stipulates that a franchisee is the sole employer of workers for whom it provides a benefit plan or pays wages, except as otherwise specifically provided in the franchise agreement.
- **(HB 5072)** (effective Feb. 23, 2016): Yet another measure separately states that under the state's Workforce Opportunity Wage Act, a franchisee is the sole employer of workers for whom it provides a benefit plan or pays wages, except as otherwise specifically provided in the franchise agreement.
- **(HB 5071)** (effective Feb. 23, 2016): Amends the Payment of Wages and Fringe Benefits Act by changing the definition of “employer” under the Act. As a result, employees who work in a franchise are considered employees of that franchisee alone under state law, unless otherwise specified in the franchise agreement.
- **(HB 5070)** (effective Feb. 23, 2016): This final bill in the series clarifies that under the Michigan Occupational Safety and Health Act, a franchisee is the sole employer of workers for whom it provides a benefit plan or pays wages, except as otherwise specifically provided in the franchise agreement.

North Dakota (HB 1139) (effective Aug. 1, 2017)

North Dakota's Franchise Investment Law sets forth the requirements for the sale and registration of franchises in the state. The new law clarifies, for purposes of the Franchise Investment Law, the employment relationship between franchisors and franchisees. It states that neither a franchisee nor an employee of a franchisee is considered an employee of the franchisor.

The law does not apply to a voluntary agreement entered into between the United States Department of Labor and a franchisee.

Oklahoma (SB 1496) (effective Nov. 1, 2016)

This relatively new law amends Oklahoma franchise law to clarify that a franchisor is not the employer of the franchisee or the franchisee's employees. The law adopts the definitions of franchise, franchisee, and franchisor defined under federal law. Thus, a franchisee is any person who is granted a franchise, and a franchisor is any person who grants a franchise and participates in the franchise relationship. Unless

otherwise stated, the definition of “franchisor” includes subfranchisors. For purposes of this definition, a subfranchisor is a person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance.

South Dakota (SB 137) (effective July 1, 2017)

The law – enacted on March 7, 2017 – amends South Dakota’s franchise law to clarify that a franchisor, a franchisee, or an employee of a franchisee, is not considered to be an employee of the franchisor.

Tennessee (SB 475) (effective Apr. 10, 2015)

This Tennessee law amends the state's right-to-work law to stipulate that neither a franchisee nor a franchisee’s employee shall be deemed to be an employee of the franchisor for any purpose, unless pursuant to a voluntary agreement entered into between the United States Department of Labor and a franchisee.

Texas (S.B. 652) (effective Sept. 1, 2015)

This law, which took effect on September 1, 2015, provides that a franchisor is generally not considered an employer of either a franchisee or a franchisee’s employees under the following labor law areas: 1) fair employment practices; 2) wage payment; 3) minimum wage; 4) professional employer organizations; 5) unemployment; 6) general provisions; and 7) workplace safety.

However, concerning a specific claim for relief under the laws, the exclusion does not apply to a franchisor that has been found by a court in Texas to have exercised a type or degree of control over the franchisee or its employees not customarily exercised by a franchisor for the purpose of protecting its trademarks and brand.

Utah (HB 116) (effective May 10, 2016)

In 2016, Utah amended its Insurance and Labor Code to adopt definitions of a franchise, franchisee, and franchisor as defined per federal regulations (16 C.F.R. § 436.1).

Generally, a franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

- The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;

- The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and
- As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

The law provides that for purposes of the Utah labor relations, wage and hour, and antidiscrimination laws, a franchisor is not considered to be an employer of a franchisee or a franchisee's employee unless the franchisor exercises a type of degree of control over the franchisee or the franchisee's employee not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand. This law took effect on May 10, 2016.

Wisconsin (SB 422) (effective Mar. 3, 2016)

Wisconsin's new law amends its workers' compensation, minimum wage, unemployment insurance, wage payment, and fair employment practices statutes to provide that, for purposes of those statutes, a franchisor is not considered to be (1) an employer of a franchisee or (2) an employer of a franchisee's employee unless:

- the franchisor has agreed in writing to assume that role, or
- the state agency or agencies charged with enforcement of the statutes finds that the franchisor has exercised a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

Wyoming (SB 94) (effective July 1, 2017)

Wyoming's new law mirrors the language found in other states' laws, clarifying that "neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor . . . unless otherwise agreed to in writing by the franchisor and the franchisee."

Pending Bills

The above state statutes could soon be followed by others. Bills that would provide "neither a franchisee nor any employee of the franchisee is an employee of the franchisee's franchisor" cleared the state Senate in New Hampshire (SB 89), and both legislative houses in North Carolina (SB 131). By contrast, a nearly identical bill (HB 1394) was vetoed in Virginia.

Analogous measures in Missouri (SB 201), Nebraska (LB 436), South Carolina (HB 3031), and Washington (HB 1881) are advancing through committee. Another bill providing that an individual who is a party to a franchise agreement under which a person or entity licenses or authorizes the individual to sell products or services "shall

not be considered an employee of the person or entity that grants the license or authorization" was introduced in Massachusetts (SB 1050) in January. Finally, a bill recently introduced in Alabama (HB 390) contains similar language to most others of its ilk –*i.e.*, it would clarify that neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor or subfranchisor.

As seen by the above activity, state legislatures are not waiting for the federal government or the court system to act.

VIII. Impact of Trump Administration

In his exit memorandum⁹⁸ to Congress, former Labor Secretary Thomas Perez called upon the new Congress and administration to focus on nontraditional employment relationships. Whether this comes to fruition is anyone's guess.

During his confirmation hearing to be the next Labor Secretary, Alex Acosta was asked about his views on joint employment. Senator Lamar Alexander, Chairman of the Committee on Health, Education, Labor and Pensions, specifically asked Mr. Acosta about the standard that should be used to determine when an entity is rendered an employer. Mr. Acosta responded that he preferred the "direct and immediate" control standard, which he considers the "traditional" factor used in making this assessment, versus the "untraditional" indirect and unexercised control method.

In addition, he expressed his intent—if confirmed—to reinstate the practice of issuing Opinion Letters in place of sub-regulatory Administrator's Interpretations. The WHD's AI on joint employment, therefore, could be considered a "soft target" for rescission.

At the NLRB, new members will eventually be seated who are presumably more business-friendly and apt to eventually issue a decision that will return the Board to its pre-*Browning-Ferris* view of joint employment, although this process will take time. Meanwhile, the appeal of *Browning-Ferris* is still pending, and could conceivably work its way to the Supreme Court. Now that he has been confirmed to the Supreme Court, Neil Gorsuch could be in a position to provide the key swing vote on this issue. A conservative-leaning judge, Gorsuch's record indicates he does not approve of agency overreach.

With the proliferation of state statutes seeking to clarify the definition of joint employment in various contexts, and the current composition of Congress, it is possible a federal bill could make headway. In the meantime, employers in multiple jurisdictions will continue to be subject to a patchwork of joint-employer laws.

⁹⁸ Secretary of Labor Thomas Perez, *Memorandum to the American People*, <https://www.dol.gov/sites/default/files/dol-exit-memo.pdf>

IX. Recommendations

As this paper makes clear, there is a great deal of uncertainty with respect to both the current joint-employer laws in various jurisdictions and how those laws will be applied in the future. It is inherently difficult to offer guidance in such an unsteady legal and regulatory climate. Nevertheless, the authors set forth a number of practical steps that would likely place companies in a better position to avoid any allegations of joint-employer relationships and any resulting liability.

Franchisor-Franchisee Relationship

Franchisors should review and revise Franchise Agreements for areas or reserved areas of control that may not be necessary to protect the brand and maintain system-wide standards. Franchisors should give particular attention to controls that could be misinterpreted to relate to the day-to-day operations and oversight of the franchisees, such as inspections. Franchisors should ensure that franchise agreements clearly indicate that franchisees are responsible for all day-to-day operation of the business, including:

- Human Resource functions (including investigation and discipline)
- Job postings and applications
- Hiring and firing
- Scheduling
- Setting compensation and benefits
- Implementing employment policies and handbooks
- Performance management
- Calculating payroll
- Retaining employment records (including employee files, background checks, time records, payroll records)

Of course, revising the franchise agreement is a forward-looking change and established franchisors will have many outstanding franchise agreements with years remaining in the current term. Thus, franchisors should attempt to make the same changes for existing franchisees by revision to the franchisor's policies and procedures. If revising the policies and procedures is not a viable route for making such changes, then franchisors should consider amending the existing franchise agreements.

Franchisors should take care to ensure that any franchisee-facing policies do not cross the line into Human Resources or labor and employment issues. If you provide any blank templates to franchisees, include appropriate disclaimers that they are samples only and always encourage franchisees to consult with their own legal or Human Resources professionals. Franchisees should be prohibited from using the brand logo on employment applications, employment agreements, checks, payroll reports or pay stubs, or any other document that could lead to a franchisee's employee mistakenly believing that he works for franchisor. Franchisors should also be reluctant

to allow franchisees to advertise job openings on the franchisor's websites.⁹⁹ Franchisors should require franchisees to identify their franchise entity to the public (sticker on the door), franchisee website, and employee break room areas, as the independent employer of their employees.

Franchisors should take particular care to train and reinforce with their employees that the employees should never cross the line into a franchisee's Human Resources or employment issues. Franchisors should consider adopting a policy that each franchisee must name a point of contact for franchisor communications. To the extent possible, franchisor representatives should communicate and interact only with that point of contact and not with other franchisee employees.

Inspections of franchise locations should focus on operational and brand protection issues, not franchisee employee issues.

Franchisee employee complaints should be directed back to the franchisee in question. Franchisors should resist the urge to be directly involved in resolving disputes between franchisees and their employees. A franchisor's remedies lie within the franchise agreement. If a franchisee is failing to meet the brand standards because of the franchisee's relations with its employees, then the franchisor's proper remedy is a default and potential termination of the franchise agreement.

Franchisors must review and revise training materials that reach down to franchisee employees. Franchisor training should be focused on operations and maintaining brand standards. Make training optional whenever possible and use third parties to provide training on labor and employment matters or issues that might be in a gray area. Ideally, franchisors will only provide training to franchisees and leave the responsibility to train franchisee employees with the franchisees. In other words, franchisors should train the trainers.

Franchisors should add disclaimers to technology such as online training platforms that require acknowledgement by the franchisee employee that they are receiving the training at the direction of their franchisee employer, not the franchisor. Franchisors should also review technology platforms to determine how much interaction they create with franchisee employees and any potential liability issues. Franchisors should not collect non-essential data or information from franchisees if there is no business purpose distinct from labor and employment issues (e.g., wage and hour data or franchisee employee demographics).

Of course, the authors recognize that there is a cost associated with each of these recommendations. An investment of time and money to make any of the recommended adjustments will certainly be required. Beyond those measurable costs are questions regarding how your brand may be negatively impacted due to a reduction in 1) the level of support you can offer to your franchisees, or 2) your ability to ensure

⁹⁹ This is a gap in support that easily could be bridged by third-party service providers.

franchisee compliance with brand standards. This is a question each franchisor will have to answer for its franchise model. Ultimately, franchisors will have to determine whether the benefits of each of these changes (as well as in the aggregate) outweigh those costs. The difficult reality that the franchise industry is faced with today is that in some cases, it will make sense for franchisors to abandon the franchise model, at least in jurisdictions that have pursued an aggressive expansion of the definition of joint employment. Alternatively, franchisors may decide to protect their franchise model by simply ceasing business operations in those jurisdictions.

Staffing Companies

Franchisors are not the only entities that are in danger of a false joint-employer determination. While no measures are failsafe, companies that use staffing agencies are advised to be proactive.

First, it is recommended that a company ensure the staffing agency it uses is approved and properly vetted for compliance with employment/immigration laws. When engaging the agency, use your own forms/contracts— do not rely on a vendor contract provided by the staffing agency.

Make sure the staffing agency is responsible for a number of key functions, such as:

- Recruiting/testing/application process
- Hiring
- Work assignment and scheduling
- Performance management/discipline/termination
- Employee compensation and benefits

Eliminate, or limit to the extent possible, the company's discretion in requesting the removal of a staffing agency employee from the premises.

Make sure there is a distinction between yours and the staffing agency's employment policies. It is likewise helpful to use different time clocks and media communications.

Other ways to delineate the staffing agency's dominion over the workers include having the agency provide on-site supervision, training, uniforms, and necessary equipment, materials, and supplies, and maintain personnel records.

Finally, it is recommended that, to the extent possible, a company use staffing agencies as a last resort, and not as a regular component of a staffing plan, and to limit the duration the staffing agency employees can work at the company. In other words, avoid using a staffing agency as the main source for hiring regular employees, and do not institute an automatic "temp to permanent" placement situation.

As noted above, these steps might increase an entity's cost and possibly its administrative burden. However, the cost of a joint-employer finding is no doubt much greater.

Appendix A: Statutory and Case Definitions Related to Joint Employment

Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<i>Browning-Ferris Indust.</i> , 326 NLRB No. 186 (2015). The case is currently on appeal before the U.S. Court of Appeals for the District of Columbia Circuit.	If an employer shares or codetermines those matters governing the essential terms and conditions of employment over the work of the employees with the actual employer.	Two-part test that looks at direct, indirect, and potential control: The initial inquiry is whether there is a common law employment relationship with the employees in question. If this relationship exists, then the question is whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. Fact based test that must be decided on case-by-case basis
Term:	Located In:	Defined As:	Additional Notes:
Joint Employment	29 CFR § 791.2 (Fair Labor Standards Act) AND 29 CFR § 825.106 (Family and Medical Leave Act)	Where the employee performs work that simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as: (1) Where there is an arrangement between employers to share an employee's services or	A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in a particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular

		<p>to interchange employees;</p> <p>(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or</p> <p>(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employee controls, is controlled by, or is under common control with the other employer.</p>	<p>employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.</p>
--	--	---	--

Term:	Located In:	Defined As:	Additional Notes:
Joint Employment	29 CFR § 500.20 (Migrant and Seasonal Agricultural Worker Protection Act)	A condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist.	
Term:	Located In:	Defined As:	Additional Notes:
Joint Employment	29 CFR § 501.3 (Immigration and Nationality Act)	Where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.	
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	20 CFR § 651.10 (Wagner-Peyser Act)	An association of employers is considered an employer if it has the indicia of an employer set forth in this definition. Such as association, however, is considered as a joint employer with	Employer means a person, firm, corporation, or other association or organization that currently has a location within the United States to which U.S. workers may be referred for employment,

		the employer member if either shares in exercising one or more of the definitional indicia.	and that proposes to employ a worker at a place within the United States and has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employees.
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer, Employee	<i>Casey v. Dept. of Health and Human Servs.</i> , 807 F.3d 395 (1st Cir. 2015)	Two parties can be considered joint employers and both liable under Title VII if they share or codetermine those matters governing the essential terms and conditions of employment.	The regulations describe three employment relationships where joint employment will generally be held to exist: (1) Where there is an arrangement between employers to share an employee's services or to interchange employee; (2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or (3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because an employer controls, is controlled by, or is under common control with the other employer.
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<i>Donahue v. Asia TV USA Ltd.</i> , 2016 WL 5173381 (S.D.N.Y. Sept. 21, 2016) citing	Interpreting both Title VII and the ADEA, the court found that joint employers are separate legal entities that have	In determining whether a joint employer relationship exists, relevant factors include commonality of hiring, firing, discipline,

	<p><i>Clinton's Ditch Co-op. Co. v. NLRB</i>, 778 F.2d 132, 137 (2d Cir. 1985), <i>Arculeo v. On-Site Sales & Mktg., LLC</i>, 425 F.3d 193, 198 (2d Cir. 2005), and <i>NLRB v. Solid Waste Servs., Inc.</i>, 38 F.3d 93 (2d Cir. 1994)</p>	<p>merely chosen to handle certain aspects of their employer-employee relationships jointly. Where this doctrine is operative, an employee, formally employed by one entity, who has been assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity, may impose liability for violations of employment law on the constructive employer, on the theory that this other entity is the employee's joint employer.</p>	<p>pay, insurance, records, and supervision. Courts consider the control that the employers exercise over the employee in setting the terms and conditions of the employee's work.</p>
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<p><i>Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i>, 611 F.Supp 344, 349 (S.D.N.Y. 1984).</p>	<p>A worker may be employed by more than one employer for purposes of Title VII where each exercises the requisite amount of control over the worker's compensation, hours and terms of employment (e.g., where a temporary personnel agency screens and hires workers for a short-term project for one of its customers.) In such cases, both employers may be subject to Title VII.</p>	
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<p><i>NLRB v. Browning-Ferris Indust. of Pennsylvania, Inc.</i>, 691 F.2d 1117 (3d</p>	<p>Under the NLRA, the question of "joint employer" status is a factual one and requires</p>	<p>This is the decision that the NLRB reviewed and rearticulated in its 2015 decision cited above. The</p>

	Cir. 1982)	an examination into whether an employer who is claimed to be a joint employer possessed sufficient control over the work of the employees to qualify as a joint employer with the actual employer.	case is currently on appeal before the U.S. Court of Appeals for the District of Columbia Circuit.
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<i>Thompson v. Real Estate Mortg. Network</i> , 748 F.3d 142 (3d Cir. 2014) citing <i>In Re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation</i> , 683 F.3d 462 (3d Cir. 2012)	When assessing whether a joint employer relationship exists under the FLSA, a court should consider the following non-exhaustive list of relevant factors: (1) the alleged employer's authority to hire and fire the relevant employees; (2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; (3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and (4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes.	As with the existence of an employer-employee relationship, the determination depends on all the facts of a particular case.
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<i>Butler v. Drive Automotive Indus. Of America, Inc.</i> , 793 F.3d 404 (4th	For purposes of Title VII liability, the Fourth Circuit in <i>Butler</i> held that in assessing under the	In the Fourth Circuit's <i>Salinas</i> decision, the court also set forth six non-exclusive factors that

	<p>Cir. 2015); <i>Salinas v. Commercial Interiors, Inc.</i>, No. 15-1915, 2017 WL 360542 (4th Cir. Jan. 25, 2017).</p>	<p>hybrid test whether an individual is jointly employed by two or more entities, courts consider the following factors, with no single factor being dispositive: (1) authority to hire and fire the individual; (2) day-to-day supervision of the individual, including employee discipline; (3) whether the putative employer furnishes the equipment used and the place of work; (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes; (5) the length of time during which the individual has worked for the putative employer; (6) whether the putative employer provides the individual with formal or informal training; (7) whether the individual's duties are akin to a regular employee's duties; (8) whether the individual is assigned solely to the putative employer; and (9) whether the individual and putative employer intended to enter into an employment relationship.</p> <p>For purposes of joint-employer liability under the FLSA, the Fourth</p>	<p>district courts “should” consider when applying the test: (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means; (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment; (3) The degree of permanency and duration of the relationship between the putative joint employers; (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer; (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and (6) Whether, formally or as a matter of practice, the putative joint employers jointly</p>
--	--	--	--

		<p>Circuit in <i>Salinas</i> held courts must first apply a two-part test to determine whether an entity is a joint employer, followed by a separate six-factor analysis.</p> <p>Joint employment is found where: “(1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of a worker's employment and (2) the two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor.”</p>	<p>determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.</p>
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<i>Gray v. Powers</i> , 673 F.3d 352 (5th Cir. 2012)	Evaluating a case under the FLSA, the Fifth Circuit held that to determine whether an individual or entity is an employer, the court considers 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. In cases where there may be more than one employer, this court must apply the economic realities test to each individual or entity alleged to be an employer and each must satisfy the four part test.	
Term:	Located In:	Defined As:	Additional Notes:
Joint Employment	<i>Grace v. USCAR</i> , 521 F.3d 655 (6th Cir. 2008)	In deciding a case under the FMLA, the Sixth Circuit considered the joint employment test as defined in 29 CFR § 825.106(a) and cites to the Third Circuit's 1989 decision in <i>Browning-Ferris</i> .	
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<i>Chicago Reg'l Council of Carpenters Pension Fund</i> , 2016 WL 4505153 (N.D. Ill. Aug. 29, 2016) citing <i>Chicago Reg'l Council of Carpenters Pension Fund v. Schal Bovis, Inc.</i> , 826 F.3d 397 at 404 (7th Cir.2016) and <i>Lippert Tile Co. v. Int'l Union of Bricklayers & Allied Craftsmen, Dist. Council of Wisconsin & Its Local 5</i> , 724 F.3d 939, 946 (7th Cir. 2013)	In an ERISA context, to determine whether two entities are a single employer, courts consider the totality of the circumstances, including whether (and to what degree) the companies had: 1) interrelation of operations; 2) common management; 3) centralized control of labor relations; and 4) common ownership. See, e.g., In general terms, single employer status is characterized by the "absence of an arm's length relationship found among unintegrated companies."	In considering the various factors relevant to the single employer analysis, it is the totality of the circumstances that matter, not the individual elements considered on their own.

Term:	Located In:	Defined As:	Additional Notes:
Joint Employer, Employer	<i>Ash v. Anderson Mechandisers, LLC</i> , 799 F.3d 957 (8th Cir. 2015) citing <i>Baker v. Stuart Broadcasting Co.</i> , 560 F.2d 389 (8th Cir. 1977)	The test of employment under the FLSA is one of economic reality, such as the alleged employer's right to control the nature and quality of the employee's work, the employer's right to hire or fire, or the course of compensation for their work.	The Eighth Circuit also recognized the integrated test that is used to determine whether two entities are actually the same entity for purposes of liability. This test includes (1) the interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control.
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<i>Moreau v. Air France</i> , 356 F.3d 942 (9th Cir. 2004)	In a case under the FMLA, the Ninth Circuit looks to the all the circumstances and the "economic reality" of the relationship in determining whether the defendant is a joint employer of the workers in question.	
Term:	Located In:	Defined As:	Additional Notes:
Joint Employment	<i>Chao v. A-One Medical Services, Inc.</i> , 346 F.3d 908, 918 (9th Cir. 2003)	Under the FLSA, joint employment will generally be considered to exist when (1) the employers are not completely disassociated with respect to the employment of the individuals, and (2) where one employer is controlled by another or the employers are under common control.	
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<i>Beltran v. InterExchange, Inc.</i> , 176 F. Supp.	The court applied the economic realities test to decide joint employer	Of primary importance, however, are the following factors: (1) whether

	3d 1066, 1080 (D. Colo. 2016) citing <i>Baker v. Flint Eng'g & Constr. Co.</i> , 137 F.3d 1436 (10th Cir.1998)	status under the FLSA. The test includes inquiries into whether the alleged employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records. In applying the economic realities test, courts consider the following factors: (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business.	defendant has the power to hire and fire; (2) whether it has the power to determine pay rates and methods of payment; (3) whether it has the right to supervise plaintiff's work and work schedules; (4) whether it is responsible for maintenance of employment records.
Term:	Located In:	Defined As:	Additional Notes:
Joint Employment	<i>Layton v. DHL Express (USA), Inc.</i> , 686 F.3d 1172 (11th Cir. 2012)	Courts use an economic realities test consisting of several factors to determine joint employment for FLSA purposes, including whether the alleged additional employer (1) had the power to hire and fire employees, (2) supervised and control	The factors are not exhaustive, and no single factor is determinative. Whether an employee has joint employers depends upon all the facts in a particular case.

		employee work schedule or employment conditions; (3) determined the rate and method of payment, (4) maintained employment records; (5) owned the facilities where the employee worked; and (6) made significant investments in equipment and facilities.	
Term:	Located In:	Defined As:	Additional Notes:
Joint Employer	<i>Al-Saffy v. Vilsack</i> , 827 F.3d 85, 96–97 (D.C. Cir. 2016) comparing <i>Spirides v. Reinhardt</i> , 613 F.2d 826 (D.C. Cir. 1979) and <i>NLRB v. Browning-Ferris Industries of Pennsylvania</i> , 691 F.2d 1117 (3d Cir. 1982)	In analyzing possible joint employers under Title VII, the court recognized two largely overlapping articulations of the test for identifying joint-employer status. The first speaks in terms of the economic realities of the work relationship, emphasizing whether the employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved. A second articulation borrows language from asking whether the employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. As their language indicates, in	

		both cases the touchstone is control.	
Term:	Located In:	Defined As:	Additional Notes:
Employer	29 U.S.C. § 203(d) (Fair Labor Standards Act)	“Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.	
Term:	Located In:	Defined As:	Additional Notes:
Employer	29 U.S.C. 652 (5) (Occupational Safety and Health Act of 1970)	The term “employer” means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.	
Term:	Located In:	Defined As:	Additional Notes:
Employer	29 U.S.C. § 1802(2) (Migrant and Seasonal Agricultural Worker Protection Act)	The term “agricultural employer” means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.	

Term:	Located In:	Defined As:	Additional Notes:
Employer	29 U.S.C. §152(2) (National Labor Relations Act)	The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.	
Term:	Located In:	Defined As:	Additional Notes:
Employer	29 U.S.C. § 2611(4) (Family and Medical Leave Act)	The term “employer” means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year; includes— (i) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and	

		<p>(ii) any successor in interest of an employer;</p> <p>(iii) any “public agency”, as defined in section 203(x) of this title; and</p> <p>(iv) the Government Accountability Office and the Library of Congress.</p>	
Term:	Located In:	Defined As:	Additional Notes:
Employer	42 U.S.C. 2000e(b) Title VII of the Civil Rights Act of 1964	<p>The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include</p> <p>(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or</p> <p>(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of</p>	

		title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.	
Term:	Located In:	Defined As:	Additional Notes:
Employer	42 U.S.C. § 12111(5) (Americans with Disabilities Act of 1990 – Title I)	<p>(A) In General</p> <p>The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.</p> <p>(B) Exceptions</p> <p>The term “employer” does not include—</p> <p>(i) the United States, a corporation wholly owned by the government of the</p>	

		<p>United States, or an Indian tribe; or</p> <p>(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.</p>	
Term:	Located In:	Defined As:	Additional Notes:
Employer	29 U.S.C. § 630(b) (Age Discrimination in Employment Act of 1967)	<p>The term “employer” means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year:</p> <p>Provided that prior to June 30, 1968, employers having fewer than 50 employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.</p>	