

Before the Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
United States House of Representatives

“Expanding Joint Employer Status:
What Does it Mean for Workers and Job Creators?”

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I would like to thank the Chairman of the subcommittee, Congressman Roe, ranking member, Congressman Tierney, and the other members of the subcommittee for this opportunity. My testimony will focus on the economic realities and legal issues relating to joint employer status in workplaces where extensive subcontracting of core business functions depends on temporary staffing services and franchising relationships.

An examination of these two forms of business organization is critical for understanding why the National Labor Relations Board is looking to its traditional joint employer test as one means of making fundamental labor rights available to workers experiencing the precarious consequences of the profound transformations now occurring in the modern workplace. By re-examining its joint employer test, the Board is fulfilling the responsibility that the U.S. Supreme Court has held is entrusted to it, i.e., to “adapt the Act to changing patterns of industrial life.”¹ In my lifetime, no change in the patterns of industrial life has been more upending than the rapid expansion of precarious low-wage work and subcontracting that has irreversibly fissured the 21st century workplace.

Temporary staffing and franchising account for a disproportionate share of the economic growth following the Great Recession of 2008. By 2013, staffing services

¹ *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975).

generated \$109 billion in sales and 2.8 million temp positions – a full 2.0 percent of total jobs. Profits are also high; In the first quarter of this year, True Blue (formerly Labor Ready), the largest U.S. staffing agency, had a profit of \$120 million on gross revenues of \$453 million. Franchising is equally profitable as evidenced by the fast-food sector of the restaurant industry where in 2012 the ten largest franchises employed over 2.25 million workers, earned more than \$7.4 billion in profits and distributed another \$7.7 billion in buybacks and dividends to shareholders.

Unfortunately, the economic impacts of temporary staffing and franchising are Janus-faced. Soaring profits and substantial job growth in these sectors has advanced hand in glove with poverty-level wages and extraordinarily high rates of wage theft and health and safety violations.

Compared to direct hires, temp workers experience a wage penalty, which is most severe for blue-collar temps who now comprise 42 per cent of the temporary staffing workforce. For example, in metro Chicago, temp workers that load and unload goods for WalMart and other big box stores comprise over two-thirds of the 150,000 workers in the warehouse workforce. They average \$9 per hour or \$3.48 less than direct hires. Almost two-thirds of these workers fall below the federal poverty line. A well documented, national epidemic of wage theft by unscrupulous staffing agencies and their clients only makes matters worse for temps. Further, OSHA complaints and protests by temp workers have unearthed major health and safety issues, causing OSHA to establish a Temporary Worker Initiative to determine, in part, when to hold staffing agencies and client employers jointly liable for violations impacting the temporary workforce.

There are more than 3.5 million fast-food workers and more than 75 per cent of them work in franchised outlets. Numerous studies indicate that under-employment, poverty-inducing earnings and wage theft are the norms. Households that include an employed, fast-food worker are four times as likely to live below the federal poverty level. The social costs of these conditions are born by U.S. taxpayers who shell out about \$3.8 billion per year to cover the cost of public benefits received by fast-food workers employed at the top-ten fast-food franchises who are compelled to rely on government welfare programs to supplement poverty level wages.

These workplace ills, pervasive in temping and franchising arrangements, are unquestionably subject to correction through the issuance of unfair labor practice charges and collective bargaining. Accordingly, the NLRB is now rightfully re-examining its test for joint employer status in *Browning-Ferris Industries*,² a representation case involving temp workers employed at a large California recycling facility where the sorting work is performed entirely by a temporary staffing workforce.

According to the U.S. Supreme Court, the NLRB's joint employment test is designed to determine whether a putative joint employer "possesses sufficient control over the work of the employees to qualify as a 'joint employer' with [the actual employer]."³ Joint employment occurs when "one 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."⁴ Absolute control over the employees of another employer is not required. Rather, the test

² Case 32-RC-109684

³ *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

⁴ *NLRB v. Browning-Ferris Industries of Pa., Inc.*, 691 F.2d 1117, 1123 (3rd Cir. 1982)

“recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment.”⁵

In temporary staffing arrangements, the user employer controls the day-to-day work environment of the temporary workforce. This reality flows from the fact that temp agencies are “labor-only” contractors that neither own nor lease capital equipment utilized by temporary employees, which is under the sole control of the user employer. Accordingly, contracts governing temping arrangements typically conform to this reality, ceding to the client employer’s management and supervisory employees a major role in co-determining the terms and conditions of work.

The standard staffing contract assigns to the staffing agency only control over wage payments, withholding of payroll taxes, provision of workers’ compensation and ensuring civil rights compliance. User clients, on the other hand, are contractually assigned all other employer responsibilities traditionally associated with the production of goods and services: supervision and direction of day-to-day work; control of working conditions at the work site; responsibility for ensuring a safe work site including civil rights compliance, provide tools and equipment and determining the length of the temp workers’ assignments.⁶

⁵ *Id.* (emphasis in original) citing *Cr. Adams Trucking, Inc.*, 262 NLRB No. 67 (1982); *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969); *NLRB v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966).

⁶ Managing Co-Employment Risk When Using a Staffing Agency (February 7, 2009), www.aquent.com/blog/managing-co-employment-risk-when-using-a-staffing-agency (Last viewed June 17, 2014; previously viewed by author in 2001) as cited in Edward A. Lenz and Dawn R. Greco, Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements, 17 (American Staffing Association 4th Ed. 2007); A Manager’s Guide to Understanding Co-Employment, Kelly Services (1995) (on file with author).

Tightly controlled business format franchisee arrangements have expanded significantly in the last decade to ensure that major franchisors like Burger King and other fast-food corporations can maintain uniformity of brand, product and operations that are essential to its business model. Under these agreements, control over franchisee workers' terms and conditions of employment are exercised through training, operating manuals, and communications with franchisees established in these business format agreements.⁷

Sophisticated management systems are in place to ensure that the franchisor brand is maintained and protected, creating a high-level of franchisor control over fast-food workers terms and conditions of employment. Through these systems, including unannounced, on-site visits by franchisor representatives, the franchisor can dictate the number of workers required to do the job, the manner and speed of the performance of every work task, the equipment and supplies used on the job, the manner in which equipment is used as well as employee grooming and uniform standards. Every one of these contract provisions dictated by the franchisor directly impacts terms and conditions of employment that are core of collective bargaining issues that can be addressed by the franchisee workforce's protected concerted activity.

Given these economic realities, the NLRB is well within the authority granted to it by Congress to adapt its traditional joint employer test to determine whether client employers of a temporary staffing agency and/or a major franchisor like Taco Bell are joint employers. Nothing in the statutory text of the NLRA or in well-reasoned precedent prevents the Board from returning to the traditional joint employer test that was the norm until 1980 when a rigid and narrower conception of joint-employment gained sway in Board proceedings.

⁷ See Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 933-34 (1990).

The traditional, well-reasoned view of joint employment, also found in the majority opinion *M.B. Sturgis/JeffBoat*⁸ and in the dissent in *Oakwood Care*,⁹ permits the Board to craft the appropriate unit for collective bargaining purposes, including “the employer unit, craft unit, plant unit, *or other unit.*”¹⁰ Similarly, the Act’s definition of employer gives the Board wide latitude in determining whether a staffing agency’s user client exercises the necessary indicia of control for joint employer status.

Notably, the current joint-employer test has virtually prevented any group of temp agency or fast-food franchise workers from achieving a voice in their workplaces. Given this, the NLRB’s reassessment of joint-employer status is in no way extraordinary. Rather, it is consistent with Supreme Court precedent on the role of the agency to adapt federal labor law to changing conditions and entirely consistent with the powers vested in the agency by this Congress. Moreover, the Board’s decision to take a hard look at its joint employer standard is both reasonable and practical as a means of considering how millions of low-wage workers can meaningfully exercise their fundamental right to collective bargain with their employers.

It is my view that a return to the Board’s traditional, better-reasoned explication of the joint-employer standard is necessary to achieve both the flexibility employers seek and the fair treatment and decent wages workers are now demanding. A failure to do so runs the risk of rendering labor law irrelevant in the much of the low-wage economy, obstructing the efficacy of collective bargaining, and increasing the potential for strikes and other forms of industrial strife or unrest. It takes little imagination to foresee the potential

⁸ 331 NLRB 1298 (2000).

⁹ 343 NLRB 659 (2004).

¹⁰ 29 U.S.C. §159(b). (emphasis added)

for industrial strife when large concentrations of under-employed, low-wage temporary workers and franchised fast-food workers are unable to meaningfully exercise their fundamental rights to bargain over the terms and conditions of employment that are jointly established by both of their employers.

Thank you for considering my comments.