

# The NLRB's Browning-Ferris Decision Explained: Myths and Realities for Workers and Small Business Owners

## Introduction

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In its August 2015 decision in the Browning-Ferris Industries (BFI) case, the National Labor Relations Board did two things:

- The Board reinstated its previous “joint employer” standard under the National Labor Relations Act (NLRA), reversing the Board’s unexplained and unwarranted trend in recent years to narrow its applicable standard.
- In so doing, it found that in a case brought by recycling workers seeking to join a union and bargain over the terms and conditions of their jobs, BFI is a joint employer with its staffing company.

In today’s economy, subcontracting and use of labor intermediaries such as staffing firms often result in degraded working conditions and diminished worker access to collective bargaining. As a result of the Board’s decision restoring the appropriate joint employer standard, companies that share control over working conditions at a job are on notice that they may also share accountability for those conditions, which in turn should result in better oversight and compliance with basic labor rights.

The Board’s decision simply stands for the unremarkable position that when companies like BFI decide to outsource portions of their workforce to staffing companies or other labor subcontractors, yet still retain control over the work, they remain accountable, along with their contractors, for labor protections.

## The NLRB's Browning-Ferris Decision Explained

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Since 2009, at its Milpitas, CA recycling facility, BFI has used a staffing company, Leadpoint Business Services (Leadpoint), to perform in-house sorting and cleaning work. Approximately 240 Leadpoint employees work along with the 60 BFI employees at the plant, though the two groups work in different areas. The staffing agreement between the two companies runs indefinitely but is terminable on 30 days’ notice. When the workers voted to join a union, the union sought to bargain with both Leadpoint and BFI, because BFI called the shots on a number of key conditions at the worksite.

Before issuing its decision as to who should be at the bargaining table, the Board undertook an extensive, deliberative and careful process through which it sought and received comments from a broad community of stakeholders, representing diverse and divergent

positions on the issue of the correct standard for joint employment under the NLRA.

After careful consideration, and noting its Supreme Court-mandated responsibility to “adapt the Act to the changing patterns of industrial life,” the Board ruled that its current joint employer standard had strayed from the common-law underpinnings of the NLRA and was out of touch with modern workplaces, undermining the core protections of the Act for many workers. The Board announced a return to its previous standard set forth in a 1982 Third Circuit case, *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), which embraced a version of the common law right-to-control test the U.S. Supreme Court affirmed in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). As the Board explained:

Under this standard, 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 relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over the employees' essential terms and conditions of

employment to permit meaningful collective bargaining. *Browning-Ferris Indus.*, 362 NLRB No. 186 (August 27, 2015), Slip op. at 2.

The Board also clarified that the “right to control” test does not require a showing that a joint employer exercised control *in fact*; rather, the *right to control* is the determinative consideration. A thorough examination of the facts of the relationship between BFI and Leadpoint showed that there was in fact a joint employment relationship, and the Board found that BFI was a necessary party for meaningful collective bargaining.

## Implications of the Decision

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### **Workers Will Be Able to Bargain With Those in a Position to Change Their Workplace Conditions.**

In industries ranging from janitorial to construction to healthcare, [companies have used outsourcing to distance themselves](#) from the labor-intensive aspects of their businesses and have shifted accountability for the fair treatment of their workers elsewhere.<sup>1</sup> These fractured arrangements leave workers with less control over their wages, hours, and working conditions because workers hired by a subcontractor often believe that they have no rights against the lead employer. Similarly, workers who sign “independent contractor” agreements as a condition of getting a job are led to believe that they have no right to claim the protection of any workplace laws and rarely take action to do so.<sup>2</sup> By clarifying that the lead employer may be responsible for conditions of employment in contracted jobs the Board’s decision will better enable workers to understand and assert their workplace rights.

### **Workers Will Have Better Opportunities to Bargain for Improved Wages and Working Conditions.**

The ambiguous legal status of many workers in contracted jobs is an important factor driving lower wages and poor working conditions. Median hourly wages are \$10 or less for workers in janitorial, fast food, home care and food service, all sectors characterized by extensive contracting.<sup>3</sup> Once outsourced, workers’ wages suffer as

compared to their non-contracted peers, ranging from a 7 percent dip in janitorial wages, to \$6 an hour in food service, to 30 percent in port trucking, to 40 percent in agriculture.<sup>4</sup> Workers in these same jobs routinely experience wage theft: 25 percent of workers report minimum wage violations, more than 70 percent are not paid overtime;<sup>5</sup> and construction, warehouse, fast food and home care workers suffer increased job accidents.<sup>6</sup> If more than one entity is responsible as a joint employer, there will be better compliance with labor rights and baseline pay standards.

### **High Road Employers Will Have a Fairer Playing Field.**

Employers that play by the rules are often at a competitive disadvantage to employers that engage in extensive outsourcing. Especially when bidding for contracts in construction or building services, those that cut labor costs often get rewarded with contracts simply because they are the lowest bidder. Yet the jobs created under these low-bid contracts often do not sustain workers and their families in a meaningful sense. Stricter adherence to a robust joint employer standard will enable high-road companies to more meaningfully compete for business and ensure that more companies are watching out for workplace protections.

## Three Myths Dispelled

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### **Myth #1: The Board is unfairly changing the rules.**

Despite claims by the Chamber of Commerce and International Franchise Association<sup>7</sup>, virtually all U.S. labor and employment laws, from the Fair Labor Standards Act (FLSA), to our anti-discrimination laws, to the NLRA, have included joint employer liability since their inception.

1. The U.S. Supreme Court<sup>8</sup> and myriad other courts have applied labor statutes to multiple businesses since the 1940's. Court decisions hold farm labor contractors and the growers that engage them responsible for unpaid minimum wages; garment workers have recovered unpaid wages from sweatshop operators and their jobbers. More recently, janitors have recovered unpaid overtime from big-box retailers when the smaller cleaning contractors they outsource to don't pay their workers, and temp and staffing workers have recovered from worksite and intermediary companies when labor standards go awry.
2. The federal Department of Labor has long-standing joint employment regulations<sup>9</sup> and has over the years prioritized industries like agriculture, building services, and garment, where subcontracting abuses create entrenched wage violations with little accountability.
3. The Equal Employment Opportunity Commission also has joint employment guidance<sup>10</sup> that has been on the books for nearly two decades, and the NLRB has enforced against multiple joint employers in numerous cases since the middle of last century.

### **Myth #2: Joint employment findings are now virtually automatic.**

To find that one or more entity is jointly responsible under an employment or labor law, most laws require a showing that two or more entities share the right to control the work. While FLSA and related laws have a broader definition of "employer," the NLRA and other statutes based in the common-law impose a narrower test to find a joint employer. Claims that findings of joint liability are now routine are thus simply false. The rich history of joint employer cases and the laws behind them are well-known and long-entrenched in our nation's labor and industrial policy.

### **Myth #3: Joint employment will destroy franchising.**

Among the dire and unsubstantiated hypothetical predictions by some business interests, perhaps the most oft-repeated is that joint employment spells the demise of franchising, and by extension, small business growth.<sup>11</sup> The majority in *Browning-Ferris* explicitly noted that it was not making any findings as to franchising in its decision. *Browning-Ferris, supra*, at 20, fn. 120. Also, franchising is growing and the reasons for this expansion are illuminating: at its core, franchising permits smaller companies to put less money down to start a business, and it provides the franchisor with a turnkey business model for running its operations.<sup>12</sup> These dynamics, which are often marked by detailed control by the franchisor over the franchisee's operations, are precisely why the corporate franchisors should and can be held responsible for any labor standards violations that may occur in the franchises.

This does not mean that franchising is on its way out:

1. Franchises have been operating under joint employment laws for decades and have seen strong growth during that time;
2. Determinations of joint employment status will still be made on a case-by-case basis, and it is simply wrong to suggest that every franchisor-franchisee arrangement will give rise to a finding of joint employment; and
3. Even if a judge finds that there is joint responsibility between the more powerful corporate franchisor and the franchisee in a particular case, this only means that the corporate franchisor should ensure that violations do not occur in the franchises, by contracting with reputable franchisees, and by monitoring compliance and taking corrective action if needed.

In fact, in a recent fact-intensive analysis in conjunction with claimed unfair labor practices, the NLRB's General Counsel determined that franchisor Freshii Development was not a joint employer with its franchisee restaurant, Nutritionality, Inc., either under the then-existing standard or the proposed General Counsel's broader joint employer standard, which was adopted in the BFI case. Advice Memorandum No. 177-1650-0100 (April 28, 2015).

## Endnotes

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1. See, e.g., National Employment Law Project, *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work* (May 2014), available at <http://www.nelp.org/content/uploads/2015/03/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf?nocdn=1>.
2. See, e.g., Erin Johansson, *Fed Up with FedEx: How FedEx Ground Tramples Workers Rights and Civil Rights*, (Am. Rights at Work, 2007), available at <http://www.civilrights.org/publications/fedex/fedupwithfedex.pdf>.
3. U.S. Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013: Janitors and Cleaners, Except Maids and Housekeeping Cleaners* (2013) note 9, available at <http://www.bls.gov/oes/current/oes372011.htm#ind>; Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013: Food Preparation and Serving Related Occupations* (2013) note 43, available at <http://www.bls.gov/oes/current/oes350000.htm>; The Paraprofessional Healthcare Institute, *Home Care Aides at a Glance* (2014), available at <http://phinational.org/sites/phinational.org/files/phi-facts-5.pdf>.
4. Arindarijt Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Wage Service Occupation? Evidence from Janitors and Guards*, 63 INDUS. & LAB REL. REV. 287 (2010); Mary McCain, *Serving Students: A Survey of Contracted Food Service Work in New Jersey's K-12 Public Schools* (Rutgers Center for Women and Work, 2009), available at <http://www.seiu.org/images/pdfs/seiuRutgersReport.pdf>; Rebecca Smith et al., *The Big Rig: Poverty, Pollution and the Misclassification of Truck Drivers at America's Ports*, (Nat'l Emp't Law Project & Change to Win, 2010), available at <http://www.nelp.org/page/-/Justice/PovertyPollutionandMisclassification.pdg?nocdn=1>.
5. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 29 – 39 (2009), available at <http://nelp.org/page/-/BrokenLawsReport2009.pdf?nocdn=1>.
6. Azari-Rad, Peter Philips and Wendine Thompson-Dawson, *Subcontracting and Injury Rates in Construction*, Eaton, Adriene E., 252 Ed. 55<sup>th</sup> Annual Meeting of the Industrial Relations Research Association Series, 2003; Jason Rowe, *New Jersey's Supply Chain Pain: Warehouses and Logistics Work Under Wal-Mart and Other Big Box Retailers* 8 – 9, note 51 (New Labor 2012); Jason Sturna et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, 5 POLICY MATTERS: A QUARTERLY PUB. OF THE UNIV. OF CAL., RIVERSIDE 1 (2012); The Restaurant Opportunities Centers United, *Serving While Sick: High Risks & Low Benefits for the Nation's Restaurant Workforce, and Their Impact on Consumers* (2010), available at [http://rocunited.org/wp-content/uploads/2013/04/reports\\_serving-while-sick\\_full.pdf](http://rocunited.org/wp-content/uploads/2013/04/reports_serving-while-sick_full.pdf).
7. See, U.S. Chamber of Commerce, *Opportunity at Risk: A New Joint Employer Standard and the Threat to Small Business*, available at <http://www.workforcefreedom.com/publications/opportunity-risk-new-joint-employer-standard-and-threat-small-business>
8. See, *Rutherford Food v. McComb*, 331 U.S. 722 (1947); *Falk v. Brennan*, 414 U.S. 190 (1973); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5<sup>th</sup> Cir. 1973); *Zheng v. Liberty Apparel*, 355 F.3d 61 (2<sup>d</sup> Cir. 2003).
9. See 29 C.F.R. 791.2.
10. <http://www.eeoc.gov/policy/docs/conting.html>.
11. <http://www.help.senate.gov/hearings/hearing/?id=22428fa0-5056-a032-5232-293d58c4db10>.
12. Chamber report at 6-7.