The NLRB's Evolving Joint-Employer Standard: *Browning-Ferris Industries of California, Inc.*†

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Introduction

This Article examines the National Labor Relations Board's (NLRB or Board) 2015 *Browning-Ferris Industries of California, Inc.* (*BFI*)[1] decision, in which the Board reversed longstanding precedent and announced a new standard for determining whether two or more separate employers constitute a joint employer for purposes of the National Labor Relations Act (NLRA or Act).[2] This Article analyzes *BFI*'s significance and likely impact on various relationships, including franchisor-franchisee and contract labor. This Article presents both management and union perspectives on the issues.[3] To no great surprise, management sees *BFI* as a politically motivated transformative decision, intended to provide more and easier organizational opportunities to unions, particularly in economic relationships in which they have had little success historically. In contrast, unions and employees do not

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1. 362 N.L.R.B. No. 186 (Aug. 27, 2015). Browning-Ferris Industries of California, Inc. (BFI) does business as Newby Island Recyclery.

2. *Id.* at 2.

3. Part VII.A is a contribution of the union- and employee-side author and Part VII.B is a contribution of the management-side author.

view *BFI* as a game changer but as a return to a prior standard. Unions and employees see management's consternation as much ado about nothing.

Part I of the Article places *BFI* in doctrinal perspective and provides an overview of the joint-employer standard that existed for over three decades before *BFI*. Part II discusses the facts and arguments in *BFI*, and Part III explains the Board's *BFI* decision and its new joint-employer standard. Part IV summarizes *BFI*'s current status. Part V reviews the Board's and Regional Directors' (RD) application of *BFI*. Part VI discusses legislative responses to *BFI*, and Part VII concludes with labor- and employee-side and management-side perspectives on *BFI*'s broader labor relations implications.

I. The Joint-Employer Standard Before *BFI*

In two 1984 cases, *TLI, Inc.*[4] and *Laerco Transportation*,[5] the NLRB adopted the Third Circuit's joint-employer standard.[6] These cases eliminated the indirect-control portion of the Board's prior joint-employer test.[7] In its place, the Board would evaluate "whether alleged joint employers share the ability to control or co-determine essential terms and conditions of employment."[8] *TLI* provided specific examples of "essential terms and conditions of employment," including, most significantly, hiring, firing, discipline, and supervision.[9]

For two decades thereafter, the Board did not change the standard, although it offered some refinement.[10] For example, the Board held that a company using contracted labor could oversee the contractor's operations to avoid disruptions to its own business without becoming a joint employer.[11] The Board increasingly emphasized the

4. 271 N.L.R.B. 798 (1984).

5. 269 N.L.R.B. 324 (1984).

6. NLRB v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117 (3d Cir. 1982). It is ironic that both the present and former joint-employer standards were articulated in cases involving BFI.

7. *See TLI*, 271 N.L.R.B. at 798–99; *Laerco*, 269 N.L.R.B. at 325 (common ownership and common management not sufficient under Third Circuit's joint-employer standard).

8. Decision & Direction of Election at 12, *BFI*, No. 32-RC-109684 (N.L.R.B. Aug. 16, 2013), http://apps.nlrb.gov/link/document.aspx/09031d45813ac6d0; *see also TLI*, 271 N.L.R.B. at 798; *Laerco*, 269 N.L.R.B. at 325.

9. *TLI*, 271 N.L.R.B. at 798.

10. Before *BFI*, the Board rejected at least three opportunities to revisit the joint-employer standard. *See* AM Prop. Holding Corp., 350 N.L.R.B. 998, 999–1000 (2007); Airborne Freight Co., 338 N.L.R.B. 597, 597 n.1 (2002); M.B. Sturgis, Inc., 331 N.L.R.B. 1298, 1323 (2000).

11. *See* S. Cal. Gas Co., 302 N.L.R.B. 456, 461 (1991).

> An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for.

Id.

type of control exercised, requiring that a putative joint employer's control be "direct and immediate."[12] It further clarified that an employer can give "routine directions," such as "where to do a job rather than how to do the job and the manner in which to perform the work," without becoming a joint employer.[13]

II. *BFI* Background

Browning-Ferris Industries (BFI) operates a recycling facility in Milpitas, California. In October 2009, BFI contracted indefinitely with Leadpoint Business Services, a temporary labor firm, to provide workers for sorting, housekeeping, and screen cleaning tasks alongside BFI's permanent employees at BFI's facility.[14] In 2013, BFI employed approximately sixty of its own workers in various positions such as loader operators, equipment operators, forklift operators, and spotters.[15] In that same year, Leadpoint employed approximately 240 full-time and part-time employees at the BFI facility.[16]

A. Region 32 Proceedings

In June 2013, Sanitary Truck Drivers & Helpers, Teamsters Local 350 filed a petition with Region 32 of the NLRB in Oakland, California, seeking to represent a unit of all sorters, housekeepers, and screen cleaners at the BFI facility, excluding BFI's directly employed workers who were covered by existing collective bargaining agreements.[17] The union asserted that Leadpoint and BFI jointly employed the sorters, housekeepers, and screen cleaners.[18] The sole issue at the NLRB's pre-election hearing was whether BFI and Leadpoint were joint employers, or whether Leadpoint was the sole employer of the contracted employees.[19]

The Acting Regional Director's (ARD) Decision and Direction of Election focused on the BFI-Leadpoint agreement, which expressly pro-

12. *Airborne*, 338 N.L.R.B. at 597. In *BFI*, Leadpoint, BFI, and management amici argued that the "direct and immediate control" portion of the joint-employer test emanated from the Board's 1984 decision in *TLI*. *BFI*, 362 N.L.R.B. No. 186, slip op. at 10 & n.43 (Aug. 27, 2015). However, the union and union amici contended that *TLI* did not include "direct and immediate control" as part of its joint-employer analysis, asserting instead that the Board did not expressly adopt that requirement until its 2002 decision in *Airborne Freight*. *See, e.g.*, Brief of Service Employees International Union as Amicus Curiae at 19 & n.48, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45817b2a3b [hereinafter Brief of SEIU].

13. Island Creek Coal Co., 279 N.L.R.B. 858, 864 (1986), *cited in* Decision & Direction of Election at 12–13, *BFI*, No. 32-RC-109684 (N.L.R.B. Aug. 16, 2013), http://apps.nlrb.gov/link/document.aspx/09031d45813ac6d0.

14. *Id.* at 2–3.

15. *BFI*, slip op. at 2.

16. *Id.* at 3.

17. Decision & Direction of Election at 1–2, *BFI*, No. 32-RC-109684 (N.L.R.B. Aug. 16, 2013), http://apps.nlrb.gov/link/document.aspx/09031d45813ac6d0.

18. *Id.* at 2.

19. *Id.*

vided that Leadpoint was "the sole employer of the Personnel" it supplied to BFI.[20] Further, the agreement stated: "Nothing in this agreement shall be construed as creating an employment relationship" between BFI and the Leadpoint contract workers.[21] Under the agreement, Leadpoint had sole authority to discipline, review, evaluate, and terminate contracted workers, but BFI could "reject or discontinue use of personnel."[22] Thus, BFI could exclude Leadpoint workers from working at BFI facilities, but could not terminate their Leadpoint employment.[23] Although BFI did not dictate Leadpoint employees' wage rates, the agreement required Leadpoint to obtain BFI's consent before raising sorters' pay above the rate BFI paid its one directly employed sorter.[24]

Leadpoint was solely responsible for recruiting, interviewing, and hiring its own employees.[25] BFI and Leadpoint each had their own human resources departments—BFI's department was located within its facility, while Leadpoint's was in a trailer outside the facility.[26]

The union and the employers disputed the extent to which BFI controlled or directed Leadpoint workers. BFI supervisors testified that they did not instruct Leadpoint workers when or how to work,[27] but BFI maintained production standards, controlled the pace of production, and could stop and start production.[28] BFI required three work shifts each day, and Leadpoint scheduled employees based on BFI's expected production level.[29] It was undisputed that BFI did not handle Leadpoint workers' requests for time off.[30] Based on these facts, the ARD concluded that Leadpoint was the sole employer of the contracted employees and directed an election in a unit composed solely of Leadpoint-employed workers.[31]

B. NLRB Review and Arguments on Review

In April 2014, the Board granted the union's petition for review of the ARD's decision.[32] In May 2014, the Board invited interested parties to submit briefs addressing the specific representational issue in

20. *Id.* at 4.
21. *Id.*
22. *Id.* at 6–7.
23. *Id.*
24. *Id.* at 5.
25. *Id.* at 7.
26. *Id.* at 5.
27. BFI supervisors testified that they directed all issues with Leadpoint workers to Leadpoint supervisors *Id.* at 9–10.
28. *Id.*
29. *Id.* at 11.
30. *Id.* at 12.
31. *Id.* at 19.
32. Order, *BFI*, No. 32-RC-109684 (N.L.R.B. Apr. 30, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45816da958.

BFI, as well as the broader question of joint-employer standards.[33] In response, the NLRB's General Counsel—who was not a party in *BFI*—filed an amicus brief.[34] The General Counsel asserted that the Board should change its long-standing test for determining joint-employer status under the Act. The General Counsel argued:

> The Board should abandon its existing joint-employer standard because it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining. The Board's current standard is significantly narrower than the traditional standard, under which an entity could be a joint employer if it exercised direct or indirect control over working conditions, had the unexercised potential to control working conditions, or where "industrial realities" otherwise made it essential to meaningful bargaining. The current standard also ignores Congress's intent that the term "employer" be construed broadly in light of economic realities and the Act's underlying goals, and has particularly inhibited meaningful bargaining with respect to the contingent workforce and other nontraditional employment arrangements.[35]

The General Counsel urged the Board to "adopt a new standard that takes account of the totality of the circumstances, including how the putative joint employers structured their commercial dealings with each other."[36] Under the proposed standard, "if one of the entities wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence, joint-employer status would be established."[37]

The General Counsel further contended that *TLI* and *Laerco* improperly raised the burden for showing indicia of control and that "strong indicia of joint-employer status under extant Board law became the *minimum* standard for finding joint-employer status."[38] The General Counsel urged the Board to look not just to the common law definition of "employer," but also to examine the "policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life."[39]

More than a dozen other amici representing the interests of business groups, trade associations, employees, labor unions, and academia filed briefs.[40] These briefs either enthusiastically supported the General

33. Notice & Invitation to File Briefs at 1–2, *BFI*, No. 32-RC-109684 (N.L.R.B. May 12, 2014), http://apps.nlrb.gov/link/document.aspx/09031d4581704931.

34. Amicus Brief of the General Counsel, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45817b1e83 [hereinafter Amicus Brief of the General Counsel].

35. *Id.* at 2.

36. *Id.*

37. *Id.*

38. *Id.* at 6–7.

39. *Id.* at 9 (quoting NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403 (1947)).

40. For access to all amicus briefs filed in *BFI*, see *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FRP-II, LLC. d/b/a/ Lead-*

Counsel's position—advocating a change to the Board's joint-employer standard—or vehemently opposed it.[41] Employee and labor groups argued that the NLRB should update the joint-employer standard to better align with current economic conditions and business practices.[42] Employer and business groups contended that changing the standard was unnecessary because it had been and remained appropriate and workable in today's business environment.[43] They also argued that changing the standard as the General Counsel urged could have potentially far-reaching adverse effects on several key sectors of the U.S. economy, including, most notably, franchising and contract labor arrangements.[44]

The union argued that, under the Board's existing *TLI-Laerco* standard, BFI and Leadpoint were joint employers.[45] The union contended that the ARD had minimized evidence showing the two companies *co-determined* essential terms and conditions of employment and improperly insisted that only evidence of BFI's *exclusive* control was relevant.[46] In the alternative, the union urged the Board to abandon its current joint-employer standard in favor of a broader one that would better effectuate the purpose of the Act and conform to industrial realities. The union encouraged the Board to look beyond direct and immediate control issues and to the totality of the relationship between the putative joint employers.[47] The union further contended—in strange symmetry with arguments raised by BFI and management amici—that the existing standard conflicted with the law of agency, which evaluates direct *and* indirect control in determining the "right to control."[48]

BFI and Leadpoint argued that the existing joint-employer standard had, for thirty years, assured neither labor nor management had an unfair advantage.[49] The companies contended that nothing relevant to joint-employer relationships had changed in the past three decades and that the only thing that had changed was the Board's po-

point Business Services, NLRB (last visited Feb. 7, 2016), http://www.nlrb.gov/case/32-RC-109684.

41. *Compare* Brief of SEIU, *supra* note 12, at 3, *with* Brief of Amicus Curiae Council on Labor Law Equality at 2, 23, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45817b2cbf.

42. *See, e.g.*, Brief of SEIU, *supra* note 12, at 1–3.

43. *See, e.g.*, Brief of Amicus Curiae Driver Employer Council of America at 1, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014).

44. *See, e.g.*, *id.*

45. Petitioner's Opening Brief at 23, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45817b31a9.

46. *Id*. at 5–15.

47. *Id*. at 32. The union argued that the Board's existing standard, requiring "direct and immediate control," conflicted with the purpose of the Act. *Id*. at 32–37.

48. *Id*.

49. Brief of Employer Leadpoint Business Services at 22, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45817b2f1d.

litical composition.[50] The companies also stressed the dangers they predicted would occur if the Board adopted the General Counsel's proposed new standard—specifically that the new standard erroneously equated general market forces with control over terms of employment and extended joint-employer status to an illogical extreme.[51]

III. *BFI*: The NLRB Adopts a New Joint-Employer Standard

A. *The Majority Decision*

On August 27, 2015, a three-member Board majority, Chairman Pearce and Members Hirozawa and McFerran, adopted the General Counsel's proposed standard in *BFI*, overturning the ARD's decision and holding BFI and Leadpoint were joint employers of the Leadpoint-provided employees.[52] The majority stated that its goal was "to put the Board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set by the Act, to best serve the Federal policy of 'encouraging the practice and procedure of collective bargaining.'"[53] The fundamental inquiry of the new standard is whether the putative joint employer *possesses* the authority, even indirectly, to control terms and conditions of employment. The Board no longer requires that a company have direct and immediate control over terms and conditions of employment, nor that a company actually *exercise* that authority.[54]

The Board relied on restructuring of the American workforce as a primary reason for its decision:

> As the Board's view of what constitutes joint employment under the Act has narrowed, the diversity of workplace arrangements in today's economy has significantly expanded. The procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased steadily since TLI was decided. . . . Over the same period, temporary employment also expanded into a much wider range of occupations. . . . This development is reason enough to revisit the Board's current joint-employer standard.[55]

The Board explained that its new test still starts with the common law concept of control, although a decision of whether a putative joint employer has control under the common law is insufficient to find joint-employer status.[56] Specifically, the majority stated: "Where a user employer reserves a contractual right . . . to set a specific term

50. *Id.* at 22–24.
51. *Id.* at 22–23.
52. *BFI*, 362 N.L.R.B. No. 186, slip. op at 2 (Aug. 27, 2015).
53. *Id.* (quoting 29 U.S.C. § 151 (2012)).
54. *Id.*
55. *Id.* at 11.
56. *Id.* at 12.

or condition of employment for a supplier employer's workers, it retains the ultimate authority to ensure that the term in question is administered in accordance with its preferences."[57] An employer need not exercise its reserved control over terms and conditions to be a joint employer, nor must it exercise that control directly, immediately, or routinely.[58]

In an apparent attempt to limit the scope of its decision, the Board clarified that a joint employer must only bargain with respect to the terms and conditions over which it possesses authority to control.[59] The majority emphasized that the extent of an employer's authority is a factual inquiry that requires individualized, case-by-case analysis.[60]

Applying this new standard to the facts in *BFI*, the Board found that BFI's right to control the Leadpoint contract employees was "indisputable" and that BFI exercised control "both directly and indirectly."[61] Specifically, the Board pointed to the facts that BFI retained the right to reject any Leadpoint employee, BFI maintained "unilateral control" over productivity standards, and BFI supervisors assigned specific tasks to Leadpoint workers.[62] In light of these facts, the majority found that "[i]t is difficult to see how Leadpoint alone could bargain meaningfully about such fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI's productivity standards."[63]

B. The Dissent

Members Miscimarra and Johnson emphatically disagreed with the majority's decision.[64] In a lengthy dissenting opinion, they found that the majority's "sweeping" decision "will subject countless entities to unprecedented joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective bargaining agreements, and to economic protest activity."[65] The dissenters primarily objected that the majority's joint-employer test allowed mere *potential* control over terms and conditions of employment could be dispositive, even in the absence of any evidence of direct or actual control.[66]

The dissent insisted that "the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee,

57. *Id.* at 13.
58. *Id.* at 14.
59. *Id.* at 16.
60. *Id.*
61. *Id.* at 18.
62. *Id.* at 18–19.
63. *Id.* at 19.
64. *Id.* at 21 (Members Miscimarra & Johnson, dissenting).
65. *Id.* The dissenting opinion was nearly thirty pages long and about eight pages longer than the majority opinion.
66. *Id.* at 22.

parent-subsidiary, contractor-subcontractor, franchisor-franchisee, [and] predecessor-successor . . . business relationships under the Act."[67] The dissenters predicted the new test would cause bargaining instability by requiring "the nonconsensual presence of too many entities with diverse and conflicting interests."[68]

The dissent also criticized the majority for insisting on a case-by-case, factual analysis without providing clear guidance as to how much control would be sufficient for joint-employer status: "Our colleagues presumably do not intend that every business relationship necessarily entails the joint employment of every entity's employees, but there is no limiting principle in their open-ended multi-factor standard. It is an analytical grab bag. . . ."[69] The dissenters thought that, by putting potential joint employers on notice that their contracts could open them to liability under the Act, the majority was inserting unnecessary uncertainty into labor relations—inconsistent with the Act's purpose to foster industrial stability.[70]

Finally, the dissenters expressed their belief that the majority overstepped the Board's authority by expanding the joint-employer definition without congressional approval and contrary to clear congressional direction.[71] As to the majority's claim that it was rebalancing employee and employer interests in light of structural workforce changes, the dissenters countered: "Whether this is good or bad policy—and we think it is bad for numerous reasons . . . this fundamental balancing of interests has already been done by Congress."[72] The dissent observed that the majority had cited neither legislative developments nor judicial precedent to justify its new test. The dissent stated: "We would support revisiting any Board doctrine that systemically fails to protect section 7 rights, but we would not do so without evidence of that failure."[73]

IV. *BFI*'s Current Status

Shortly after the Board's *BFI* decision, the ballots previously cast by the putatively jointly employed employees were opened and tallied.[74] Of 205 eligible voters, 73 voted for union representation and

67. *Id.* at 23.
68. *Id.*
69. *Id.* at 26.
70. *Id.* at 48.
71. *Id.*
72. *Id.* at 28.
73. *Id.* at 43. In response to the dissent's concerns, the majority wrote that "[a]s a practical matter, the criticisms . . . could be made about the concept of joint employment generally." *Id.* at 20 (majority). The majority stated it was not the Board's duty, nor the NLRA's purpose, to allow employers "to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace." *Id.* at 21.
74. *See* Tally of Ballots, *BFI*, No. 32-RC-109684 (N.L.R.B. Sept. 4, 2015), https://www.nlrb.gov/news-outreach/graphs-data/tally-of-ballots/32-RC-109684.

17 voted against.[75] On September 14, 2015, the NLRB issued a Certification of Representative, declaring the union as the representative of the jointly employed Leadpoint contract employees at BFI.[76] BFI declined to bargain with the union so the union filed an unfair labor practice charge with the NLRB.[77] BFI admitted that it refused to bargain with the union, but alleged that it was not a joint employer of Leadpoint's contract employees.[78] BFI contended that the Board's new joint-employer standard was incorrect and that it did not jointly employ Leadpoint contract workers.[79] On January 12, 2016, the Board granted the General Counsel's summary judgment motion and ordered BFI to bargain in good faith with the union.[80] BFI filed a petition with the U.S. Court of Appeals for the District of Columbia for review of the Board's summary judgment.[81]

V. Joint-Employer Developments Post-*BFI*

Between the Board's *BFI* decision and submission of the manuscript for this Article, the Board had not issued a decision determining a joint-employer relationship under its new standard.[82] However, the Board has denied petitions to revoke subpoenas duces tecum in two unfair labor practice proceedings in which the documents sought were specifically related to joint-employer status.[83] In addition, two

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75. *Id.* There were twenty-nine non-determinative challenged ballots. *Id.*

76. *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FRP-II, LLC. d/b/a/ Leadpoint Business Services*, NLRB (last visited Feb. 8, 2016), https://www.nlrb.gov/case/32-RC-109684.

77. *Id.*; Aaron Vehling, *Browning-Ferris Joint-Employer Row Back at NLRB*, LAW360 (last visited Feb. 8, 2015), http://www.law360.com/articles/707902/browning-ferris-joint-employer-row-back-at-nlrb.

78. *See* Motion for Summary Judgment at 6–7 & Exhibit 20, Browning Ferris Indus. of Cal., Inc. (*BFI II*), No. 32-CA-160759 (N.L.R.B. Nov. 13, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581ebca1b.

79. Response to Notice to Show Cause, *BFI II*, No. 32-CA-160759 (N.L.R.B. Nov. 13, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581ef6677.

80. *BFI II*, 363 N.L.R.B. No. 95, slip op. at 1 (Jan. 12, 2016). The Board explained:

> All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.

Id.

81. *BFI II*, No. 16-1028 (D.C. Cir. filed Jan. 20, 2016).

82. One administrative law judge has cited, but offered little analysis of, *BFI* in finding joint-employer status. *See* Campaign for the Restoration and Regulation of Hemp, THCF & Presto Quality Care Corp. at 3, No. 19-CA-143377 (N.L.R.B. Dec. 17, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581f2c578.

83. *See* Order at 1–2, Panera, LLC, No. 07-CA-136197 (N.L.R.B. Dec. 8, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581f0adaa; Order at 2–3, Dolchin Pratt, LLC,

RDs have issued decisions applying the new *BFI* standard.[84] In both decisions, the RDs, applying *BFI*'s factual analysis, concluded that no joint-employer relationship existed.[85]

A. Dolchin Pratt, LLC

On November 6, 2015, the NLRB denied petitions to revoke subpoenas duces tecum in *Dolchin Pratt, LLC*.[86] The subpoenas sought information related to an alleged joint-employer relationship between the corporate franchisor, Jimmy John's, and one of its franchisees, Dolchin Pratt, LLC.[87] Chairman Pearce and Member Hirozawa denied the petitions to revoke because the sought-after information was relevant to the pending unfair labor practice proceeding, and the subpoenas were sufficiently particular.[88]

Dissenting, Member Miscimarra would have revoked the subpoenas because the General Counsel had "failed to articulate an objective factual basis for investigating possible single or joint employer relationships between Jimmy John's Franchise, LLC and the other Petitioners [the franchisees]," and thus the subpoenas "[did] not pertain to the substantive allegations of the charges."[89] Member Miscimarra noted, however, that he would have granted the petitions to revoke "without prejudice to the ability of the General Counsel to issue new subpoenas seeking this information" if the General Counsel could "establish an objective factual basis supporting such an inquiry, beyond the mere allegation in the second amended charges that Jimmy John's is a joint and/or single employer with the other Petitioners."[90] Chairman Pearce and Member Hirozawa disagreed with Member Miscimarra's suggestion that "probable cause or other threshold factual showing is a prerequisite to the exercise of the subpoena power of an administrative agency," stating that the subpoenas at issue were "well within the scope of the Board's broad investigative authority."[91]

No. 05-CA-135334 (N.L.R.B. Nov. 6, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581ea4361.

84. *See* Decision & Order at 13–15, Akima Global Servs., LLC (*AGS*), No. 03-RC-161373 (N.L.R.B. Nov. 6, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581ea4201; Decision & Direction of Election at 8–13, Green JobWorks, LLC, No. 05-RC-154596 (N.L.R.B. Oct. 21, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581d84cf6.

85. Decision and Order at 14, *AGS*, No. 03-RC-161373 (N.L.R.B. Nov. 6, 2015); Decision & Direction of Election at 15, *Green JobWorks*, No. 05-RC-154596 (N.L.R.B. Oct. 21, 2015).

86. Order at 1, *Dolchin Pratt*, No. 5-CA-135334 (N.L.R.B. Nov. 6, 2015).

87. *Id.* at 1 & n.2.

88. *Id*.

89. *Id.* at 3–4 (Member Miscimarra, dissenting).

90. *Id*. at 4–5.

91. *Id.* at 1–2 n.2 (majority).

B. Panera, LLC

One month after *Dolchin Pratt*, in *Panera, LLC*, a three-member Board panel, including Member Miscimarra, denied Panera's petition to revoke a subpoena duces tecum seeking information relating to an alleged joint-employer relationship between Panera and a franchisee group.[92] In at least one agreement between a franchisee and Panera, Panera agreed to provide the franchisee a policy manual, and the franchisee agreed to comply with all standards and requirements in the manual.[93] The evidence thus suggested that Panera had control over franchisee employees. The Board concluded the subpoena sought "information relevant to the matters under investigation."[94]

Although Member Miscimarra did "not agree with the Board's revised standard for assessing joint-employer status,"[95] he believed "that a subpoena seeking documents pertaining to an alleged joint-employer and/or single-employer status of a charged party 'requires more . . . than simply stating the name of a possible single or joint employer on the face of the charge.'"[96] Member Miscimarra concluded the "preliminary information" available in *Panera*—the agreement between Panera and the franchisee group pertaining to the employee policy manual—suggested that an "adequate basis exist[ed] for the subpoena's requests,"[97] unlike in *Dolchin Pratt*, where no such evidence was present.

C. Green JobWorks, LLC

Green JobWorks, LLC[98] was the first RD decision to apply the *BFI* standard. Green JobWorks, a staffing company, provided temporary labor to ACECO, LLC, a demolition and environmental remediation contractor.[99] At issue was whether ACECO jointly employed Green JobWorks employees who worked at ACECO sites.[100]

Green JobWorks and ACECO entered into a master labor services agreement requiring Green JobWorks to "provide lead workers at ACECO sites where [Green JobWorks] employees [were] assigned."[101] The lead workers documented and tracked Green JobWorks employee hours; determined breaks and rest periods; and removed Green Job-

92. Order at 1, *Panera*, LLC, No. 7-CA-136197 (N.L.R.B. Dec. 8, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581f0adaa.

93. *Id.* at 1–2 n.2.

94. *Id.* at 1.

95. *Id.* at 1–2 n.2 (citing *BFI*, 362 N.L.R.B. No. 186, slip op. at 2 (Aug. 27, 2015)).

96. *Id.* (quoting Order at 3, Dolchin Pratt, LLC, No. 5-CA-135334 (N.L.R.B. Nov. 6, 2015) (Member Miscimarra, dissenting)).

97. *Id.*

98. Decision & Direction of Election, Green JobWorks, LLC, No. 5-RC-154596 (N.L.R.B. Oct. 21, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581d84cf6.

99. *Id.* at 4–5.

100. *Id.* at 2.

101. *Id.* at 5.

Works employees from construction sites, if necessary.[102] Under the agreement, Green JobWorks was exclusively responsible for the following regarding its own employees: (1) employee recruiting, hiring, counseling, discipline, and discharge; (2) establishing and paying employee wages; (3) providing workers' compensation insurance and fulfilling unemployment compensation obligations; and (4) maintaining personnel and payroll records.[103] The general contractor determined project orientation and day-to-day schedules.[104] The petitioning union asserted that ACECO was a joint employer of the Green JobWorks-provided employees because: (1) the master labor services agreement gave ACECO the right to direct the managers and supervisors and to dismiss Green JobWorks employees under certain circumstances; (2) ACECO could request specific Green JobWorks employees with particular skills and had done so; and (3) ACECO effectively controlled Green JobWorks employees' wages.[105]

The RD distinguished the relationship between BFI and Leadpoint from the relationship between ACECO and Green JobWorks,[106] concluding that the union failed to show "specific, detailed and relevant evidence" demonstrating a joint-employment relationship between ACECO and Green JobWorks.[107]

Two lessons can be drawn from *Green JobWorks*. First, unions must present more than anecdotal evidence to demonstrate joint-employer status to satisfy *BFI*'s standard. In *Green JobWorks*, the union produced witnesses and text messages demonstrating ACECO supervisors' control over Green JobWorks employees.[108] However, the RD found this insufficient to overcome the written terms of the ACECO-Green JobWorks agreement, which, unlike *BFI*, limited ACECO's involvement in the terms and conditions of the contracted employees' employment.[109] *Green JobWorks* thus provides a guide to employers using contract laborers that they should avoid contract provisions that allow them to remove employees from jobsites if they wish to avoid a finding of joint-employer status. Second, *Green JobWorks* illustrates the inherent evidentiary challenges for unions seeking to

102. *Id*.
103. *Id.* at 5–6.
104. *Id.* at 12.
105. *See id*. at 2, 5, 9–13.
106. *Id.* at 9–13.
107. *Id.* at 8–9. The RD analyzed four specific factors that he found distinguishable from *BFI*: (1) the company's business organization and ability to hire, transfer, discipline, and terminate employees; (2) wages; (3) supervision; and (4) appropriateness of requiring the company to participate in bargaining. *Id.* 9–13. With regard to the fourth factor, the RD found that ACECO lacked the "ultimate control that is probative of an employment relationship such that it would warrant ACECO's involvement in collective bargaining." *Id.* at 13.
108. *Id.* at 6–11.
109. *Id.* at 11.

demonstrate joint-employer status in pre-election hearings. As in *Green JobWorks*, unions may lack access to contracts before representation hearings, leaving them to rely on weak anecdotal testimony that is likely to be insufficient.[110]

D. Akima Global Services, LLC

The second decision addressing the new *BFI* joint-employer standard is *Akima Global Services, LLC* (*AGS*).[111] In *AGS*, a federal detention facility contracted with Akima Global Services (AGS) to provide unarmed and armed detention officers.[112] AGS supplied its own unarmed officers and subcontracted with Akal Security, Inc. to provide the armed detention officers.[113] The armed and unarmed officers performed separate functions.[114] A union sought to represent all armed and unarmed detention officers.[115]

The ARD found that AGS and Akal jointly employed the armed detention officers,[116] explaining:

> AGS controls how Akal officers perform their work via its written employment policies (the employee handbook, the Fitness for Duty Policy, and the Minimum Standards for Employee Conduct and Qualifications for Duty), which specifically refer to Akal officers as part of the "AGS team" and cover numerous aspects of employment. Even beyond the employment policies' terms, the AGS-Akal subcontract specifically provides that all AGS employment policies apply in whole to Akal officers.
>
> Furthermore, AGS "possess[es] sufficient control over [Akal's] employees' essential terms and conditions of employment to permit meaningful collective-bargaining." First, AGS retains control under the subcontract to reassign, at its sole discretion, an Akal officer, and furthermore to direct that Akal discharge any Akal officers whom AGS deems unfit for duty. Second, AGS directly supervises Akal employees (in the complete absence of Akal supervisors) during the 12:00 a.m. to 8:00 a.m. shift Monday through Friday and all day on Saturday and Sunday. Third, the subcontract requires that all Akal employees' overtime must be approved by AGS. Fourth, under the subcontract AGS retains the ability to terminate the Akal subcontract "at its convenience."[117]

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110. On March 8, 2016, the NLRB (Member Miscimarra, dissenting) granted the union's request for review in *Green JobWorks*. *See generally* Order, *Green JobWorks*, No. 05-RC-154596 (N.L.R.B. Mar. 8, 2016), http://apps.nlrb.gov/link/document.aspx/09031d45820332cf.

111. Decision & Direction of Election, Akima Global Services, LLC (*AGS*), No. 3-RC-161373 (N.L.R.B. Nov. 6, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581ea4201.

112. *Id.* at 1.

113. *Id.*

114. *Id.* at 3.

115. *Id.* at 1–2.

116. *Id.* at 15.

117. *Id.* at 13–14 (alterations in original) (quoting *BFI*, 362 N.L.R.B. No. 186, slip op. at 2 (Aug. 27, 2015)). However, the ARD determined that Akal did not jointly employ AGS's unarmed officers. *Id.* at 14.

Applying *Oakwood Care Center*,[118] which prohibits combined bargaining units of jointly employed workers and directly employed workers absent both employers' consent,[119] the ARD dismissed the union's representation petition because neither AGS nor Akal had agreed to a mixed unit of directly employed and jointly employed detention officers.[120]

AGS suggests that RDs will consider workplace policies—such as employee handbooks—that govern both directly employed and jointly employed workers as strong evidence of a joint-employer relationship.[121]

VI. Legislative Responses to *BFI*

Federal and state lawmakers responded swiftly to *BFI*. Fewer than two weeks after *BFI*, U.S. Senator Lamar Alexander introduced the Protecting Local Business Opportunity Act[122] to reverse *BFI* by limiting joint-employer status to circumstances where employers have "actual, direct, and immediate" control over essential terms and conditions of employment.[123] The Senate Health, Education, Labor and Pensions Committee held hearings on the bill in October 2015.[124] Several states

118. 343 N.L.R.B. 659 (2004).

119. *Id.* at 659.

120. Decision & Direction of Election at 15, *AGS*, No. 3-RC-161373 (N.L.R.B. Nov. 6, 2015). From the union perspective, the *Oakwood* standard poses a significant barrier to unions attempting to utilize the new *BFI* joint-employer standard, as demonstrated in *AGS*. In *Miller & Anderson, Inc.*, currently pending before the Board, the Board invited briefing on whether it should adhere to *Oakwood* or return to *M.B. Sturgis*, 331 N.L.R.B 1298 (2000), which distinguished jointly employed units from multi-employer units and permitted such units to include both directly employed and jointly employed workers without both employers' consent. *See* Notice & Invitation to File Briefs, *Miller & Anderson*, No. 5-RC-079249 (N.L.R.B. July 7, 2015), https://www.nlrb.gov/news-outreach/news-story/board-invites-briefs-miller-anderson-inc. If the Board overturns *Oakwood*, it would remove an impediment to unions seeking to organize jointly employed workforces. It is speculative whether this would result in increased union representation. From the management perspective, *Oakwood* correctly balanced the interests of those employers confronted with a unit of directly employed and jointly employed employees and thus should be left undisturbed.

121. The ARD placed great evidentiary weight on AGS's employee handbook and employment policies that governed both armed and unarmed officers. Decision & Direction of Election at 13–14, *AGS*, No. 3-RC-161373 (N.L.R.B. Nov. 6, 2015).

122. S. 2015, 114th Cong. (2015).

123. *See id.*

124. *See Stealing the American Dream of Business Ownership: The NLRB's Joint Employer Decision*, *Hearing Before U.S. Senate Comm. on Health, Educ., Labor & Pensions*, 114th Cong. 1 (2015), http://www.help.senate.gov/hearings/stealing-the-american-dream-of-business-ownership-the-nlrbs-joint-employer-decision. Republicans in Congress threatened to use an appropriations rider to the $1.1 trillion budget bill to block enforcement of *BFI*'s joint-employer standard. However, they removed the rider in mid-December 2015 following comments from the White House that the Obama administration would oppose such efforts. *See* Chris Opfer & Cheryl Bolen, *White House Stands Firm Against 'Joint Employer' Rider*, Daily Labor Report (BNA) No. 236 (Dec. 9, 2015); Chris Opfer, *Omnibus Would Increase DOL Funds, Drop Riders*, Daily Labor Report (BNA) No. 241 (Dec. 16, 2015). The White House's comments stopped

passed laws to preclude franchisors from being considered employers of their franchisees' employees.[125]

VII. *BFI*'s Implications

A. *Union Perspective*

With all of the employer hand-wringing over *BFI*, it is easy to lose touch with a key salient fact: *BFI* is a game changer only if unions take advantage of it. Many of the employer-predicted consequences of the decision, including increased unfair labor practice liability, forced collective bargaining, and secondary activity, arise if—and only if—unions pursue joint-employer claims. As a corollary to this point, it is important to note unfair labor practice liability in the joint-employer context, the law governing secondary activity, and other doctrines relating to joint employers are well-developed and remain unchanged by *BFI*.[126] There is, for example, already a well-defined legal strategy for employers seeking to avoid section 8(a)(3) unfair labor practice liability.[127] Similarly, the law regarding secondary activity has not changed in its application to joint employers.[128] The existing ally and struck-

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short of stating that the President would veto any budget bill, including a joint-employer rider.

125. See, for example, S. 652, 84th Leg., 2015–2016 Sess. (Tex. 2015), which amends the Texas Labor Code and clarifies that a franchisor is not an employer of its franchisee's employees unless the franchisor "has been found . . . to have exercised a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand." *Id.*; *see also* H.R. 464, Reg. Sess. (La. 2015); S. 475, 109th Gen. Assemb., 2015–2016 Sess. (Tenn. 2015); 2015 Wisconsin Act 203 (Wis. 2016).

126. *But see* discussion *supra* note 120 (Board considering changing *Oakwood* doctrine).

127. *See* National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (2012). The three-prong test outlined in *Capitol EMI Music, Inc.* guides employers in avoiding such entanglements. 311 N.L.R.B. 997, 1000 (1993). Under *Capitol EMI Music*, the Board does not automatically impute section 8(a)(3) liability to a joint employer:

> The General Counsel must first show (1) that two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action.

Id.

128. If joint employers share the same facility, the union need not worry about following the *Moore Dry Dock Co.* standard for common *situs* picketing, which is designed to limit impact on neutral parties. 92 N.L.R.B. 547, 549 (1950). The standard states:

> [P]icketing of the premises of a secondary employer is primary, if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the

work doctrine will likely preclude *BFI* from having any significant impact on circumstances where the contracting firm and the labor-supplying firm's workers occupy the same site.[129] However, *BFI* could significantly affect secondary activity in franchisor-franchisee relationships.[130] Still, the opportunity for picketing in the franchise context requires that unions organize franchisee employees. Unions, such as the Service Employees International Union (SEIU), are seeking to organize franchisee employees,[131] but it is too soon to tell whether such campaigns will be successful.

From the union perspective, *BFI* is a precarious victory. BFI is still litigating the union's certification and the Board's new joint-employer standard.[132] While *BFI* litigation is pending, the presidential campaign is underway. The election may substantially alter the Board's composition. Simultaneously, various Republican lawmakers are attempting legislatively to reverse *BFI*.[133] All of these developments put *BFI*'s holding in peril.

Nonetheless, it is still worthwhile to analyze *BFI*'s implications because, although it did not create a sea change in other legal areas, its new joint-employer standard will surely affect workers and unions. The key question is whether unions can take advantage of the new standard by engaging in effective organizing campaigns. Answering this question requires examination of the context in which *BFI* may increase unions' organizing opportunities—temporary labor and franchised employers.

1. Temporary Labor

In *BFI*, a user company contracted with Leadpoint, a supplier company, to supply temporary labor for BFI's waste and recycling sorting facilities.[134] This "triangular" labor-only contracting model inherently blurs the lines of employer responsibility because BFI, the user-employer, owned the facility and all of the equipment on which the employees worked.[135] This model is different from the franchi-

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location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Id.

129. *See* Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 626–27 (1967) (union pressure tactics are legal "where the secondary employer against whom the union's pressure is directed has entangled himself in the vortex of the primary dispute").

130. *See infra* Part VII.B.1.

131. *See, e.g.*, Alejandra Cancino & Greg Trotter, *Federal Ruling Strengthens Bargaining Power of Franchise Employees*, CHI. TRIB. (Aug. 27, 2015), http://www.chicagotribune.com/business/ct-joint-employer-labor-board-0828-biz-20150827-story.html.

132. *See supra* notes 77–81 and accompanying text.

133. *See supra* Part VI.

134. *BFI*, 362 N.L.R.B. No. 186, slip op. at 3 (Aug. 27, 2015).

135. *Id.* at 2.

see-franchisor model often mentioned in the same breath with the *BFI* decision.[136] The Board has indicated that it will apply a different standard to franchise relationships.[137] Of all the industries anxious about *BFI*, those that utilize triangular labor-only contracting should be most concerned.

Workers in perma-temping industries, such as warehousing, waste management, or manufacturing, may not be the easiest targets for organizing. Union have had limited success in organizing low-wage industries. For example, only 1.7% of fast food workers and 5.7% of retail workers belong to unions.[138] However, given the endemic lack of benefits,[139] low wages,[140] and often poor and dangerous working conditions[141] that many of these workers face, organizers could find fertile ground for unionizing campaigns within these industries. Further, because perma-temps often have identical duties to full-time employees, it may be easier for unions to organize the perma-temps who feel inferior to their counterparts. Unions can capitalize on the discontent that perma-temp employees experience when they see full-time employees performing identical duties while being paid twenty-five percent more[142] along with benefits and job security. It is too soon to know whether such campaigns, which require deep pockets and political stamina, will be successful. Even SEIU, at the forefront of the "Fight for $15" campaign, has received objections from its own members for its financial support of this campaign.[143] Unless unions engage in the difficult task of organizing perma-temp workers, *BFI*'s impact will be muted.

2. Franchisor-Franchisee Relationships

While *BFI* is generally considered a victory for the union movement, it remains to be seen how the joint-employer standard will

136. *See infra* Parts VII.A.2, VII.B.1.

137. *See infra* Parts VII.A.2, VII.B.1.

138. Steven Greenhouse, *How to Get Low-Wage Workers into the Middle Class*, THE ATLANTIC (Aug. 19, 2015), http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540.

139. See Brief Amici Curiae of National Employment Law Project et al. at 9, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45817b1fe2 [hereinafter Brief of National Employment Law Project]; Brief of Amicus Curiae Labor Relations & Research Center at 4–5, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45817b3084 [hereinafter Brief of Labor Relations & Research Center]; Brief of SEIU, *supra* note 12, at 5–1.

140. *See* Brief of National Employment Law Project, *supra* note 139, at 10.

141. *See* Brief Amici Curiae of National Council of Occupational Safety & Health et al. at 27–35, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014).

142. *See* Brief of Labor Relations & Research Center, *supra* note 139, at 4–5, *BFI*; *see also* Brief of National Employment Law Project, *supra* note 139, at 10.

143. *See* Greenhouse, *supra* note 138. SEIU spent more than thirty million dollars in union dues without gaining a single new union member. *Id.* Not surprisingly, there has been some internal unrest as to whether this was money well-spent. *Id.*

play out in the other major joint-employer battlefield—franchised businesses. For instance, on November 29, 2012, over 100 fast-food workers from McDonald's, Burger King, Wendy's, Kentucky Fried Chicken, and Taco Bell walked off their jobs in New York City in a strike for higher wages, better working conditions, and the right to form a union without employer retaliation from their managers.[144] This was the first widely public act of a campaign orchestrated by a coalition of community and civil rights groups, including New York Communities for Change, United NY.org, the Black Institute, and SEIU.[145] Since then, there have been several other fast food worker strikes and walkouts.[146]

Predictably, the strikes led to the filing of 291 unfair labor practice charges against McDonald's franchisees in Board regions across the country.[147] On July 29, 2014, the General Counsel announced that its investigation found about half of the charges were meritorious and that complaints would be issued against both McDonald's franchisees and McDonald's USA, LLC as joint employers.[148] On December 19, 2014, the General Counsel issued thirteen consolidated complaints listing McDonald's USA, LLC and its franchisees as joint employers.[149] The complaints included allegations of "discriminatory discipline, reductions in hours, discharges, and other coercive conduct . . . in response to union and protected concerted activities, including threats, surveillance, interrogations, promises of benefit[s], and overbroad restrictions on communicating with union representatives or with other employees about unions and the employees' terms and conditions of employment."[150] In regards to the joint-employer determination, the Office of General Counsel noted:

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144. Alana Semuels, *Fast-Food Workers Walk Out in N.Y. Amid Rising U.S. Labor Unrest*, L.A. TIMES (Nov. 29, 2012), http://articles.latimes.com/2012/nov/29/business/la-fi-mo-fast-food-strike-20121129.

145. Steven Greenhouse, *With Day of Protests, Fast-Food Workers Seek More Pay*, N.Y. TIMES (Nov. 29, 2012), http://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html.

146. *See* Kim Gittleson, *US Fast Food Worker Protests Expand to 190 Cities*, BBC NEWS (Dec. 4, 2014), http://www.bbc.com/news/business-30339438.

147. *See* Press Release, NLRB Office of Pub. Affairs, 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), http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against [hereinafter Press Release, NLRB Office of the General Counsel Issues Consolidated Complaints].

148. *See* Press Release, NLRB Office of Pub. Affairs, NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's USA, LLC Is a Joint Employer (July 29, 2014), http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds.

149. See Press Release, NLRB Office of the General Counsel Issues Consolidated Complaints, *supra* note 147.

150. See *id.* The complaints are not available for public viewing because the Board may later redact portions of them. *See, e.g.*, *The Retzer Group, Inc., a McDonald's Fran-*

> Our investigation found that McDonald's USA, LLC, through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of our Act. This finding is further supported by McDonald's USA, LLC's nationwide response to franchise employee activities while participating in fast food worker protests to improve their wages and working conditions.[151]

The management bar has expressed deep concern with the General Counsel's issuance of these complaints, alleging that they call into question the franchise model's viability.[152] However, because the General Counsel's complaints are not yet publicly available, it is difficult to determine what, if any, unique factors might exist in the McDonald's charges that might not be predictive of *BFI*'s application to other franchisors. Because the Board had not decided *BFI* when the General Counsel issued the McDonald's complaints, it is reasonable to presume that the General Counsel thought that McDonald's USA, LLC met the now-former *TLI* and *Laerco* joint-employer standard.[153] Accordingly, the McDonald's complaints likely contain factual allegations of "direct and immediate" control.[154] Parsing the General Counsel's limited public statements about the complaints, McDonald's USA, LLC and its franchisees allegedly coordinated their response to strikes, walkouts, and other unionizing activity, which may form at least part of the General Counsel's basis for alleging that McDonald's USA, LLC is a joint employer.[155]

The General Counsel's public statements also indicate that McDonald's technology may have been a key factor in the complaints.[156]

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chisee, NLRB, http://www.nlrb.gov/case/15-CA-143212 (last visited Dec. 31, 2015). A Freedom of Information Act (FOIA) request can be made to review individual complaints. *Id.*; *see also* 5 U.S.C. § 552 (2012) (federal agency public disclosures required); *IFA Seeks Labor Department Explanation of Applying a New Joint Employer Standard*, INT'L FRANCHISE ASS'N (Aug. 26, 2015), http://www.franchise.org/IFA_NEWS/Franchise_Association_Seeks_Details_of_NLRB_Counsel%E2%80%99s_%E2%80%9CJoint_Employer%E2%80%9D_Opinion/ (International Franchise Association filed FOIA request seeking Occupational Safety and Health Administration's (OSHA) rationale for investigating franchises for joint-employer status and requesting copies of OSHA's correspondence with NLRB).

151. *McDonald's Fact Sheet*, NLRB, http://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet [https://web.archive.org/web/20150112130023/http://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet] (last visited Jan. 1, 2015).

152. *See, e.g.*, *IFA Statement on NLRB Declaring McDonald's Corporation a "Joint Employer,"* INT'L FRANCHISE ASS'N (July 29, 2014), http://www.franchise.org/Franchise-News-Detail.aspx?id=62712 ("Ruling that franchises are joint-employers will be a devastating blow to franchise businesses and the franchise model.").

153. *See supra* Part I.

154. *See* Airborne Freight Co., 338 N.L.R.B. 597, 597 (2002).

155. *See supra* notes 147–51 and accompanying text.

156. For example, during a speech at the West Virginia University College of Law in October 2014, the General Counsel noted that new "enormous software capability" allows franchisors to monitor their franchisees "in real time," which is significant because

A footnote in the General Counsel's amicus brief in *BFI* puts forth this premise:

> The Board should continue to exempt franchisors from joint-employer status to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand. *The "traditional standard" cases finding that franchisors were not joint employers preceded the advent of new technology that has enabled some franchisors to exercise indirect control over employee working conditions beyond what is arguably necessary to protect the quality of the product/brand.*[157]

Recently filed lawsuits provide insight into the General Counsel's theory of technology's effect on joint-employer determinations. On January 22, 2015, a plaintiff filed a Title VII complaint in the Western District of Virginia in *Betts v. McDonald's Corp.*,[158] alleging harassment and discrimination claims.[159] This lawsuit is particularly relevant because the Fight for $15 movement—supporting fast food strikers[160]—has publicly supported the *Betts* plaintiff, and the plaintiff alleged detailed facts supporting an allegation of a joint-employer relationship between a local McDonald's franchisee and McDonald's USA, LLC.[161] The *Betts* complaint alleged that McDonald's franchisees were required to use an "'in-store processor' (ISP) and a computer software program called 'Staffing, Scheduling and Positioning for Operational Excellence.'"[162] According to the complaint:

> McDonald's Corporate's mandatory software programs prescribe restaurants' staffing levels, generate weekly employee schedules, and position crew members within restaurants. McDonald's Corporate instructs all franchisees, including [Franchisee] Soweva, to use the software's positioning tool to ensure the number of people working on each shift and in each position is not greater than the numbers prescribed by McDonald's Corporate.
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> . . . .

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monitoring "goes beyond protecting the brand . . . in those instances we think the franchisor should be named and held responsible as a joint employer." Richard F. Griffin, Jr., Gen. Counsel, NLRB, Keynote Address at the West Virginia University College of Law's Labor Law Conference: Zealous Advocacy for Social Change (Oct. 24, 2014), http://wvulaw.mediasite.com/Mediasite/Play/31e143f0990647558b0268e9086ca3e4.

157. Amicus Brief of the General Counsel, *supra* note 34, at 15–16 n.32 (citations omitted) (emphasis added).

158. Complaint, Betts v. McDonald's Corp., No. 4:15-cv-00002 (W.D. Va. Jan. 22, 2015), http://www.pathlaw.com/wp-content/uploads/2015/02/Filed-Complaint.pdf.

159. *Id.* at 3.

160. *See McDonald's Workers Fire Major Federal Civil Rights Lawsuit Against Fast-Food Giant*, FIGHT FOR $15, http://fightfor15.org/en/mcdonalds-workers-file-major-federal-civil-rights-lawsuit-against-fast-food-giant/ (last visited Dec. 31, 2015).

161. *See generally* Complaint, *Betts*, No. 4:15-cv-00002 (W.D. Va. Jan. 22, 2015).

162. *Id.* at 16.

> McDonald's Corporate's mandatory software programs also engage in a real-time monitoring of each restaurant's labor expenses and sales receipts. McDonald's Corporate establishes acceptable ratios of labor expenses to sales receipts. When the software shows that a restaurant's labor cost ratio exceeds levels approved by McDonald's Corporate at any time, franchise operators are instructed by McDonald's Corporate to reduce labor costs. McDonald's Corporate provides detailed instructions to franchise operators on how to respond to excess labor costs by promptly taking workers off their shifts.
>
> McDonald's Corporate evaluates franchisees on whether they follow their computer programs' staffing dictates. In practice, McDonald's Corporate requires franchise operators, including Soweva, to follow the program's directions.
>
> McDonald's Corporate's software generates a "Daily Activity Report" for all restaurants in the McDonald's system, including those operated by Soweva. Daily Activity Reports include information about employee hours worked on the clock, sales made, the customer count, the drive-thru window sales count, transactions per worker-hour, and the labor cost as a percentage of sales. These Daily Activity Reports are updated at least once per hour.
>
> McDonald's Corporate's software compiles restaurant-level inventory, labor, and payroll information about franchised restaurants, including those operated by Soweva. Data from the software is transferred to McDonald's Corporate. Data is reviewed regularly by McDonald's Corporate.[163]

If these alleged facts are true and are sufficient to prove joint-employer status, franchisors may have to engage in a cost-benefit analysis of whether requiring franchisees to use certain technologies is worth the risk of potential joint-employer liability. However, there likely is a long road of litigation between complaint-filing and a final determination that McDonald's USA, LLC is in fact a joint employer.

It is too soon to speculate as to what, if any, effects the McDonald's complaints will have on franchising. The parties will likely appeal all the way to the Supreme Court.[164] In the meantime, changes to both the Board's and the Supreme Court's composition are anticipated.[165]

B. Employer Perspective

Employers' and the business community's principal objection to *BFI* is that nothing about the BFI-Leadpoint dispute necessitated revisiting the standard, nor was there a compelling reason to change the standard. The ARD in *BFI* found that the facts did not establish

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163. *Id.* at 16–17.

164. *Cf. supra* note 81 and accompanying notes.

165. *See supra* text accompanying notes 132–33 (new President could affect Board's composition); Associated Press, *Supreme Court May Face Extended Period with 8 Justices*, N.Y. TIMES (Feb. 17, 2016), http://www.nytimes.com/aponline/2016/02/17/us/politics/ap-us-supreme-court-is-eight-enough.html.

joint-employer status under the *TLI-Laerco* standard,[166] which the Board had applied for more than three decades.[167] The General Counsel, not even a party in *BFI* and expressly declining to offer a view on the merits of the case, nonetheless used the case as a vehicle to provide a friendly Board majority the opportunity to change the law.[168] Thus, the management community views *BFI* as merely an expedient to obtain a desired but unnecessary outcome that ignores its adverse impact on established and vitally important economic practices.[169]

Congress enacted the NLRA eighty years ago to promote industrial stability.[170] It is therefore ironic that *BFI* will likely cause industrial *instability.* There was no labor relations instability before *BFI* to necessitate changing thirty years of precedent.[171] Instead, the Board found that "dramatic growth in contingent employment relationships" warranted a change in the joint-employer standard.[172] But if progress is the supposed impetus for the change, how can the appropriate response be to return to a standard discarded three decades ago?

Like the recently implemented revisions to election rules,[173] the Board's new joint-employer standard appears to be a solution in search of a problem. From the business and employer perspective, *BFI*, like other recent controversial NLRB decisions,[174] is an attempt by the present Board majority to leave its mark in a way that perhaps no prior Board has—with a heavy emphasis on rewriting longstanding rules to advance a pro-union agenda. This partisan approach to deciding cases is anathematic to the Act's purpose.[175]

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166. Decision & Direction of Election at 15, *BFI*, No. 32-RC-109684 (N.L.R.B. Aug. 16, 2013), http://apps.nlrb.gov/link/document.aspx/09031d45813ac6d0.

167. *See supra* Part I.

168. *See* Amicus Brief of the General Counsel, *supra* note 34, at 3. Many see this as another example of the problem inherent in the NLRB: short-term political appointees prosecute and adjudicate matters arising under the Act, thereby defining national labor policy. *See, e.g.*, George Leef, *NLRB's Browning-Ferris Decision—Yet Another Administrative Law Abuse*, FORBES (Sept. 17, 2015), http://www.forbes.com/sites/georgeleef/2015/09/17/nlrbs-browning-ferris-decision-yet-another-administrative-law-abuse/#6e927d4541ce.

169. *See, e.g.*, Leef, *supra* note 168.

170. *See* 29 U.S.C. § 151 (2012); *see also National Labor Relations Act*, NLRB, https://www.nlrb.gov/resources/national-labor-relations-act (last visited Jan. 25, 2016).

171. *See supra* Part I.

172. *BFI*, 362 N.L.R.B. No. 186, slip op. at 1. The Board also found that a new standard was warranted because precedent had improperly restricted the joint-employer standard by adding additional requirements that were non-existent three decades ago. *Id.*

173. *See generally* 79 Fed. Reg. 74308–74490 (Dec. 15, 2014).

174. *See, e.g.*, Purple Commc'ns, Inc., 361 N.L.R.B. No. 126 (Dec. 11, 2014).

175. Senator Lamar Alexander's National Labor Relations Board Reform Act, among other things, would amend the NLRA to add a sixth Board member, require that three Board members represent each of the two major political parties, and require that a panel of at least four members hear each case. S. 288, 114th Cong. (2015). Of the four or more members deciding each case, there would have to be an equal number representing each major political party. *Id.* More in-depth discussion of possible solutions to

1. Franchise Relationships

BFI's principal effect is likely to be on franchisor-franchisee relationships. Although *BFI* disclaimed any notion that it "fundamentally alter [ed] the law" with regard to other relationships, including franchisor-franchisee relationships,[176] the decision's implications plainly lower the bar for a future decision that franchisors are liable for franchisee's unfair labor practices and must bargain with labor organizations representing franchisee employees.

Franchising has grown as a method of business expansion and entrepreneurship. In 2005, the franchise model—including its spillover effects, such as purchase of products and services from franchised outlets—represented approximately twenty-one million jobs in the U.S. economy.[177] In 2012, franchisees directly employed 8.1 million workers at 750,000 franchise establishments, accounting for roughly 3.4% of the country's gross domestic product.[178] The sheer numbers involved suggests that the change brought about by *BFI* could have a substantial impact on an important and significant sector of the U.S. economy.

A franchise is a:

> [c]ontinuing commercial relationship where (1) the franchisee distributes goods or services bearing the franchisor's marks or uses the franchisor's marks in the sale of goods or services, and (2) "the franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan or business affairs."[179]

Under most franchise agreements, the franchisor requires the franchisee maintain the integrity of the franchisor's brand—that is, its core products or services—and the goodwill associated with them. In return, the franchisee may open its own business under the franchisor's established brand with the goodwill the franchisor and its existing franchisees have established, with less risk than opening a new, independent business.[180]

Franchisors typically dictate operational controls such as franchise locations, appearance standards, products and services, store hours,

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the longstanding problem inherent in the structure of the NLRB is beyond the scope of this Article.

176. *BFI*, slip op., at 20 n.120.

177. Letter from Jay B. Perron, Vice President, Gov't Relations & Pub. Policy, Int'l Franchise Ass'n, to Barry J. Kearney, Assoc. Gen. Counsel of the Div. of Advice, Nat'l Labor Relations Bd., at 4 (Oct. 29, 2013), http://apps.nlrb.gov/link/document.aspx/09031d45817a8d9e [hereinafter Perron October 2013 letter].

178. Letter from Jay B. Perron, Vice President, Gov't Relations & Pub. Policy, Int'l Franchise Ass'n, to Gary Shinners, Exec. Sec'y, Nat'l Labor Relations Bd., at 1 (June 26, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45817a8d9e.

179. Perron October 2013 letter, *supra* note 177, at 6 (quoting 16 C.F.R. § 436.2(a)(1)(B)(1) (2013)).

180. *Id.*

advertising content, accounting procedures, and training requirements.[181] Indeed, many franchisors, including McDonald's, provide franchisees a full business format that includes marketing plans, operating manuals, and quality control mechanisms.[182] However, franchising typically occurs in situations in which the franchisee and franchisor are physically separate, independent entities, limiting the extent to which the franchisor can comprehensively oversee all aspects of the franchisee's business. *BFI*'s opponents have expressed concern that a franchisor's operational measures and controls designed to protect the brand will now convert franchisors into joint employers of franchisee employees with "dire consequences" for the entire franchise industry.[183] The Board's failure to understand these realities may unfairly impose joint-employer liability for franchisee unfair labor practices. If the Board focuses on whether a franchisor has the right indirectly to control franchisee employees—even if never actually exercised, franchisors also could be forced to join franchisees at the bargaining table.

This is not a merely hypothetical concern. The General Counsel has already filed charges against franchisors as joint employers—most notably, the McDonald's proceedings.[184] In arguing for a change to the joint-employer standard, the General Counsel contended in *BFI* that improvements in technology have permitted franchisors "to exercise indirect control over employee working conditions beyond what is arguably necessary to protect the quality of the product/brand."[185] It is difficult to understand from where the General Counsel derived the specialized expertise to reach this conclusion, or how reverting, as *BFI* did, to the pre-1984 joint-employer standard is the appropriate response to this new technology. Indeed, some of the systems and software that the General Counsel has used to demonstrate that franchisor "indirect control" over franchisee employees extends beyond brand protection are undeniably intended to protect the franchisor's brand—not to assert control, indirect or otherwise, over franchisee employees.[186]

No one can seriously question that there is more to a Big Mac than two all-beef patties, special sauce, lettuce, cheese, etc.[187] McDonald's customers expect not only the same product quality, but also product delivery in the same, consistent quick-service manner—at every

181. *Id.* at 7.
182. *Id.* at 3.
183. *Id.* at 2.
184. *See supra* Part VII.A.2.
185. Amicus Brief of the General Counsel, *supra* note 34, at 15–16 n.32.
186. *See supra* Part VII.A.2 (for example, discussing the *Betts* complaint). To the extent there may be limited effects on franchisee employees' work conditions, these effects are unintended and incidental.
187. *See* VintageTVCommerical, *1975 McDonalds Commercial Two All Beef Patties Special Sauce Lettuce. . .* , YouTube (Mar. 9, 2009), www.youtube.com/watch?v=dK2qBbDn5W0.

McDonald's franchise.[188] This gives McDonald's a vested interest in protecting the goodwill in its Big Mac and the customer's overall experience by requiring that its franchisees have sufficient cooks, counter and dining-room staff, and other employees so that the Big Mac is delivered to the customer in the same timely, high-quality manner McDonald's has spent decades cultivating.[189] Therefore, McDonald's requirement that franchisees use its scheduling software to ensure sufficient staffing for the expected customer experience protects both the product and the brand—in other words, the franchise itself.[190] If a franchisee independently determined when and how many employees to schedule, problems could easily arise. Imagine going into a McDonald's at noon and being told that it would be twenty minutes to get a Big Mac because the franchisee miscalculated staffing needs. Asserting that a franchisor's mandating scheduling software goes beyond what is necessary for brand protection simply ignores these realities.[191]

Franchisors have invested in technology to protect their brands, to support existing franchisees, and to attract new franchisee investors. The facts and circumstances in *BFI* did not justify interfering with these sound business practices, as the decision portends. Moreover, the more important and difficult question left unanswered by *BFI* is this: even if technology has both a brand protection objective and an indirect employee control effect, is one purpose so much more important than the other to warrant imposing joint-employer status, and how is the predominant purpose even determined? The management community notes that the NLRA's preamble also declares the promotion of commerce as among its stated purposes.[192]

There is hope for franchisors, however. Before *BFI*, the General Counsel released a helpful Advice Memorandum in *Nutritionality, Inc.*[193] The memorandum concluded that the franchisor, Freshii, was not a joint employer of franchisee employees under either the pre-*BFI* standard *or* under what became the *BFI* standard.[194] The *Nutritionality* memorandum provides franchisors a roadmap for avoiding joint-employer status under *BFI*.

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188. *See* Perron October 2013 letter, *supra* note 177, at 6.

189. *See supra* Part VII.A.2.

190. *See generally* Perron October 2013 letter, *supra* note 177..

191. Also, a franchisor's requirement that a franchisee use scheduling software protects the brand because it helps ensure that franchisees maintain compliance with certain employment laws—i.e., overtime pay and meal or rest breaks—which, if violated, can tarnish the franchisor's product, brand, and reputation. *See id.*

192. 29 U.S.C. § 151 (2012).

193. Advice Memorandum, Nutritionality, Inc., No. 13-CA-134294 (N.L.R.B. Apr. 28, 2015), http://apps.nlrb.gov/link/document.aspx/09031d4581c23996.

194. *Id.* The General Counsel analyzed *Nutritionality Inc.* under both the then-current joint-employer standard *and* the proposed new standard from the General Counsel's *BFI* amicus brief, which the Board ultimately adopted. *Id.*

The recent *Green JobWorks* and *AGS* RD decisions suggest that *BFI* will not result in near-automatic joint-employer findings.[195] Nonetheless, *BFI* requires franchisors to be much more careful in crafting franchise agreements and adjusting their relationships with franchisees, lest brand protection efforts be transmogrified into joint-employer relationships.

2. Contract Labor Model

In 1990, the temporary services industry accounted for one percent of U.S. employment.[196] By 2000, that number had doubled, and by February 2005, temporary labor and employee leasing providers supplied more than 1.2 million workers to U.S. businesses.[197] The Department of Labor (DOL) reported in June 2014 that U.S. companies use 2.7 million temporary and staffing agency employees—the highest number ever.[198]

BFI involved temporary labor supplied by a separate employer.[199] Thus, *BFI* carries serious implications for the contract labor industry.[200] One commentator observed: "It's hard to imagine a scenario where the use of temporary workers, employees from a staffing agency, many subcontracting relationships, seasonal workforces and day laborers will not automatically bind the supplying and using companies."[201] *BFI* will likely force employers engaged in or contemplating such economic relationships to reevaluate whether contract labor still makes sense for them. *BFI* risks diminishing an important industry that has increasingly created jobs and fueled business for several decades.[202]

3. Other Implications

A. Secondary Activity

Although the Act permits employees to picket or strike against an employer with whom they have a labor dispute, section 8(b)(4) protects neutral parties that merely do business with the "primary" employer[203]

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195. *See supra* Sections V.C.–V.D.

196. Amicus Brief of the General Counsel, *supra* note 34, at 12.

197. *Id.*

198. Petitioner's Opening Brief at 1, *BFI*, No. 32-RC-109684 (N.L.R.B. June 26, 2014), http://apps.nlrb.gov/link/document.aspx/09031d45817b31a9.

199. *BFI*, 362 N.L.R.B. No. 186, slip op. at 2–3.

200. Stacy Cowley, *Labor Board Ruling on Joint Employers Leaves Some Companies Scratching Their Heads*, N.Y. Times (Aug. 28, 2015), http://www.nytimes.com/2015/08/29/business/smallbusiness/labor-board-ruling-on-joint-employers-leaves-some-companies-scratching-their-heads.html?_r=0 (*BFI* "sent a chill through those in the temporary staffing industry").

201. Matthew D. Austin, *NLRB's 'Joint Employer' Test Will Rewrite Labor Law*, Law360 (Sept. 18, 2014), http://www.law360.com/articles/578268/nlrb-s-joint-employer-test-will-rewrite-labor-law.

202. For a discussion of the changing U.S. workforce, see Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 A.B.A. J. Lab. & Emp. L. 53, 54–57 (2015).

203. 29 U.S.C. § 158(b)(4) (2012).

from "secondary activity" that might pressure them to break existing contracts or relationships with the picketed or struck employer.[204]

BFI undermines existing secondary activity protections. *BFI* blurs the line between primary employers and neutral third parties.[205] *BFI* makes it hard to identify legitimate strike targets and makes it harder for neutral parties to challenge unlawful secondary activity. For example, assume a Burger King franchisee in Phoenix is charged with engaging in unfair labor practices, the General Counsel pursues a violation against both the franchisee and the corporate franchisor, and the Board determines the franchisee and franchisor are joint employers. Would that allow a union to picket any Burger King franchisee location anywhere in the United States, simply because all Burger King franchisees have a common joint employer? In other words, if a franchisor is a joint employer with one franchisee, would that mean that any activity directed at any of its franchisees is primary activity? *BFI* makes this possible, even though the absurdity of the proposition should be self-evident.[206]

B. WORKPLACE SAFETY

BFI has also affected the U.S. Occupational Health and Safety Administration (OSHA)—the federal agency charged with investigating and ensuring compliance with workplace safety laws.[207] In August 2015, just before *BFI*, OSHA circulated a memorandum instructing its inspectors to ask franchisees about the extent of franchisor control over workplace safety practices.[208] The memorandum identifies questions for OSHA inspectors to consider in determining whether a franchisor is liable for franchisee workplace safety violations.[209] OSHA inspectors have already issued subpoenas to franchisees for franchisor-promulgated safety policies.[210] *BFI*'s broad joint-employer standard will only reinforce OSHA's August 2015 policy.[211]

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204. *See* Secondary Boycotts (Section 8(b)(4)), NLRB, https://www.nlrb.gov/rights-we-protect/whats-law/unions/secondary-boycotts-section-8b4 (last visited Jan. 25, 2015).

205. *See BFI*, slip op. at 21–22, 40 (Members Miscimarra & Johnson, dissenting).

206. For additional discussion and examples of the impracticalities of the *BFI* joint-employer standard, see *BFI*, slip op. at 37–41 (Members Miscimarra & Johnson, dissenting).

207. *See* 29 U.S.C. §§ 651–678 (2012).

208. *See* Brian Mahoney, *OSHA Probes Franchises on Joint Employment—What Happens After* Browning-Ferris*—More Than One Way to Undermine a Union?*, POLITICO (Aug. 26, 2015), http://www.politico.com/tipsheets/morning-shift/2015/08/osha-probes-franchises-on-joint-employment-what-happens-after-browning-ferris-more-than-one-way-to-undermine-a-union-019788.

209. *Id.*

210. *Id.*

211. *See* Joanne Deschenaux, *NLRB's New Joint Employer Test May Impact OSHA*, SOC'Y FOR HUMAN RES. MGMT. (Sept. 21, 2015), http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/osha-joint-employer.aspx.

C. Misclassification

Before *BFI*, the DOL was working to correct "misclassification" of employees as independent contractors.[212] The DOL seeks to classify more workers as employees based, in part, on its expressed belief that it will better protect employee rights and stabilize unemployment and workers' compensation programs.[213] The DOL's initiative to classify more workers as employees, combined with the NLRB's broad joint-employer standard, concerns employers seeking flexibility in hiring independent contractors. Employers fear that the Board's expansion of joint-employer liability in the labor-relations sphere could result in similar expansion of the employment relationship under other employment laws.

D. Immigration

Under federal immigration law, employers must verify each new employee's identity and employment authorization using the I-9 form.[214] If immigration officials define "employer" similar to *BFI*, multiple businesses may become responsible for completing I-9 forms for the same workers. In fact, Department of Homeland Security investigators already assume that all persons present at a worksite are "employees," regardless of whether they are temporary workers or independent contractors.[215] Unlike the NLRA, regulations governing I-9 requirements contain a specific "independent contractor" definition."[216] They do not, however, define "joint employer."[217]

An employer that fails to complete an employee's I-9 form faces substantial fines or, alternatively, an expensive appeals process.[218] However, an employer that completes I-9 forms for all workers—including contract workers—to avoid potential fines could be found to be conceding that all workers are "employees" under other laws, imposing other sources of liability. *BFI* has placed employers between a rock and a hard place in determining how to comply with immigration laws.

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212. *See* David Weil, Employee or Independent Contractor*?*, U.S. Dep't of Labor Blog (July 15, 2015), https://blog.dol.gov/2015/07/15/employee-or-independent-contractor/.

213. *Id.*; *see also* Sprague, *supra* note 202 (discussing shifts in the economy toward greater use of independent contractors).

214. *I-9, Employment Eligibility Verification*, U.S. Citizenship & Immigration. Servs. (May 8, 2013), http://www.uscis.gov/i-9.

215. *See* Valentine A. Brown, *The* Browning-Ferris *Effect: I-9 Enforcement Actions*, Law 360 (Nov. 13, 2015), http://www.law360.com/articles/726299.

216. *See Who Needs the Form I-9*, U.S. Citizenship & Immigration Servs. (Nov. 9, 2015), https://www.uscis.gov/i-9-central/complete-correct-form-i-9/who-needs-form-i-9.

217. *See id.*

218. *See* Brown, *supra* note 215.

Conclusion

It likely will be years before *BFI*'s long-term effects are fully realized. With *BFI*'s pending appeal and legislative challenges, the Board's reformulated joint-employer standard may not stand. Although it may be premature for employers—particularly franchisors and contract labor users—to panic and too early for unions to celebrate, *BFI* heralds a substantial shift in NLRB joint-employer jurisprudence. This shift could have serious and diverse ramifications for labor-management relationships, for franchised operations, and for the economic relationships of employers that contract with other firms for labor.