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I. EXECUTIVE SUMMARY

The Protecting Local Business Opportunity Act is a simply-worded amendment to the National Labor Relations Act (the "NLRA" or "Act") that would accomplish far more than its name and simplicity suggest. It would require the National Labor Relations Board (the "NLRB" or "Board") to give the term "employer" its ordinary meaning – as Congress intended – not the "far-fetched" one that the Board just adopted in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (August 27, 2015) ("*BFI*"). Although the Board's new standard might serve a political agenda in the short run, in the long run, it will cause serious damage to large sections of our economy and to the Act itself.

Notably, the Act never references the term "joint employer," and expressly limits the Board's ability to certify bargaining units to groups of individuals who are employed by a single employer. 29 U.S.C. § 151, *et seq.* The Board, however, recognized the reality that two entities could, in fact, exercise such control over a group of employees' terms and conditions of employment that, collectively, the two employers should be deemed "the employer" of those employees. Initially, the Board applied the approach to situations where the two entities were not truly separate, and developed the "single employer" test for such situations. In the 1960s, the Board expanded on that approach by recognizing that wholly distinct business entities could, despite their separate identities, collectively control as a "joint employer" a group of employees' terms and conditions of employment. The Board, however, failed to articulate any consistent standard for determining when two entities would be found to be a joint employer. The lack of any readily identifiable standard led to confusion, even by the Board. *See, e.g., NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117 (3rd Cir. 1982) (noting that "there has been a blurring of these concepts at times by some courts and by the Board).

The Board soon adopted the standard articulated in the Third Circuit's 1982 *Browning-Ferris Industries* decision and applied it consistently for more than thirty years. In its recent *BFI* decision, however, the Board reversed thirty years of established labor law to adopt a new but amorphous standard for determining when two legally separate companies jointly employ a group of employees. In particular, the Board adopted a two-part test. The first part of that

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test is, itself, a multi-factor test that the Board asserts determines whether a "common law employment relationship" exists between a particular group of workers and the putative joint employer. If so, and "the putative joint employer possesses sufficient control over those employees' essential terms and conditions of employment to permit meaningful collective bargaining," then both employers will be deemed to jointly employ the unit of employees. *Id.* at p. 2. The common law employment test the Board adopted, however, is not particularly helpful for identifying "the employer" of a group of employees because that was not the purpose it was developed to serve. That test was not developed to identify which one (or more) of several entities was an individual's employer, but to determine whether an individual was an employee or an independent contractor.[2] When there is no dispute that the workers in a group are, in fact, employees of some entity, many of the factors of the common law test are already satisfied and provide no meaningful guidance to help determine which particular entity (or entities) is (or are) their employer(s). Also, the common law test the Board purportedly incorporates was rooted in judicial efforts to resolve questions of liability for the torts committed by individuals while acting on behalf of others, not in any effort to define statutory employer-employee relationships. Indeed, the unique nature of the NLRA, which grants and protects the rights to employees as a group, not as individuals, makes the application of the Board's proposed test ill-suited to the purposes of the Act and yields results antithetical to the Act's goals.

In addition, the Board's decision in *BFI* fails to provide any guidance as to how the common law test is to be applied. It does not, for example, explain how its particular factors are to be weighed and balanced. It provides no help to employees, employers, unions, or the Board's own regional directors in enabling them to determine, with any reasonable certainty, what entity is, will or should be deemed to be a joint employer. Instead, *BFI* holds that an entity's indirect control over another's workers is sufficient *in itself* to render that entity a joint employer of the employees. *BFI* also dictates that the theoretical ability one entity has to control another's workers, even if not exercised, is also sufficient to establish a joint employer relationship. Indirect control and the unexercised theoretical potential to control another company's workers are inherent aspects of almost every business relationship where one entity provides goods or services to another. Moreover, the right to control the workers of another company is always inherently reserved *by operation of law* to any business that owns or leases property on which another company's workers perform their jobs. Obviously, the extent of such indirect control or unexercised right to control varies dramatically in business relationships. *BFI* gives employers, employees and unions no basis for guessing how much indirect control or reserved but unexercised right to control will be deemed sufficient by the NLRB to find that two entities are joint employers.

[2] *Cf. Clackamus Gastroenterology Associates v. Wells*, 538 U.S. 440, 444 n.5 (2003) (in coming as close as the Court ever has to defining the term "employer" under a labor or employment law, the Supreme Court concluded that the common law factors for determining whether an individual is an employee [the factors the Board's new standard expressly adopts] were "not directly applicable to this case [under the Americans with Disabilities Act] because we are not faced with drawing a line between independent contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer").

Being able to determine, with a degree of certainty, the statutory "employer" of a particular unit of employees is crucial under the NLRA for employers, employees, and unions alike. Without reasonable certainty, companies will be unable to know what legal rights and obligations they have and what risks they have assumed. Without being able to identify their employer with reasonable certainty, employees will not know the extent of their rights under the Act, and unions will not know whether their picketing is legal or illegal under the Act. The lack of reasonable certainty will, in itself, have profound economic consequences on businesses that cannot make rational decisions in the marketplace because they have no meaningful standards to apply in assessing their potential costs, risks and rewards. This lack of certainty will adversely affect all businesses, and will disproportionately affect small businesses and franchisees by adding yet another layer of legal complexity and expense to their entrepreneurial efforts. The latter comprise the segment of the employer community that has led the country in creating jobs, and in providing the greatest opportunity for women and minorities to move from being employees to becoming business owners. Moreover, that same lack of certainty undoubtedly will lead to a serious instability in labor relations, undermining the most fundamental purpose of the Act.

For more than thirty years, the Board has provided that stability by giving all of its stakeholders the ability to know, with reasonable certainty, who employed any particular group of workers. The Board's prior standard deemed two separate entities to be joint employers of a unit of workers if they shared, or co-determined, "the essential terms and conditions of employment" of those workers in a manner that "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *TLI, Inc.*, 271 NLRB 798 (1984). Moreover, the Board provided further clarity to that standard by requiring that the putative joint employer's control over the employment matters was direct and immediate. *Id.* (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

Remarkably, the Board's stated reason for overturning the stability that its thirty-year old standard had provided is to address what it perceives to have been the prior standard's failure to "keep pace with changes in the workplace and economic circumstances" in light of the "more than 2.87 million of the nation's workers employed through temporary agencies."[3] However, the standard the Board has been applying for the past thirty years already provided that protection. Under the pre-*BFI* standard, contingent employees of one company who worked at another and were under the second company's direct supervision – as is almost always the case – already would have been deemed to be jointly employed by both companies. No change in the standard was necessary for the Act to accommodate the changes in employment patterns that the Board posits as the rationale for its radical revision of a long-settled standard. In the absence of any legitimate rationale, the unquestionable dislocation and uncertainty that will ensue by such revision cannot be justified.

[3] *Board Issues Decision in Browning-Ferris Industries*, Aug. 27, 2015; https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries.

Unless Congress acts through this proposed amendment, it will take years of litigation and untold cost to determine how the NLRB will apply its new standard to the diverse business arrangements that exist today. In the meantime, the economy – and the fundamental purposes of the Act itself – will have been seriously damaged.

II. ANALYSIS

A. For Thirty Years Before *BFI*, The Board Applied A Clear And Appropriate Standard For Determining Joint Employer Status.

For more than three decades before *BFI*, the Board provided stability in labor relations for all parties by applying a clear and appropriate standard for determining when two separate entities were joint employers under the Act. That standard required that each entity exert direct and significant control over the same employees such that they "share or codetermine those matters governing the essential terms and conditions of employment . . ." *TLI, Inc.*, 271 NLRB 798, 798 (1984). The Board applied that test by evaluating whether the putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction" and whether that entity's control over such matters is direct and immediate. *Id*, (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

By tying joint employer status to direct and immediate control over the fundamental aspects of the employment relationship – hiring, firing, discipline, supervision and direction – the Board's pre-*BFI* standard ensures that the joint employer is actually involved in matters material to the scope of the Act, and is not merely engaged in a market relationship that may have an indirect impact upon employees. Additionally, by requiring that the control be direct and immediate, the standard assigns joint employer status only to those entities with the actual authority to impact the employment relationship, the singular focus and subject matter of the Act.

In articulating the joint employer standard in *Laerco* and *TLI*, the Board provided further clarity by applying it to the detailed, particular facts of each case. *Laerco* involved a group of drivers that another company, CTL, supplied to it under a cost-plus contract. 269 NLRB 324, 325 (1984). CTL made all the decisions regarding hiring, discipline and discharge of the drivers it provided. *Id* at 324-25. CTL also made all legally-required contributions and deductions from the drivers' paychecks and provided them with benefits. *Id.* at 325. Once a driver was assigned to a Laerco facility, CTL representatives sometimes provided the driver with his or her initial job duty instructions; however, other times Laerco provided those initial instructions alone or with CTL representatives. *Id.*

Beyond occasionally providing CTL's drivers with their initial instructions, Laerco supplied the drivers' vehicles and required them to comply with Laerco's safety regulations. *Id.* at 324. Under Laerco's contract with CTL, Laerco was permitted to establish driver qualifications and refuse to accept any drivers provided by CTL. *Id.* On occasion, Laerco

pointed out issues regarding the drivers' performance to CTL, which CTL then resolved. *Id.* at 325. CTL supervisors were seldom at the Laerco facilities to which CTL assigned its drivers, so Laerco provided what little supervision the CTL drivers needed, such as directing them where to go for a pick-up or delivery and setting the drivers' priorities. *Id.* Laerco would attempt to resolve minor problems that arose for the drivers in the workplace, but CTL handled any significant issues. *Id.* at 326.

In reviewing the facts of the case, the Board noted:

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. *[Citing Biore v. Greyhound Corp.*, 376 U.S. 473 (1964) and *NLRB v. Browning-Ferris Industries,* 691 F.2d 1117 (3d Cir. 1982)] Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

Id. at 325.

Examining the facts before it in *Laerco,* the Board held that the level of control exercised by Laerco was inadequate to establish that Laerco and CTL functioned as a joint employer. *Id.* Although Laerco provided some supervision of the CTL drivers, it was "of an extremely routine nature" and "the degree and nature of Laerco's supervision" failed to render it a joint employer. *Id.* at 326. Moreover, while Laerco exercised some control in resolving minor issues raised by CTL's drivers, "[a]ll major problems relating to the employment relationship" were handled by CTL. *Id.* Consequently, the Board concluded that Laerco was not a joint employer because its control of the CTL employees' terms and conditions of employment was not meaningful, given "the minimal and routine nature of Laerco's supervision, the limited dispute resolution attempted by Laerco, [and] the routine nature of the work assignments." *Id.*

TLI, Inc. also involved a situation where one company, TLI, provided drivers to another company, Crown. 271 NLRB 798 (1984). Each day, Crown directed the drivers as a group about which deliveries to make, but the drivers selected their specific assignments based on seniority. *Id.* at 799. The drivers reported their accidents to Crown; however, TLI investigated the accidents and determined whether discipline was warranted. *Id.* When a driver engaged in conduct that concerned Crown, Crown would give an incident report to TLI and TLI conducted its own investigation. *Id.* Crown did not hire, fire or discipline TLI's employees. *Id.*

The Board analyzed these facts under the standard set forth in *Laerco* and the Third Circuit's 1982 *Browning-Ferris* decision and determined that "[a]lthough Crown may have exercised some control over the drivers, Crown did not affect their terms and conditions of employment to such a degree that it may be deemed a joint employer." *Id.* The Board found that Crown's daily supervision was not "meaningful": "the supervision and direction exercised by Crown on a day-to-day basis is both limited and routine, and considered with [Crown's] lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint employer finding." *Id.* (emphasis added). Furthermore, even though a Crown representative actually attended bargaining sessions between TLI and the union and discussed cost savings, the Board found his involvement did not amount to sharing or co-determining terms and conditions of employment because the Crown representative left the actual savings determinations to TLI and the union. *Id.*

The standard articulated by the Board in *Laerco* and *TLI* is clear, rational and withstood the test of time for thirty years. Indeed, the Board's direct control standard was "settled law" since 1984, until August 27, 2015. *See Airborne Express*, 338 NLRB 597, n.1 (2002). Over that span of years, the Board developed a coherent body of law from *Laerco* and *TLI* that elucidates the facts, circumstances and scenarios under which an entity becomes a joint employer.[4] Reviewing courts likewise have adhered to the Board's

[4] *See, e.g., Aldworth Co.*, 338 N.L.R.B. 137, 139-40 (2002) (affirming ALJ's finding of joint employer relationship because "[b]ased upon a thorough review of the record, the judge determined that Respondents Aldworth and Dunkin' Donuts together share control over the hiring, firing, wages, benefits, discipline, supervision, direction and oversight of the truck drivers and warehouse employees and thereby meet the standard for joint employer status"); *Mar-Jam Supply Co.*, 337 N.L.R.B. 337, 342 (2001) (affirming finding of joint employment after analyzing all terms and conditions of employment and finding that putative employer directly hired and fired employees, solely supervised and directed the employees with regard to work assignments, time, attendance and leave, and disciplined the employees); *C. T Taylor Co.*, 342 N.L.R.B. 997, 998 (2004) (affirming finding of no joint employment where none of essential terms and conditions of employment were controlled by putative employer); *Mingo Logan Coal Co.*, 336 N.L.R.B. 83, 95 (2001) (stating that the putative joint employer meaningfully affected all five essential terms and conditions of employment); *Villa Maria Nursing and Rehab. Center, Inc.*, 335 N.L.R.B. 1345, 1350 (2001) (affirming finding of no joint employer relationship where "Villa Maria does not have any authority to hire, fire, suspend or otherwise discipline, transfer, promote or reward, or lay off or recall from layoff ServiceMaster's employees. Villa Maria does not evaluate them or address their grievances."); *Windemuller Elec., Inc.*, 306 N.L.R.B. 664, 666 (1992) (affirming ALJ's finding of joint employment based on facts that putative joint employer shared or co-determined hiring, firing, discipline, supervision and direction); *Quantum Resources Corp.*, 305 N.L.R.B. 759, 761 (1991) (affirming joint employer finding and specifically adding to Regional Director's decision that FP&L's control over hiring, discipline, discharge and direction "[t]ogether with the close supervisory relationship between FP&L and [contract] employees ... illustrate[s] FP&L's joint employer status"); *D&S Leasing, Inc.*, 299 N.L.R.B. 658, 659 (1990) (finding joint employment based on facts that putative joint employer shared or co-determined the hiring, firing, discipline, supervision and direction of contract employees); *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 1000 (1988) (affirming joint employer finding based on fact that G. Heileman shared or co-determined all five essential terms and conditions of its contract employees' employment, and in addition negotiated directly with the union); *Island Creek Coal*, 279 NLRB 858, 864 (1986) (no joint employer status because there was "absolutely no evidence in this record to indicate that the normal functions of an employer, the hiring, firing, the processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leaves of absences, were in any way ever performed by [the putative joint employer]).

bright-line test for decades. [5]

The stability and predictability provided by the Board's pre-*BFI* standard has allowed thousands of businesses, large and small, to structure their business relationships in a sensible and optimal fashion, subcontracting discrete tasks to other companies with specialized expertise to provide services that would otherwise be far more difficult or costly. At the same time, that joint employer standard did not deny any employee the right to union representation granted by the Act, nor prevent any union from bargaining with the employer directly involved in setting the terms and conditions of employment in a workplace.

B. The *BFI* Standard For Determining Joint Employer Status Is Amorphous And Contrary To The Language, Legislative Intent And Fundamental Policies Of The Act.

As the Supreme Court has opined, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317-18 (2012) (holding due process required fair notice even when regulations imposed no criminal penalty or monetary liability). Inherent in the notion of due process is the requirement that the obligation be clear enough that citizens can reasonably ascertain to whom it applies.

The "standard" the Board adopted in *BFI*, however, is no standard at all; rather, it merely provides for the NLRB to make post-hoc conclusions drawn after results-oriented inquiries. It fails to explain how the common law test – which was never developed to resolve disputes about which entity was an individual's employer – is to be applied to any of the numerous business arrangements that pervade our economy, much less, how any particular factor is to be weighed and the scales balanced. Absent such guidance, that standard fails to provide the notice required by due process.

Rather than provide meaningful guidance that reasonably limits the new joint employer standard, the Board has demonstrated through other recent cases that its view of that standard

[5] *See, e.g., SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding that supervision which is "limited and routine" in nature does not support a joint employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.") (citation omitted); *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (finding no joint employment where only one indicium of control (participating in the collective bargaining process) existed and there was no direct and immediate control over hiring and firing, discipline, supervision or records of hours, payroll, or insurance); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (finding joint employer status where the putative joint employer had "unfettered" power to refuse to hire certain employees, monitored the performance of referred employees, assumed day-to-day supervisory control over such employees, gave such employees their daily assignments, reports, supplies, and directions, and held itself out as the party whom employees could contact if they encountered a problem during the work day); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (finding joint employer status where the putative joint employer "exercised substantial day-to-day control over the drivers' working conditions," was consulted "over wages and fringe benefits for the drivers," and "had the authority to reject any driver that did not meet its standards" and to direct the actual employer to "remove any driver whose conduct was not in [the putative joint employer's] best interests.").

is expansive and untethered to either the clear language or the intent of the NLRA. In *CNN America, Inc*., 361 NLRB No. 47 (2014), for example, the Board found CNN to be a joint employer of employees provided by a contractor (TVS), **despite the fact that the Board had certified TVS as "the employer" of those employees some 20 years earlier**. As noted above, the Act envisions that a group of employees has one and only one employer. Although two employers can be deemed to jointly employ a group of employees, it belies the language and purposes of the Act for the Board to ignore its own certification as to who is "the employer" of a group of employees. The Board has processes that can be used to modify a certification when economic situations change, but, in the absence of the certification being modified, employers must be able to rely on the Board's certification to conclude whether they are, or are not, the employer of any particular group of employees.[6] Yet, despite its own certification to the contrary, the *CNN* Board found CNN to be a joint employer liable for back pay awards for approximately 300 highly-compensated individuals for up to a ten-year period of time. If a Board certification of employer status can be ignored at the whim of a subsequent NLRB on a joint employer theory, then it will be, as a practical matter, impossible for employers to determine their rights and potential obligations under the Act. Moreover, the ten-year lapse of time it took the Board to resolve *CNN* is indicative of the lengthy delays we can expect before countless dollars are spent by employers to figure out what the parameters of the Board's new joint employer standard are.

Indeed, the *BFI* standard is incapable of clear application because business relationships today typically involve an agreement or physical realities that necessarily but indirectly result in one entity impacting the terms and conditions of employment for the other's employees. Service contracts, in particular, often involve significant control by the customer over the service provider and, when services are performed on the customer's property, the amount of control is even greater. That control, in turn, can indirectly impact the service provider's employees' terms and conditions of employment. Hours the services are performed, the skills of the individuals who will perform them and conduct requirements to ensure the customer's employees, property and its own customers are reasonably protected – not to mention the amount the customer is willing to pay for the services – all necessarily impact the service provider's employees' terms and conditions of employment. Under the Board's new test, the customers in such cases apparently would be deemed to jointly employ the service providers' employees. Yet, it would be absurd to treat a homeowner as the joint employer of the workers a contractor hires to remodel her home simply because she and the contractor have agreed to a specified amount she will pay for the services, she controls the location, environment and hours where and when the work will be performed, and what the individual must do to leave her home clean and free of hazards at the end of every day.

The Board's assertion that its indirect control test is limited because it applies only to common law employees is simply incorrect given that the multi-factor test it adopted provides no basis for determining who an employee's employer is. Moreover, the fact that the Board

[6] A union or employer, for example, may file an "AC Petition" asking the Board to modify a prior certification. NLRB's *Rules and Regulations*, 29 C.F.R. § 102.60(b).

applied that test on the facts of this case demonstrate that the purported common law test can be manipulated to find almost any company is a joint employer if it contracts with another for services to be rendered on its property. In particular, Leadpoint hired, fired, disciplined, paid and supervised its employees. Yet, it provided services that were part of BFI's business operation on its property during hours BFI mandated the services be performed, and the Board had no difficulty concluding that BFI was a joint employer of Leadpoint's workers under its new standard.

1. The *BFI* Standard Would Violate The Clear Provisions And Dictates Of The Act.

Although the Supreme Court has never defined the term "employer" under the Act, it has made it abundantly clear that an employment relationship is defined by direct supervision of the putative employee. *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167-68 (1971). And in *Allied Chemical*, the Court rejected the Board's attempt to expand the definition of the term "employee" beyond its ordinary meaning, observing that

> "It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . *"Employees" work for wages or salaries under direct supervision.* . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings, but ordinary meanings."

Id. at 167-68 (quoting H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis in original)). Just as the Board cannot define the term "employee" in a manner inconsistent with its ordinary meaning, it cannot adopt a "far-fetched" definition of "employer" that dramatically expands it by eliminating the fundamental touchstone of an employer-employee relationship; namely, direct control of the employee.[7] *Cf. NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (6th Cir. 1995) ("The deference owed the Board . . . will not extend, however, to the point where the boundaries of the Act are plainly breached."). If Congress meant "employee" to be defined by the fact that she is directly controlled by her employer, it is axiomatic that Congress meant

[7] Similarly, Congress limited the Board's ability to certify a unit of employees employed by more than one company in requiring that all employees in a unit be employed by a single employer. *Oakwood Care Ctr.*, 343 NLRB 659 (2004). Obviously, had Congress intended to allow for the certification of a unit of workers with different employers, it would have done so by simply adding the two words, "or employers," to Section 9(b). As noted above, the Board has overcome this limitation by utilizing the fictional "joint employer" entity. That fiction, as it has been applied historically, may be consistent with Congressional intent. But the fiction that two wholly separate companies constitute a "joint employer" entity cannot be legitimately extended as far as the Board directs in *BFI* such that it includes as a joint employer any entity that has the right to control some terms and conditions of another's employees without ever having exercised that right. Such a definition is inconsistent with any reasonable interpretation of what Congress meant by using the singular term, "the employer," in the Act.

"employer" to be the person who directly controls the employee. Moreover, the Act clearly limits the certification of any bargaining unit to employees of a single employer. Although the Board has developed the fiction of a single, joint employer, to be consistent with the dictates of the Act, its new approach in BFI is utterly inconsistent with the clear language of the Act and its policies and purposes.

2. The *BFI* Joint-Employer Test, In Practice, Will Undermine The Act's Purpose Of Encouraging Effective Bargaining.

When Congress adopted the Act, it made clear its primary purpose was to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. As noted above, however, a series of cases that had expanded the Act's reach beyond what Congress intended caused Congress to revisit and substantially revise the Act in ways that directly or practically limited the process of collective bargaining. For example, Congress amended the Act to protect employee rights to *not* engage in collective bargaining or otherwise support unions and it made clear that the Act's reach was not as extensive as the Board and Court seemed to believe. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (amending 29 U.S.C. § 157). Another limiting change Congress made through the Taft-Hartley Act was to preclude the Board from certifying a unit based solely on the extent to which a union had been successful in organizing; instead, the unit must be appropriate for bargaining. 29 U.S.C. § 159(c). Clearly, the purpose of the Act today is not merely to encourage collective bargaining for its own sake but, rather, to encourage collective bargaining that can *meaningfully* address the workplace concerns of a group of an employer's employees that shares a community of interest.

In *BFI*, however, the Board failed to recognize the obstacles created by forcing two different businesses to bargain over the terms of employment for a group of employees only one of them directly controls. Proposed contract terms that might be crucial to one of the joint employers, and for which it might be willing to make significant concessions, might be irrelevant to, or contrary to the interests of, the other. Moreover, some issues that might be significant to the union, and which might be acceptable to the direct employer if negotiating alone, likely will be barriers to any agreement in a joint-employer situation because the direct employer will not agree to be bound to certain terms when its contract with the other joint employer can be terminated on short notice. It belies logic to assume that, simply because unions want to have both businesses at the bargaining table, more effective bargaining will result. Indeed, precisely the opposite is true.

Viewed in practical terms, the Board's new standard is plainly intended, and will inevitably result in changes in the way the two businesses negotiate with one another and structure their own *business relationship*, far more than it will facilitate how an employer and its employees negotiate and order their *employment relationship*. Congress has made the latter the focus of the Act and its regulation the proper function of the Board. Congress, however, in no way has authorized the Board to unnecessarily interfere, impair, or invalidate business

to business relationships. Yet, under the Board's new standard, a general contractor easily could be deemed the joint employer of its subcontractor's employees and, if the subcontractor's employees are unionized, the general contractor and now joint employer could be limited in terminating its relationship with the subcontractor, and have an obligation to bargain with the union before doing so.

The problems for effective bargaining caused by forcing two different business entities into a bargaining relationship are clear because:

> [T]he interests of [the] employers will [] necessarily conflict. Unlike joint employers that have explicitly or tacitly agreed to a common undertaking, here the employers are buyer and seller, roles that are complementary in some respects and clearly conflicting in others. Each derives some benefit from the other. However, only the user employer derives the ultimate profit from the work of the employees; the supplier is merely one of many resources utilized in the user's enterprise. The structure of the relationship between these employers is voluntary and contractual . . . . Requiring that the employers also engage in involuntary multiemployer bargaining injects into their relationship duties and limitations beyond those established and allocated in their agreement, creating severe conflicts in the underlying business relationship and rendering impossible the productive collective bargaining the majority envisions.

M.B. Sturgis, 331 NLRB 1298, 1320-21 (2000) (Member Brame, dissenting) (citations omitted). Although *Sturgis* involved true multi-employer unit considerations, the Board's new joint-employer test would result in nothing more than deeming a multi-employer unit a joint-employer unit by adjudicatory fiat. And, regardless of whether the Board decides to call two different business entities a "joint employer" even though one does not exercise direct control over the other's employees, the practical problems that will arise in collective bargaining are no less real than those that exist in what the Board currently recognizes as a multi-employer unit.

3. The *BFI* Joint-Employer Test, In Practice, Will Eviscerate The Protections Afforded In Section 8(b)(4) of the Act.

Congress fundamentally re-structured the NLRA in 1947 with the passage of the Taft-Hartley amendments. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947). The amendments, for the first time, delineated certain actions by unions that would henceforth constitute unfair labor practices. Chief among these was a new prohibition against unions engaging in secondary boycotts. The statutory prohibition and resulting protections are contained in Section 8(b)(4) of the Act, as amended. 29 U.S.C. § 158.

The Act reflects the understanding of Congress that employees and unions are entitled to, and will, engage in various activities including handbilling, picketing and

striking to influence employers through the economic pressure attendant to such activities. However, Congress has also expressly recognized, in particular by enacting Section 8(b)(4), that the right to exercise such economic leverage is not unlimited, and must be closely regulated. When the immediate target of that economic pressure is the employer with whom the employees have a direct employment relationship and/or a labor dispute, that employer is deemed to be the "primary employer" and the handbilling, picketing and striking is thus deemed to constitute legitimate primary activity. When, however, the target of the economic pressure is an employer that has a business relationship with the primary employer, that employer is deemed to be a "secondary" or "neutral" employer, and activity is deemed to be "secondary" and outlawed by Section 8(b)(4).

In enacting Section 8(b)(4) Congress made clear that direct, primary activity was legitimate and lawful. It made equally clear, however, that secondary pressure aimed against neutral employer with the object of causing that employer to adversely alter its business relationship with the primary employer is unlawful. The prohibitions against secondary activity in Section 8(b)(4) are designed to protect secondary or neutral employers from being enmeshed in the labor disputes of the primary employer.

The Board's new joint employer standard would destroy the concept of "neutrality" by finding the secondary employer to be a joint employer whenever the primary employer is economically dependent on the secondary employer. That would be so even though the secondary employer has no ability or authority to control the employees' terms and conditions of employment or to remedy the union's labor dispute. Under the proposed standard, the secondary employer would become a joint employer with the primary employer and the protections that Congress specifically added to the Act through the enactment of Section 8(b)(4) would become meaningless.

4. The *BFI* Joint Employer Test Will Impose Massive Costs On Businesses That Do Not Directly Control The Daily Operations Of The Other Joint Employer.

Saddling a putative joint employer with all of the duties and responsibilities required of direct employers under the Act could have enormous financial and time-consuming consequences. For example, large-scale franchisors who retain only the control required to protect their brand, trade name and trademark could be drawn into hundreds of collective bargaining relationships where they have little or no involvement with the workplace. Additionally, joint employers with limited involvement in the workplace would be required by Section 8(a)(5) to execute bargaining agreements and subject themselves to contractual and unfair labor practice liabilities without having any control over day to day operations at myriad locations throughout the country. Rather than accept such liabilities with no control over the workplace, or engage in endless bargaining across the country, many companies undoubtedly will opt to cancel subcontracts or franchise arrangements, or subcontract overseas, thus displacing small businesses and the millions of jobs that small businesses

create. The impact upon the economy of the Board's misguided new standard will be as consequential as it is harmful.

III. CONCLUSION

The rationale that led the Board, three decades ago, to adopt a direct control standard remains fully applicable today. No new facts or industrial developments justify abandoning that test, and the language, legislative history and purpose of the Act militate against the purported "standard" the Board adopted in BFI. That new standard sweeps too broadly and will enmesh separate businesses with different interests in bargaining relationships that will render meaningful negotiations far more difficult, result in far greater situations of impasse in negotiations, and not benefit employees. It would create massive uncertainty throughout large segments of American industry and would cause significant economic upheaval. Moreover, it is not justified by the reason the Board identified for the change because contingent workers are already afforded the full protection of the Act.

The Board's adoption of the new standard is particularly troubling given that it creates a host of practical and legal issues without recognizing them, much less addressing them or providing guidance as to how the amorphous standard might apply. Companies will learn for the first time that they are supposedly the joint employer of workers who are employed by wholly separate businesses when they face prosecution by the federal government for unfair labor practices they did not commit, or that only the employer of a group of workers' could have committed. Without prior notice, the Board can subject them to bargaining obligations and liabilities, and deprive employees of the right to decide that they want a union to represent them in their dealings with this newly-discovered employer.

The Amendment would restore the standard for determining when a particular group of workers is, for purposes of the Act, jointly employed by more than one company. The Board had used that standard consistently for more than thirty years and it is a standard that gave the term "employer" its ordinary meaning, not a "far-fetched" one that serves short-sighted political goals but undermines the Act. Congress should act quickly to restore the labor stability that the Board's *BFI* decision has thrown into turmoil before that decision causes the serious damage that will otherwise be its inevitable consequence.