NEW YORK STATE BAR ASSOCIATION

LABOR AND EMPLOYMENT LAW SECTION

Fall Meeting

ITHACA

September 20-22, 2019

Statler Hotel at Cornell University

130 Statler Drive

Ithaca, New York

www.nysba.org/LABRFA19

Fall Meeting 2019

Labor & Employment Law Section

September 20-22, 2019

Statler Hotel at Cornell University
130 Statler Drive | Ithaca, NY

Thank You! This program is made possible by the generous donation of time and expertise by members and volunteers. Thank you to our volunteers—and to you, for choosing NYSBA Programs.

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

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New York State Bar Association

ACCESSING THE ONLINE ELECTRONIC COURSE MATERIALS

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

> The course materials may be accessed online at:
> www.nysba.org/LABRFA19Materials

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **Labor and Employment Law Section Fall Meeting**
Date/s: September 20-22, 2019 Location: Ithaca, NY

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_5mwA8e69dqPOQRf
This evaluation survey link will be emailed to registrants following the program.

Total Credits: **7.0**

Credit Category:
5.5 Areas of Professional Practice
1.5 Ethics and Professionalism

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys participating via recording or webcast should refer to www.nycourts.gov/attorneys/cle regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

ADDITIONAL INFORMATION AND POLICIES

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

Newly admitted attorneys (admitted to the New York Bar for less than two years) may not be eligible to receive credit for certain program credit categories or formats. For official New York State CLE Board rules, see www.nycourts.gov/attorneys/cle.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or the NYSBA Member Resource Center at (800) 582-2452 (or (518) 463-3724 in the Albany area).

FALL MEETING PLATINUM SPONSORS

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Coughlin & Gerhart LLP
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FRUMKIN & HUNTER LLP

Labor & Employment Law Section Chair
Alyson Mathews, Esq., Lamb & Barnosky LLP, Melville

CLE Committee Program Co-Chairs
Robert L. Boreanaz, Esq., Lipsitz Green Scime Cambria LLP, Buffalo
Abigail Levy, Esq., New York City Office of Collective Bargaining, New York City
Christopher A. D'Angelo, Esq., Consolidated Edison Company of New York, Inc., New York City

TOTAL CLE CREDITS: Under New York's MCLE rule, this transitional program has been approved for a total of **7.0 MCLE credits** consisting of 5.5 credits in Professional Practice and 1.5 in Ethics for all attorneys including newly admitted.

HOTEL INFORMATION/RESERVATIONS:

Statler Hotel
130 Statler Drive, Cornell University, Ithaca, New York 14853
Book Your Lodging via the Hotel Reservation Link at: www.nysba.org/LABRFA19

Hotel Reservation Deadline: August 28. Room availability is not guaranteed – please book early, rooms sell out quickly at this venue.

Hotel Rate for Traditional Guestrooms:
$245 Single/Double plus taxes/fees. Check in is 3:00 p.m.; check out: 12 noon.
Hotel Parking: $12 per night self-parking or valet. Parking for commuters is available for $14 per day.
The Hoy Parking garage is just down the street from the Statler. Parking passes may be purchased at the Parking Booth on Hoy Road or you may or contact the Office of Visitor Relations at 607-254-4636, Monday through Friday, for parking information.

Getting to the Statler Hotel and Around Ithaca

Ithaca Tompkins Regional Airport (ITH) offers daily flights to and from Washington Dulles, Detroit and Philadelphia (www.flyithaca.com). The Statler Hotel offers a complimentary shuttle to and from the Ithaca Tompkins Regional Airport. The operational hours are from 7:00 a.m. until 12:00 Midnight. Please email frontoffice@sha.cornell.edu or call 607-254-2500 in advance to schedule your shuttle pick-up. Departure requests can be handled at the hotel front desk upon check in. The shuttle clearly marked with the hotel's logo will be parked outside of the baggage claim area at the airport. Exit the building and approach the shuttle when you arrive. If you are waiting for checked bags, please introduce yourself to the van driver. He/she will be happy to wait for you. The Statler tracks the flights into Ithaca and will plan scheduled trips accordingly. If you do not see the van outside of the airport after a reasonable amount of time, please call the hotel at 607-254-2500.

Transportation within the City: Uber and Lyft; Collegetown Cab: 607-588-8888; University Taxi: 607-277-7777; Cayuga Taxi: 607 277-TAXI (8294); Yellow Taxi: (607) 277-CABS (2227). Various Bus Routes also service the downtown area from the Cornell campus, visit: www.tcatbus.com for route information.

Additional ground transportation information may be found at www.flyithaca.com/ground.

Finger Lakes Region Information:
www.visitfingerlakes.com
www.cayugawinetrail.com

Information on Cornell University and/or the City of Ithaca May Be Found At:
www.visitithaca.com
www.downtownithaca.com
www.cornell.edu

SCHEDULE OF EVENTS

Friday, September 20

11:00 a.m. — **Registration** – Carrier Ballroom Foyer, Second Floor

11:00 a.m. – 12:15 p.m. — **Lunch** – Carrier Ballroom Foyer, Second Floor
Boxed lunches are provided for registered attorneys only as part of their meeting fees.

12:15 – 3:00 p.m. — **GENERAL SESSION** – Carrier Ballroom, Second Floor
Wifi Sponsored by Greenberg Burzichelli & Greenberg P.C.

12:15 – 12:30 p.m.

Section Welcome
Alyson Mathews, Esq.
Section Chair

Program Welcome
Abigail Levy, Esq.
CLE Committee Program Co-Chair

12:30 – 1:45 p.m. — **Plenary One: Massive Disruption – How Artificial Intelligence & Automation Are Likely to Reshape Labor & Employment Law and the Workplace**
Perhaps no issue has more long-term significance for employees, employers and the attorneys who represent them than the extent to which automation - also referred to as "robotization"- is altering the nature of employment in the U.S. Automation is splitting workers into two worlds (highly educated professionals making large salaries and many more employees holding futureless, low-paying jobs in the service and retail sectors), and has critical implications for the legal constructs that govern the employment relationship. How the work force will change during and what it will be like in the next ten years is something all labor and employment lawyers must comprehend.

Panel Chair: **Kelly Trindel, PhD.**, Head of Industrial Organizational Science & Diversity Analytics, Pymetrics, New York City

Panelists: **Dr. Gerlind Wisskirchen**, CMS Hasche Sigle, Cologne, Germany
Larry Cary, Esq., Cary Kane, New York City

1:45 – 2:00 p.m. — Coffee Break – Carrier Ballroom Foyer, Second Floor
Sponsored by Sapir Schragin LLP

2:00 – 3:15 p.m. — **Plenary Two: Negotiating Statutory Procedures in the Public Sector**
This panel, comprised of a management attorney, a union attorney and PERB neutrals, will address public sector bargaining issues under the Taylor Law with respect to the negotiation of statutory procedures, including Civil Service Law Sections 71-73, Civil Service Law Section 75 and General Municipal Law Section 207-a and 207-c.

Moderator: **Paul J. Sweeney, Esq.**, Coughlin & Gerhart, LLP, Binghamton

Panelists: **Richard K. Zuckerman, Esq.** (Management), Lamb & Barnosky LLP, Melville
Nolan J. Lafler, Esq. (Union), Blitman & King LLP, Syracuse
Hon. Joseph O'Donnell (Neutral), Public Employment Relations Board, Buffalo
Hon. Mary Thomas Scott (Neutral), Public Employment Relations Board, Buffalo

3:15 – 3:30 p.m. — Coffee Break – Carrier Ballroom Foyer, Second Floor

CONCURRENT WORKSHOPS (PLEASE SELECT ONE)

3:30 – 4:20 p.m. — **Workshop A** – Amphitheater, Second Floor
Medical and Recreational Marijuana in the Workplace or as a Business
What employers should know regarding employee policy and procedures and regulating its foreign national staff. Federal Preemption has come to mean many things in the area of employment law and immigration. Marijuana has opened up a whole new debate. This seminar will strive to answer and address these questions through real life examples and consequences for both USA citizens and foreign nationals.

SCHEDULE OF EVENTS

Moderator: **Patricia L. Gannon, Esq.**, Greenspoon Marder, LLP, New York City

Panelists: **Marcela Bermudez, Esq.**, Greenspoon Marder LLP, New York City
Geoffrey A. Mort, Esq., Kraus & Zuchlewski LLP, New York City

3:30 – 4:20 p.m. **Workshop B** – Carrier Ballroom, Second Floor

Current Developments in Wage and Hour Law

A variety of emerging issues in the always changing world of wage and hour law will be discussed, including recent agency opinion letters, pending regulatory revisions, and case law developments in New York state and federal courts.

Panelists: **Joseph A. Carello, Esq.**, Wegmans Food Markets, Inc., Rochester
Jessica Lukasiewicz, Esq., Thomas & Solomon LLP, Rochester
Laura G. Rodriguez, Esq., Pechman Law Group PLLC, New York City
Erin S. Torcello, Esq., Bond, Schoeneck & King, PLLC, Buffalo

3:30 – 4:20 p.m. **Workshop C** – Taylor Room, Second Floor

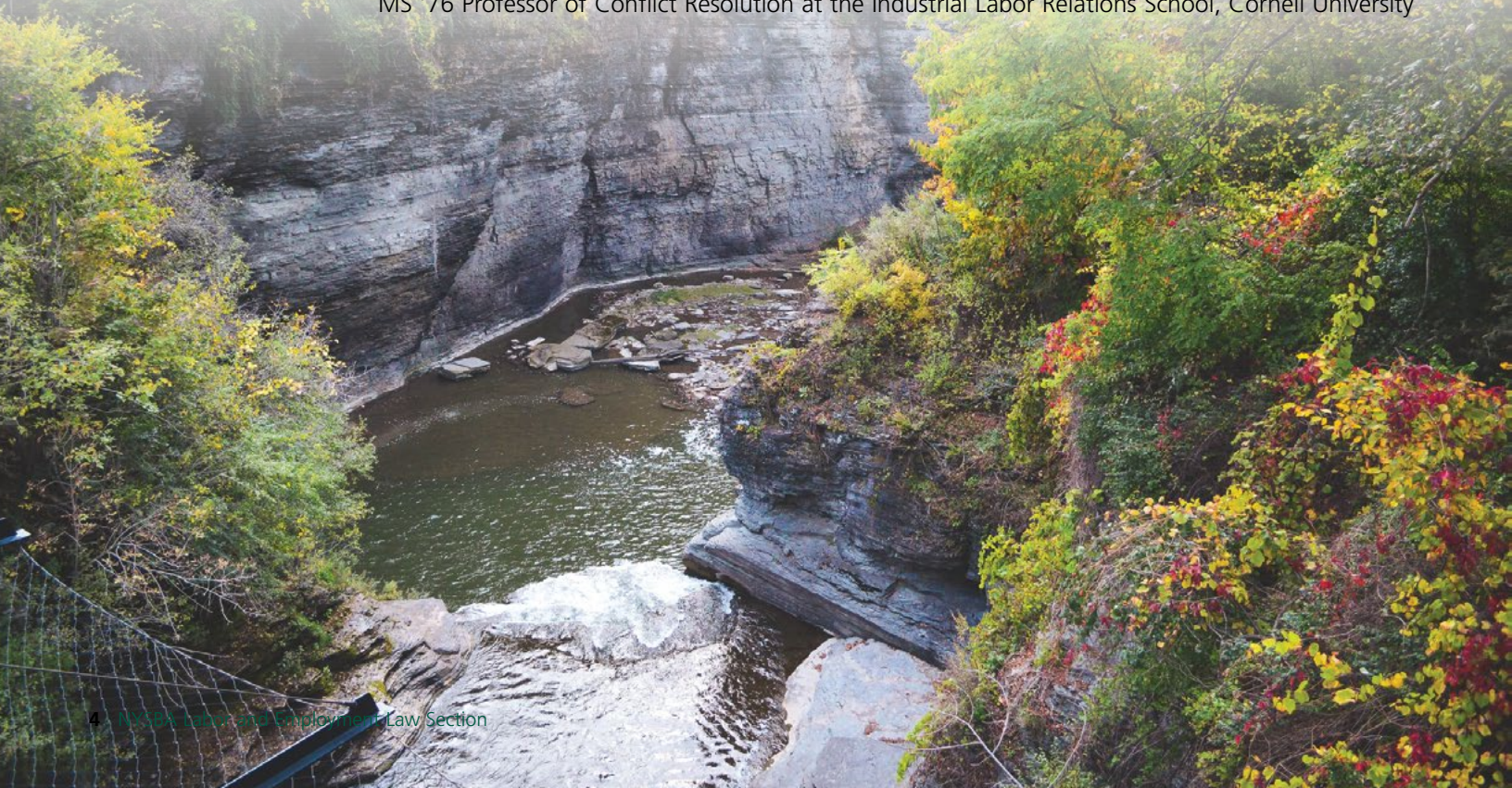
Changes to Employee Benefits and Executive Compensation under the Tax Cuts and Jobs Act of 2017

- Changes to the Limitation on Excessive Employee Remuneration (Code section 162(m))
- Excise Tax on Excess Tax-Exempt Organization Executive Compensation (Code section 4960)
- The new Qualified Equity Grants (Code section 83), and other changes to benefits and executive compensation under the Act

Panelists: **Stanley Baum, Esq.**, Amityville
Ryan J. Barbur, Esq., Levy Ratner, P.C., New York City
Gretchen Harders, Esq., Epstein Becker & Green, P.C., New York City

7:00 – 10:00 p.m. **COCKTAIL RECEPTION & DINNER** – Carrier Ballroom, Second Floor
Reception Sponsored by Lamb & Barnosky, LLP
Dinner Wines Sponsored by Abrams Fensterman

Dinner Speaker: **DEAN ALEXANDER COLVIN, PH.D.**, Kenneth F. Kahn '69 Dean and the Martin F. Scheinman '75, MS '76 Professor of Conflict Resolution at the Industrial Labor Relations School, Cornell University



SCHEDULE OF EVENTS

Saturday, September 21

7:30 – 9:00 a.m.	**Continental Breakfast** – Carrier Ballroom Foyer, Second Floor ***Sponsored by Proskauer Rose LLP***
8:00 a.m. – 8:55 a.m.	**Committees' Breakfast Meetings** – Taylor & Rowe Rooms
8:00 a.m. – 9:00 a.m.	**Registration** – Carrier Ballroom Foyer, Second Floor
9:00 a.m. – 12:00 p.m.	**GENERAL SESSION** – Carrier Ballroom, Second Floor ***Wifi Sponsored by Outten & Golden LLP***
9:00 – 9:10 a.m.	**Program Introduction** Robert L. Boreanaz, Esq. CLE Committee Program Co-Chair
9:10 – 10:25 a.m.	**Plenary Three: Attorney Client Privilege – What it Really Covers and How to Protect It (ETHICS)** Lawyers (and clients) often use the term "attorney client privilege" claiming it applies to a particular communication. Often that characterization is misplaced. This program will explore what the privilege really covers and doesn't cover, and how to protect it.
Panelists:	**Dean W. Bradley Wendel**, Associate Dean for Academic Affairs and Professor of Law, Cornell Law School, Ithaca **Hon. Therese Wiley Dancks**, U.S. Magistrate Judge, Northern District of New York, Syracuse **Erin McGee, Esq.**, Friedman & Anspach, New York City **Colin M. Leonard, Esq.**, Bond, Schoeneck & King, PLLC, Syracuse
10:25 – 10:40 a.m.	Coffee Break – Carrier Ballroom Foyer, Second Floor
10:40 – 11:55 a.m.	**Plenary Four: NLRB 2019 Update** Earlier this year the National Labor Relations Board announced an ambitious rulemaking agenda that will include, in addition to the joint employer standard, rulemaking on employee status of graduate students and access to employer private property, among other things. We will review the status and implications of these agency initiatives as well as recent rulings by the Board and the General Counsel's Division of Advice on independent contractor status, use of the "rat" and other inflatables in labor disputes, and limits on union organizational activity.
Panel Chair:	**Peter D. Conrad, Esq.**, Proskauer Rose LLP, New York City
Panelists:	**Karen P. Fernbach, Esq.**, Arbitrator; Visiting Assistant Professor Law, Hofstra Law School; and Retired Regional Director of the National Labor Relations Board (Manhattan), Great Neck **Allyson L. Belovin, Esq.**, Levy Ratner, P.C., New York City
1:00 – 5:30 p.m.	**Golf Tournament** – Country Club of Ithaca, 189 Pleasant Grove Road, Ithaca Meet at the Golf Pro Shop at 1:00 p.m. $95 per person. Fee includes 18 holes of golf, golf cart and boxed lunch. Directions available at registration desk.

SCHEDULE OF EVENTS

6:30 – 8:30 p.m. **COCKTAIL RECEPTION – COLTIVARE, 235 SOUTH CAYUGA STREET**
at the corner of East Clinton, one block from "The Commons."

Meaning "to cultivate" in Italian, Coltivare houses the culinary "Farm-to-Bistro" programs of the Tompkins Cortland Community College. It helps support the College's Farm, sourcing produce grown there as part of the school's Sustainable Farming and Food Systems program. Reservations may be booked for dinner following our reception at the onsite restaurant at 607-882-2333. Other dining options in The Commons can be found on pages 7 and 8. Free weekend parking nearby in the Cayuga Street garage.

8:30 p.m. Dinner on Your Own

Sunday, September 22

8:30 – 10:00 a.m. **Executive Committee Breakfast Meeting** – Carrier Ballroom, Second Floor

Checkout

IMPORTANT INFORMATION

CLE INFORMATION

Under New York's MCLE rule, this transitional program has been approved for a total of **7.0 MCLE credits** consisting of 5.5 credits in Professional Practice and 1.5 in Ethics for all attorneys including newly admitted.

NYSBA Discounts and Scholarships

New York State Bar Association members and non-members may receive financial aid to attend this program. Under this policy, anyone who required financial aid may apply in writing, not later than ten working days prior to the start of the program, explaining the basis of the hardship, and if approved, can receive a discount or scholarship, depending on the circumstances. For more details, please contact: Catheryn Teeter at cteeter@nysba.org

NEW: Section Registration Discount Policy

The Labor & Employment Law Section has established a program to encourage participation by Section members who may have difficulty participating in the Fall Destination Meeting due to economic limitations. Any Labor & Employment Law Section member who makes $75,000 per year or less (and who will NOT be reimbursed for such registration fees by his or her employer) may register and receive a waiver of 50% off the registration fee for the meeting. The discount waiver will be available on a first-come, first-served basis until the amount allocated in the budget has been exhausted. Please note that the New York State Bar Association is a registered lobbyist. State, federal and municipal attorneys should consult with their respective entity's ethics officer to ensure that they can lawfully participate in this program.

Accommodations for Persons with Disabilities

NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Catheryn Teeter at least 10 working days prior to the meeting start date at 518-487-5573 or cteeter@nysba.org

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

JOIN OUR SECTION

☐ As a NYSBA member, **PLEASE BILL ME $35 for Labor and Employment Law Section dues.** (law student rate is $5)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Labor and Employment Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ / _____ / _____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:

MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

JOIN A LABOR AND EMPLOYMENT LAW SECTION COMMITTEE(S)

On the list below, please designate, in order of preference (1, 2, 3), up to three committees to which you would like to be appointed as a member. Every effort will be made to accommodate your preferences, but each committee's composition is based on space availability and balance.

___ Alternative Dispute Resolution (LABR2600)
___ Communications (LABR3400)
___ Continuing Legal Education (LABR1020)
___ Diversity and Leadership Development (LABR3200)
___ Employee Benefits and Compensation (LABR1500)
___ Equal Employment Opportunity Law (LABR1600)
___ Ethics and Professional Responsibility (LABR2700)
___ Finance (LABR3300)
___ International Employment and Immigration Law (LABR3100)
___ Labor Arbitration (LABR2100)
___ Labor Relations Law and Procedure (LABR2200)
___ Legislation and Regulatory Developments (LABR1030)
___ Membership (LABR1040)
___ Mentoring Program (LABR4700)
___ New Lawyers (LABR4400)
___ Public Sector Labor Relations (LABR1700)
___ Technology in Workplace and Practice (LABR4500)
___ Wage and Hour (LABR4600)
___ Workplace Rights and Responsibilities (LABR1900)

2020 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state.
Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2012 and prior	$275
Attorneys admitted 2013-2014	185
Attorneys admitted 2015-2016	125
Attorneys admitted 2017 - 3.31.2019	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2012 and prior	$180
Attorneys admitted 2013-2014	150
Attorneys admitted 2015-2016	120
Attorneys admitted 2017 - 3.31.2019	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2019

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Massive Disruption – How Artificial Intelligence & Automation Are Likely to Reshape Labor & Employment Law and the Workplace

Kelly Trindel, PhD., Panel Chair
Head of Industrial Organizational Science &
Diversity Analytics, Pymetrics, New York, NY

Dr. Gerlind Wisskirchen
CMS Hasche Sigle, Cologne, Germany

Larry Cary, Esq.
Cary Kane, New York, NY

Massive Disruption – How Artificial Intelligence & Automation Are Likely to Reshape Labor & Employment Law and the Workplace

NY State Bar Association, Labor and Employment Law Section Fall Meeting

September 20-22, 2019, Ithaca

Dr. Gerlind Wisskirchen
CMS Germany
T: +49 221 7716 345
E: gerlind.wisskirchen@cms-hs.com

Table of Content

A. Introduction

Modern information technologies and the daily use of the Internet have strongly influenced the world of work in the 21st century. Computers and software simplify everyday tasks, and it is impossible to imagine how most of the steps of a procedure could be managed without them. But the use of artificial intelligence and robotics is accelerating and is even revolutionizing the world of work with computers. According to European understanding "**Artificial intelligence (AI) systems** are software (and possibly also hardware) systems designed by humans3 that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behavior by analyzing how the environment is affected by their previous actions (https://ec.europa.eu/digital-single-market/en/news/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines).

The same applies for **online platforms** who are acting as intermediary between service providers and clients and are the backbone of the gig economy. Under the broadest definition, 33% of adults use/used platforms in the United States and European Union. However, only 1% to 5% of adults in the U.S. and the EU have earned income through platforms. In general, platforms and their users can be categorized. There are different legal challenges in each category:

- ☐ **Sharing platforms**: tax problems: distinction between private and professional users
- ☐ **Online marketplaces**: tax problems: how to ensure uniform and general taxation (e.g. in the EU) but also employment status (e.g. Uber)
- ☐ **Social media platforms**: data privacy issues: how to ensure compliance with restrictive data protection laws and how to avoid fake news and (racial) harassment
- ☐ **Crowdworking platforms**: labor and employment law: employment status, social protection; but also tax issues: distinction between private and professional users.

The following paper reflects some of the contents of the report on **'Artificial Intelligence and Robotics and Their Impact on the Workplace'** Part I and Part II that I wrote for the IBA Global Employment Institute. Part I was published by the IBA Global Employment Institute on April 2017 and can be downloaded at:

https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=012a3473-007f-4519-827c-7da56d7e3509

The second part of the report will be published soon.

The **key messages** of the reports are:

- ☐ Digitalization affects the blue-collar and the white-collar sectors alike. Gradual changes will take place in the world of work.
- ☐ There will be new company structures, new forms of work and an increase of self-employed persons/freelancers and platform workers.
- ☐ Mass unemployment is not an unrealistic scenario in certain branches. Jobs at all levels presently undertaken by humans are at risk of being reassigned to robots or AI.
- ☐ Labor and employment laws are lagging behind business reality, and the gap is increasing. Some legislation once in place to protect workers may be no longer fit for purpose.
- ☐ The AI phenomenon and its integration into the working world of the future is a far-reaching and varied field of practice, especially for lawyers specializing in labor and employment law in the following issues:

    - ☐ Labor relations (cooperation with employee representation and unions),
    - ☐ Drafting (employment) contracts,
    - ☐ Distinguishing between the various groups of workers,
    - ☐ Working hours,
    - ☐ Remuneration structures,
    - ☐ Data privacy,
    - ☐ Protection of know-how and
    - ☐ Negotiating agreements for new working forms and lifelong learning

B. Impact on Labor Market

The Future Labor Market will eliminate some jobs completely, but sufficient jobs will be added at the same time. However, only less than 5 percent of occupations can be automated in their entirety, but within 60 percent of jobs, that means at least **30 percent of activities**, could be automated in the US labor market and the **day-to-day nature of work changes for nearly everyone due to AI**. Nearly 40 percent of affected jobs are in occupational categories that could shrink between now and 2030 due to AI (https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-in-america-people-and-places-today-and-tomorrow).

Concerning the changes in jobs and tasks on the labor market, a distinction can be made between **two types of technologies**: First, there are "**enabling technologies**" that complement and increase the productivity of certain types of skills and thus lead to new jobs. There are also "**replacing technologies**" that perform tasks that were previously performed by employees and replace the employees in question.

However, it must be noted that current job displacement will mostly take place in the first category where algorithms and production machines become more and more effective. At current technological level, AI-systems are not completed and still need human workers' help carrying out nearly-automated tasks that still need residual human

components. These jobs are generally low-paid, do not need trainings and will disappear in some decades (e.g. truck driver, call-center operators and facial recognition verifiers), but at current level, those jobs are still necessary to be performed (https://workforceinsights.randstad.com/hr-research-reports-flexibilitywork-2019).

Whether the structural changes in the labor market will be dramatic, however, is not certain. While especially unions and some politicians are predominantly pessimistic and announce a loss of a lot of jobs, other researchers come to the conclusion that automation has a short negative direct effect on employment that will turn to a positive net effect on jobs in the next years. McKinsey prognoses this result in the US for 2030 (https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-in-america-people-and-places-today-and-tomorrow). Advancing technologies are likely to increase total employment by around 0,5% annually. Automation reduces prices, leading to additional demand for the goods produced by automating industries. This leads to more labor in industries linked to the automating industry through the supply chain. Technological advances increase consumer's income in general, leading to increasing output and therefore employment in all industries (https://workforceinsights.randstad.com/hr-research-reports-flexibilitywork-2019).

Most outcomes of the digital transformation are not sure and differ from company to company and from branch to branch. There is consensus only that the introduction of intelligent systems will radically change the individual occupational tasks and the determining factor whether a job or a task will be displaced is the routine. Jobs will be created in the high skilled programming area as well as in the lower wage service sector, while routine processes performed anonymously will be digitalized in the background, especially in most countries with high labor costs.

C. New Skillset for all employees

The lower the demand for workers due to automation and digitalization, the higher will be the companies' demand for highly qualified employees. Irrespective of the industry, companies need highly qualified and well-trained employees more than ever because AI is not just changing jobs, it is enhancing jobs. In order to remain competitive in the digital fast-moving labor market, companies must regularly rethink their business models and anticipate trends. Since a company's greatest asset is its employees, one of the company's tasks is to constantly recruit innovative employees and adapt its existing workforce to digital trends. On the subject of retraining, the World Economic Forum comes to the conclusion that a large proportion of the workforce, particularly in the Western industrialized countries, will require significant retraining in the next years and could take up to 100 days per year, ie. 50% of the working time (http://www3.weforum.org/docs/WEF_Future_of_Jobs_2018.pdf).

To remain employable as a human worker in future, not just technical skills, but soft skills such as innovative thinking, team spirit, capacity for criticism, assertiveness, creativity, critical thinking, social and communicative skills and good time management, as well as a basic understanding of digital technologies, are more important than any professional knowledge. In addition, creativity and flexibility are becoming increasingly important. In the future, critical and problem-orientated thinking

and independent working is expected by all employees. This requires sound judgment. The expectations with respect to availability will be higher for future employees. Flexible working hours and standby duties will be the rule and no longer an exception in the labor market. Employees will be required to focus not only on one main practice area, but also to take on several multifaceted, sometimes highly complex tasks as necessary, and also to perform as part of a team. Employees are increasingly expected to have non-formal qualifications and the motivation of lifelong learning. These include, for example, the ability to act independently, to build networks, to organize themselves and their teams with a focus on targets, and to think abstractly. Special knowledge or a flair for high-quality craftsmanship will become less important, since this work is likely to be done by intelligent software or a machine. In addition, verbal and grammatical accuracy, as well as spatial imagination or strong memory, are no longer so important due to the use of digital tools. Mere knowledge workers will no longer be required; the focus will rather be on how to find creative solutions to problems or business models.

Decisions are often predetermined by intelligent algorithms, and individual employees work more at their own pace than ever before. Besides these new skill requirements, employees must be able not only to communicate with other people, but also, if necessary, to lead them effectively and coordinate with them and with some intelligent machines or algorithms in the future. Especially, the role of managers is changing from the person who tells you what to do to a motivator, moderator and organizer of clients, AI and internal and external specialists. The increased recourse to freelancers and the coordination of internationally operating virtual teams, who often work in different time zones, presents an additional challenge to managers.

Some companies already realized that even more employees need trainings. Amazon for example spends 700 million USD to retrain about a third of its 300.000 US workers by 2025. Especially warehouse workers are in high demand at the moment. However, no other company automates its warehouses as much as Amazon. Once this automation process is complete, however, new jobs for warehouse workers must be found. Amazon will begin this retraining program for all American workers (including finance, law and IT sectors too) in the next few years (https://www.nytimes.com/2019/07/11/technology/amazon-workers-retraining-automation.html).

D. Company Structures

Everything that is part of a routine and does not correspond to the core competencies of a company will be digitalized or outsourced. This will be done in future via platforms, which will replace the previous commercial outsourcing agents or other intermediaries and reduce the number of coordinators within the company. This consolidated outsourcing process will also lead to an altered corporate philosophy characterized by the increased instruction of external service providers instead of the employment of permanent staff with the necessary skills. Companies whose focus to date has been less on the IT and data processing sector must also adapt to the technical innovations in order to stay competitive in the long run. Big data analyses, automated production processes and preprogrammed decisions by intelligent algorithms are indispensable for bringing about a tangible increase in efficiency. Flat hierarchy levels are necessary, too,

in order to react quickly to trends, because only the first developer can make big gains in a fast-paced market.

On the other hand, ever more companies are involving external employees in new projects in order to nurture creative ideas. These include hobby programmers (prosumers), platform workers (crowdworkers), customers (open innovation) or competitors (joint ventures). Virtual working groups, project teams or Scrums are increasing internally. Instead of traditional corporate structures under corporate law, complex matrix structures are forming in order to organize globally interconnected groups. From an internal point of view, agile methods and an increased flexibility of companies reacting on digital trends will win over fixed business plans with fixed budgets for the next years. For agile work, new internal methods are necessary. Resolute changes in fixed paradigms are unavoidable. Some of these trends include:

- ☐ Abolish a culture of presence and promote a culture of results
- ☐ Allow failure
- ☐ Segmentation of the big picture into individual problems
- ☐ Reliable short-term results and employee satisfaction are not mutually exclusive.
- ☐ Focus on service and actively involve customers.
- ☐ Using alternative forms of work for the company (e.g. Virtual working groups, project groups, agile teams, Scrum, Crowdworking)

E. Labor and Employment Law Issues

Newly evolving employment structures require new reactions from the lawmakers. Companies will outsource as much work as possible because traditional employment leads to high wage costs in western countries. Additionally, the borderlines between digital workers' professional and private life are becoming blurred. The breakdown of boundaries also makes it difficult for the employer to check how many hours the employee actually worked. There is no factor linking the time/wage system. In the future, elements of performance-linked payment will be used increasingly also with regard to non-executive employees. If the place of work, in addition to working time, becomes more flexible, it will become harder to **distinguish between an employee and an external freelancer** (e.g. crowdworker) and the risk of false self-employment including fines for hirers increase. Furthermore, the future work will be characterized by the use of connected technical wearables and the employees' own devices (e.g. data glasses or fitness trackers). With regard to the processing of the data of European customers or employees, **strict European data protection rules have to be respected**. In contrast to employees, self-employed contractors are not released from liability and are responsible for their own social security contributions.

Besides this, the implementation of technical innovations and AI or innovative working time models will not be possible without the **employee representatives' consent** in most cases. Employee organizations have realized that new challenges are in store for employees from all professional and social classes and put pressure on employers establishing AI.

I. Classification of Platform workers

The increasing number of platform workers leads to more judgement regarding the classification of workers in Europe. As in the US, the number of court decisions on the classification of platform workers is increasing in Europe, too. Amongst others, the **European Court of Justice (ECJ, - 20 December 2017 - C-434/15)** classified **Uber** as a transport service subject to authorization. The mediation service is "an integral part of a comprehensive service consisting mainly of transport services".

In this context, the ECJ also notes that the drivers working on the platform do not carry out autonomous activities that are independent of the platform. On the contrary, this activity exists solely on the basis of the platform, without which the activity of the drivers would make no sense. The ECJ also points out that controls over the economically important aspects of the urban transport service offered through its platform:

- ☐ On conditions that drivers must meet in order to take up and perform the activity;
- ☐ By rewarding drivers who accumulate a large number of journeys and informing them of where and when they can rely on a high volume of journeys and/or advantageous fares (which allows them to adjust their supply of demand fluctuations without imposing formal constraints on drivers);
- ☐ Over controls the quality of the work of the drivers, which can even lead to the exclusion of drivers from the platform, and
- ☐ By specifying the price of the service and settling the payment. All these characteristics mean that Uber “cannot be considered merely a mediator between driver and passenger."

The decision of the ECJ is of particular importance for the complete gig economy in Europe and also has implications for employment law. With the help of this dependency of the "independent" drivers on "Uber", which has now been established in the final instance, it will hardly be possible to maintain a position as a freelancer. Among other things, the ECJ used the same arguments as, for example, the London Labor and Appeals Court, which has already granted 40,000 English drivers a claim to the statutory minimum wage in the UK in 2017 regarding Uber drivers.

Anything else could apply only to the sharing of accommodation. In the case of "AirBnB","Wimdu" and "9Flats", a form of joint consumption of already existing consumer goods actually takes place, whereas in the case of the mediation of driving services (Uber, Lyft, Wunder) the focus is not on community consumption, but rather on the mediation of additional journeys, which otherwise would not have taken place at all. The main reason why more and more drivers are complaining is the lack of social protection for drivers in Europe (e.g. in the event of a lack of orders or illness, or in old age). It is advisable to use models such as those in Spain, in which "solo self-employed persons" must also pay social security contributions (pension and sickness insurance) in whole Europe.

II. Classification of YouTube-Partners

While the employee representatives' power concerning co-determination issues become stronger, classical union memberships decrease all over the world. The number of freelancers is increasing, and they are not represented by works councils or unions in general. However, unions still want to remain the main player to fight for workers' rights (e.g. avoid dismissals, more training to achieve digital literacy, better working conditions), and they will expand their constituency by also representing the increasing number of freelancers in the Gig Economy. In this regard, German union IG Metall started a fight against crowdworking platforms last year and recently start fighting YouTube. This shows that unions are rethinking their roles. They move away from their core clientele and start taking care of platform workers and support new forms of work.

According to their video, YouTube is too powerful and favors YouTubers with advertising-friendly content and arbitrarily changes rules that everyone has to follow without having any influence on them. The business practices are not transparent at all. From a labor and employment laws' point of view, many YouTubers would have to be considered disguised employees of the platform they said. Under German law, this would mean that between YouTube and its "partners" a permanent employment relationship with all protective rights such as protection against dis-missal, paid leave and continued pay during absences due to illness would be established and the platform would have to withhold income tax and social security contributions for YouTubers. This would also mean considerable fines for the false classification of YouTubers.

Under German law, the risks of a false self-employment exist only where crowdworkers are dependent on one client or one platform and receive precise instructions from the platform and/or client about the way in which their work is to be performed and the platforms and/or clients must therefore be considered employers.

The chances for a successful lawsuit in Germany are to be assessed as low. The better arguments indicate that the YouTubers should not be classified as employees of the platform, because, amongst others, the YouTubers are free to:

- ☐ essentially organize their working hours and place of work,
- ☐ decide on the content of the videos,
- ☐ choose their own operating resources and are not required to use any operating resources specified by YouTube,
- ☐ record videos and actions for different clients/platforms,
- ☐ terminate the monetization at any time and delete their contents,

In addition, YouTube – in contrast to Uber – offers numerous contents provided by hobby users besides the monetarized contents of its "partners". The platform serves other purposes too and is only paying YouTubers on the basis of their performance (clicks) and not for the time spent creating the content.

This does not, however, prevent unions or individual YouTubers from bringing actions in other member states, such as the United Kingdom. The chances of success are higher

there, at least to be classified as "workers". Under UK law, a worker is a hybrid between self-employed and employed; they are entitled to paid breaks, paid leave and the UK minimum wage.

III. AI Law

Regarding AI, legislative activities differ between Europe and the USA. While in the USA laws are created for the handling of AI systems, the European legislator restricts itself to issuing non-binding ethical guidelines. The EU will facilitate and enhance cooperation on AI across the Union to boost its competitiveness and ensure trust based on EU values. In its proposal, the EU Commission points out 7 key requirements that AI systems should meet in order to be deemed trustworthy (https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai):

- ☐ **Human agency and oversight:** AI systems should empower human beings, allowing them to make informed decisions and fostering their fundamental rights. At the same time, proper oversight mechanisms need to be ensured, which can be achieved through human-in-the-loop, human-on-the-loop, and human-in-command approaches
- ☐ **Technical Robustness and safety:** AI systems need to be resilient and secure. They need to be safe, ensuring a fall back plan in case something goes wrong, as well as being accurate, reliable and reproducible. That is the only way to ensure that also unintentional harm can be minimized and prevented.
- ☐ **Privacy and data governance:** besides ensuring full respect for privacy and data protection, adequate data governance mechanisms must also be ensured, taking into account the quality and integrity of the data, and ensuring legitimised access to data.
- ☐ **Transparency:** the data, system and AI business models should be transparent. Traceability mechanisms can help achieving this. Moreover, AI systems and their decisions should be explained in a manner adapted to the stakeholder concerned. Humans need to be aware that they are interacting with an AI system, and must be informed of the system's capabilities and limitations.
- ☐ **Diversity, non-discrimination and fairness:** Unfair bias must be avoided, as it could have multiple negative implications, from the marginalization of vulnerable groups, to the exacerbation of prejudice and discrimination. Fostering diversity, AI systems should be accessible to all, regardless of any disability, and involve relevant stakeholders throughout their entire life circle.
- ☐ **Societal and environmental well-being:** AI systems should benefit all human beings, including future generations. It must hence be ensured that they are sustainable and environmentally friendly. Moreover, they should take into account the environment, including other living beings, and their social and societal impact should be carefully considered.
- ☐ **Accountability:** Mechanisms should be put in place to ensure responsibility and accountability for AI systems and their outcomes. Auditability, which enables the assessment of algorithms, data and design processes plays a key role therein, especially in critical applications. Moreover, adequate an accessible redress should be ensured.

While **flexibility and adaptability to the changing reality** in **labor and employment law** would be desirable, **internationally consistent rules** should be established with regard to **digitalization-related labor and employment law**. Until this situation has changed, one of the greatest challenges facing labor and employment lawyers will be how to make **efficient use of existing technical possibilities and new business models in compliance with the labor and employment law**.

F. Summary and Outlook

Several million jobs are jeopardized worldwide. A high level of unemployment in some sectors will almost be unavoidable. The consequence of these risks would be a wide gap between the salaries of well-educated employees and the salaries of less educated employees, which, in turn, can result in social tensions. The question arises as to what the future world of work will look like and how long it will take for this to happen in each branch.

At the same time, the major share of the jobs will be shifted to a different area of work, mainly to the service sector, and new service models will be created (e.g. sharing economy, gig economy, crowdworking). AI will result in growth and prosperity: employees will benefit from flexible solutions concerning working time and workplace caused by the introduction of AI as well. Human beings are adaptable and will have an enhanced control function in the production sector.

It is definite that both blue- and white-collar sectors will be affected to the same degree and that the digitalization (and automation) of services is a global phenomenon. This phenomenon is a far-reaching and diversified field of advisory services, however, particularly with regard to labor law and employment. It would be desirable if future laws, which will hopefully be secured on the international level by uniform standards, will be geared to the technological developments and the increased need for flexibility. In European countries, co-determination rights and restrictive laws (e.g. data protection laws, occupational safety regulations or the European working time directive) have to be observed during the companies' transition to a modern world of work of tomorrow. Especially for larger companies, the following points are important:

- ☐ The use of robots and AI does not release companies from **legal responsibility** for their actions.
- ☐ Crowdworkers may be **qualified as employees**, which is why companies should be prepared for the legal consequences of employee status, such as sick pay or leave entitlements. In France, for example, at the beginning of 2018 a legal definition was introduced for workers using an electronic placement platform.
- ☐ According to the new European data protection law (General Data Protection Regulation, GDPR), **any handling of employee or customer data** (such as the creation of an internal leave schedule, the inclusion of the customer address in a directory or the transfer of data within the group) must be documented, communicated to the person concerned and permitted by law or by the consent of the person concerned.

- ☐ When flexible working hours are used, **maximum limits of working hours** must not be exceeded; despite the fact that employees can be reached online, employees must be granted **time for rest and privacy**.

New York State Bar Association
Labor and Employment Committee
Cornell University
2019

Universal Basic Income

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A Universal Basis Income ("UBI) is generally defined as a periodic cash payment from the state to every adult which is unconnected to work, the inability to work or the desire to work, the entitlement being unconditional and made regardless of wealth or income. By contrast, the dominant social welfare programs of today are means-tested and often made conditional on being available for work. Other social insurance programs like Social Security or Medicare have participants pay into the system to qualify for a later benefit.

Material for this paper is based on three books: (1) Andy Stern's *Raising the Floor, How a Universal Basic Income Can Renew Our Economy and Rebuild the American Dream*, published in 2016. As he was the former head of the SEIU, a union of 2 million, and favored the concept, as a labor lawyer, it seemed I should begin with his view of the subject. Not willing to be limited to his opinion, I decided I should read other proponents, including (2) Annie Lowery's *Give People Money, How a Universal Basic Income Would End Poverty, Revolutionize Work, and Remake the World*, published in 2018. In contrast to Stern, who is about my age and spent a lifetime in the labor movement, Lowery is 35 and therefore she is a voice for a younger generation. She is a contributing editor for *The Atlantic* and studied English and American Literature as an undergraduate at Harvard. A former writer for the *New York Times*, the *New York Times Magazine*, and *Slate*, among other publications, Lowery is a frequent guest on CNN, MSNBC, and NPR.

The third book I reviewed was (3) *Basic Income, A Radical Proposal for a Free Society and a Sane Economy*, co-authored by Philippe Van Parijs, the Hoover Chair of Economic and Social Ethics at the University of Louvain (Louvain-la-Neuve) and Yannick Vanderborght, Professor of Political Science at Université Saint-Louis (Brussels) and the University of Louvain. Published in 2017, this is a scholarly treatment of the issue drawing on intellectual sources of every description.

In simple terms, the problem to be solved and the goals to be attained by having UBI differ among the three sources while overlapping to some degree.

Stern

Stern is concerned about the coming Armageddon of half of our jobs disappearing because of Artificial Intelligence ("AI") and automation and the need to provide for an income that is independent of work because, without it, society will become ugly and revolution becomes a possibility. He writes,

> If there are significantly fewer jobs and less work available in the future, how will people make a living, spend their time, and find purpose in their lives? Also, how can we keep the income gap from growing so vast that it erupts into social discord and upheaval?

Stern at 13.

> Technological unemployment threatens our economy, and also our American way of life. An underclass of youth without hope and jobs is capable of becoming violent and spawning terrorists. [T]echnological unemployment is a national security issue.

Stern at 185.

He believes we are at a strategic inflection point, where change has become inevitable but is not discerned by most. There was a time, in the 1950s, when a middle-class standard of living was possible for working people due to the rise of productivity and strong unions. In the last 30 years, we have seen the decline of unions, stagnating wages, and the growth of precarious employment, for example, contingent, part-time, free-lance, and payment free internships. He notes that only 1/4 of the world's workers have permanent jobs – that 3/4 work in temporary jobs or have a short-term contract or no contract of employment. And while automation in the 1950s led to greater productivity which created the economic conditions for higher living standards, today's AI and automation will not result in the creation of enough new types of jobs to keep masses of people employed and earning a middle-class standard of living. He sees the United States as having become a low wage nation which will get worse as time goes by. Since AI will eliminate many jobs requiring human interaction and skill, the destruction of social relations will reach high into the middle class. Income inequality has already reached the point where the top 1 percent now own more than the bottom 90 percent, and it will get worse. And we now see the rise of substantial new companies which dominate industries, like Uber, Facebook, and Airbnb that, respectively, don't own cars, create content or own real estate.

Stern proposes a UBI of $1,000 per month for all adults between 18 and 64 and to top off social security payments to bring the recipient up to $1,000 per month. He believes this is enough for most Americans to maintain a minimum standard of living. He expects it will cost between $1.75 trillion and $2.5 trillion per year. Paying for it will require gutting federal and state welfare programs as well as make "adjustments" to the entitlement of future social security recipients as well as create a new non-employer based national health insurance system, a redirection of unnamed government spending and taxation expenditures and increased revenue from unnamed sources. Stern at 201-201.

Lowery

Lowery describes UBI in terms that many would find jarring:

> The money would be enough to live on, but just barely. It might cover a room in a shared apartment, food, and bus fare. It would save you from destitution if you had just gotten out of prison, needed to leave an abusive partner, or could not find work. But it would not be enough to live particularly well on. Let's say that you could do anything you wanted with the money. It would come with no strings attached. You could use it to pay your bills. You could use it to go to college or save it up for a down payment on a house. You could spend it on cigarettes and booze, or finance a life spent playing Candy Crush in your mom's basement and noodling around on the Internet. Or you could use it to quit your job and make art, devote yourself to charitable works, or care for a sick child. Let's also say you do not have to do anything to get the money. It would just show up every month, month after month, for as long as you lived. You would not have to be a specific age, have a child, own a home, or maintain a clean criminal record to get it. You just *would*, as would every other person in your community.
>
> This simple, radical, and elegant proposal is called a universal basic income ... .

Lowery at 4.

She acknowledges Stern's argument about the need for UBI to ameliorate the coming future where robots may take half of humanity's jobs, but she does not believe there will be an Armageddon. After discussing the sharp drop in manufacturing jobs in the 1970s and 80s, she dismisses the idea that there will be a no-jobs future.

> The point is economies grow and workers survive regardless of the pain and churn of technological dislocations. **** When manufacturing went from more than a quarter of American employment to just 10 percent, mass unemployment did not result. Nor did it when agriculture went from employing 40 percent of the workforce to employing just 2 percent.

Lowery at 18.

> Opening a discussion about UBI as a solution to a world with far less demand for human labor feels wise, but insisting the discussion needs to happen now and, on those terms, seems foolish and myopic.

Lowery at 35.

Her argument for UBI focuses more on its effects at eliminating poverty and the government bureaucracy currently employed in providing social service benefits to the poor and retired. “Hello UBI, good-bye to the Departments of Health and Human Services and Housing and Urban Development, the Social Security Administration, a whole lot of state and local offices, and much of the Department of Agriculture.” Lowry at 7. She sees developments in technology as creating more and “crummier” jobs with low wages and deadening repetition of tasks. She notes that the era of the white male high school graduates in the Midwest having a path to the middle class is now closed off. Corporate monopoly power is on the rise. And we now have the precariat, which combines "precarious" with "proletariat," in the form of non-regular and non-full-time employment, e.g., contingent and temporary employees in all its forms.

In the end, she believes that UBI would end poverty because it would empower the poor and "would act as a kind of twenty-first-century union, returning power to workers and radically redefining them as an investment for businesses, not just a cost to them. With a basic income, workers could refuse to take a job with low pay **** [and] demand better benefits." Also, she sees UBI as a form of welfare for middle-class wages instead of a subsidy for poverty wages, which exists under the present system of social service benefits.[1]

She points out that there are 40,000,000 people in America living in poverty. And here in the US, "the social stigma of poverty and the high cost of basic goods and services like health care and housing might make extreme poverty [here] feel worse than in the developing world." Lowery at 116. For example, she says that she

> believe[s in our present society] there is a moral difference between taking a home mortgage interest deduction and receiving a section 8 housing voucher. We judge, marginalize, and shame the poor for their poverty – to the point where we make them provide urine samples, and want to force them to volunteer for health benefits. As such, we tolerate levels of poverty that are grotesque and entirely unique among developed nations.

Lowery at 127. UBI would eliminate the stigma.

She disagrees with Stern's view that social service programs should be completely eliminated but believes they need to be carefully evaluated for elimination or the introduction of UBI could lead to more poverty and inequality.

[1] An example of the latter principle is Walmart, where employees frequently qualify for food stamps - this indirectly subsidizes Walmart's ability to pay substandard wages.

She points to racism and the lack of ethnic homogeneity as a significant impediment in America to having a European style welfare state and suggests that UBI is a way out of this problem because of its universal nature. She also points out that UBI solves for the growing problem of women working in the home not receiving pay for their work. She notes that a third of stay-at-home moms fall below the poverty line today, compared with just 14 percent in 1970.

She also sees UBI as ameliorating the post-Trump political polarization in our society because it will make people feel more secure than they now do.

She calculates that giving $1,000 a month to every American citizen would cost $3.9 trillion and be equal to a fifth of the American economy, and equal to everything the federal government spends. Elimination of all means-tested programs to help pay for UBI at this level would result in some people who currently receive health care, not receiving it. But in the end, she believes that the money is there and that having UBI would only bring the US tax burden in line with the European social democracies. At the same time, reflecting "very modern tax theory" (my characterization) she questions whether UBI needs to be paid for at all, as we can deficit spend. She suggests that payment would not have to be solely through income taxes but include a carbon tax, a value-added tax, and a wealth tax which would generate significant money.

Parijs and Vanderborght

Parijs and Vanderborght (hereafter PV) see UBI as fostering freedom. It will promote "a world of freedom – real freedom, not mere formal freedom, and for all, not just for the happy few." PV at 1. The authors discuss philosophy, politics, history and economics as they compare the idea of a basic income with rival ideas past and present for dealing with poverty and unemployment. But the normative standard to be used in their opinion is "the standard of freedom – more precisely, of real freedom for all and not just for the rich."

PV accepts the view that there will be a significant loss of work due to AI and automation and posits that there are two alternatives for dealing with it – guaranteed minimum income schemes which foster dependency because people lose their benefit if they go to work and a UBI which has no such impediment and thereby encourages participation in the labor market.

PV expands the definition of UBI by considering the territorial and extraterritorial aspects of the issue in their description of UBI. In addition to universal periodic guaranteed payments from the state, the recipients

> must be members of a particular, territorially defined community. In our interpretation, this condition must mean fiscal residence rather than [a] permanent resident or citizenship. This excludes tourists and other travelers, undocumented migrants, and also diplomats and employees of supranational organizations, whose earnings are not subject to the local personal income tax. It also excludes people serving prison sentences, whose upkeep costs

> more than [a] basic income, but who should be entitled to it from the minute they get out.

PV at 8-9.

PV also consider the international implications of UBI, where, because of different standards of living and various economic resources, a UBI in different countries might be of differing amounts. They are adamant that an immigrant, undocumented worker is not to receive UBI. They categorically state that "there is no fundamental human right of free movement that must be enforced at the cost of crushing existing redistributive systems." PV at 221. They suggest a compromise can be reached between interfering with the right of free movement and the expansion of freedom occasioned by a UBI by imposing a waiting period before UBI kicks in. But ultimately, PV believes that there needs to be a global UBI funded by auctioning off the right of corporations to expel carbon dioxide into the atmosphere but only to the extent that it is determined scientifically not to cause more climate change.

PV believes that:

> Egalitarian social justice must apply on a global scale.
>
> [O]ur conception of justice as real freedom for all requires an unconditional basic income to be introduced and sustainably maximized at the world level. Such a basic income, funded on a global scale, would be required to distribute more fairly the gifts or opportunities that people today enjoy to extremely unequal extents across the globe."

PV at 217.

Within each nation-state, the local UBI would be funded by a tax on all workers either directly or indirectly. They argue for a flat tax for everyone (at about 35 percent) beginning with the first dollar of income. To hold individuals who are taxed at a higher rate than what they could expect if they relocated to a different country with a lower tax rate, PV suggests that we encourage patriotism but also point out that one could prohibit taking one's wealth with them when they leave.

PV traces the history of ideas and social policy to the development of social services and insurance schemes. They also acknowledge the UBI's antecedent idea found in the writings of many economists, intellectuals and others, including Ricardo, Robespierre, Paine, and Locke. My favorite quote from the past about a foundational concept for UBI is by Bertrand Russell who writes in *Roads to Freedom*, published in 1918, that:

> Anarchism has the advantage as regards liberty, socialism as regards the inducement to work. Can we not find a method of combining these two advantages? It seems to me that we can….

> Stated in more familiar terms, the plan we are advocating amounts essentially to this: that a certain small income, sufficient for necessaries, should be secured to all, whether they work or not, and that a larger income, as much larger as might be warranted by the total amount of commodities produced, should be given to those who are willing to engage in some work which the community recognizes as useful.

PV at 78.

Put in other words by Russell, UBI would be a vagabond wage, enough for existence but not for luxury.

Analysis

The arguments supporting UBI include the additional freedom it would give to recipients to do whatever they wanted to do, that it would subsidize the young embarking on the world of work which is today dominated by minimum wage jobs or free labor, and that it would cushion dramatic transitions such as an unworking battered spouse having to leave the home. Since every adult would receive it, there would be no social stigma like there is today with social services. But, ironically, the elimination of the bureaucracies currently providing benefits would cause unemployment, a problem intended to be ameliorated by instituting UBI. And it must be noted that the social cohesiveness fostered by having governmental employment would be eliminated as well. On the other hand, since means-testing is eliminated, its recipients, unlike current recipients of social services, would have no disincentive to work and earn money.

The proposed $12,000 a year is simply too little to provide a decent standard of living. In NYC, for example, the median annual wage is about $50,000, and a living wage requires earnings of at least $36,000 a year, before taxes. The numbers suggested for UBI are, in Russell's terms, a vagabond wage. Freedom to sleep under the Brooklyn Bridge is not, in my opinion, maximizing "freedom" in our society.

The $12,000 benefit level is far below the levels paid in current social service programs. For example, in most states unemployment insurance compensation pays a benefit of as much as $450 a week, which is about twice as much as the proposed UBI.

The wholesale elimination of social programs currently in place is also something that needs to be considered. While some workers would receive more from UBI than what they get from Social Security others would receive less. According to Social Security, the average monthly benefit amount in 2019 is $1462, and the maximum retirement benefit at normal retirement age is $2861. While these amounts are substantially more than what UBI would pay, these sums are insufficient for many if not most retirees who wish to maintain their quality of life.

Paying for UBI is expensive. I reject the notion that it need not be paid for, that we simply could have huge deficits going out forever in time.

About the impending problem of IA and automation causing no paid work for large numbers of workers, there can be steps taken to hold our society together and mitigate the pain. For example, when the longshoremen were confronted by containerization, their union negotiated guaranteed lifetime payments. While not a perfect solution, as health outcomes were negatively affected, it did allow the men to continue to provide for themselves and their families. For this to happen in a widespread way, unions would need to grow considerably and regain power in their dealings with employers and the government.

While I do not question the good intentions of the proponents of UBI, I do worry that the rationale for doing so can become the excuse for gutting the social service safety net that is currently in place.

Andrew Yang, a democratic candidate for president, advocates UBI, calling it the "Freedom Dividend." He would give recipients of social services a choice between continuing to receive what they currently get or becoming entitled to receive $1,000 UBI in cash each month forever. He believes that most would opt for the cash and he may be right. But an individual's exercise of choice does not eliminate the impacts on society of destroying the social service system.

He also advocates that under his proposal UBI would be stacked on top of what a retiree receives from social security. Again, while this makes the proposal more palatable, it does not thoughtful consider the economic feasibility of doing so nor its long term political impact on the future of social security. I believe it would spell the eventual death of the program.

I am not overly worried that Andy Stern's worst fears will be realized, and that massive loss of hope will turn young people into terrorists. If it did, the repressive forces of the government would be stepped up, and if necessary, there would be greater legal freedom to use drugs to blunt anger and purposeful misconduct. And if worst comes to worst, like the Roman Empire, which gave free grain to the masses in Rome, some amount of social service payment, whether means tested or not, would likely be paid to mollify the young masses. We might also have a very different society with mandatory conscription and public service sucking up excess labor and directing it to some generally good purpose. Hopefully, this shall not come to pass because enough new jobs will be created to prevent our society from going off the cliff. But in any event, UBI sounds simply too good to be true.

Negotiating Statutory Procedures in the Public Sector

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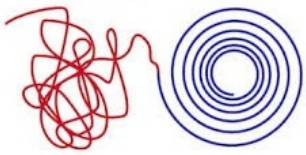
Negotiating Statutory Procedures in the Public Sector §§ 71, 72, 73, 75

A Practical Approach



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*Thanks to Rachel Wright, a PERB intern, who contributed to the research on this topic.

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Topic Summary

A panel, comprised of a management attorney, a union attorney and PERB neutrals, will address public sector bargaining issues under the Taylor Law with respect to the negotiation of statutory procedures, specifically CSL §§ 71-73, CSL § 75 and GML §§ 207-a & 207-c.

- Moderator: Paul J. Sweeney & Nat Lambright
- Speakers: Rich Zuckerman (Management), Nolan Lafler (Union) and PERB ALJ's Joseph O'Donnell and Mary Thomas Scott (Neutrals)

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Agenda

1. Bargaining – Mandatory, Non-mandatory and Prohibited Subjects

2. Reviewing Statutes – A Preliminary Approach

3. Avenues by Which PERB Reviews Mandatory Bargaining Obligations:

- Bad faith bargaining charges (§ 209-a.1(d) or § 209-a.2(b))
- Improper Proposal pursuant to Voluntary or Compulsory Interest Arbitration (§ 209.4)
- Declaratory Rulings – purpose to provide a less adversarial means than an IP to resolve existing justiciable issues between parties : whether a party is covered by the Act, or whether a matter is a mandatory subject of negotiation

4. CSL §§ 71-73, 75 – Due Process and Bargaining Theory

- CSL §§ 71-73 Termination of public employees due to disability
- CSL § 75 Termination of public employees for misconduct or incompetence

5. CSL § 209.4 Impasse and Petitions for Interest Arbitration

3

Bargaining Fundamentals

- **Taylor Law: Public policy favoring bargaining of terms and conditions of employment**
- **Refusal to Bargain - Defenses**
  - Non-mandatory subject
    - Prohibited ("would not be enforceable and therefore cannot be negotiated,") *ultra vires*
    - Against public policy
    - Does not impact terms and conditions of employment unit employees
    - **Preempted by Law**
      - **Contrary to clear legislative intent that has removed the discretion of the employer to agree**
  - Impasse
  - Mandatory, but Permitted by Contract
    - Duty Satisfaction, Waiver, Management Prerogative-Rights

4

CSL § 71 WC Absence & Reinstatement -Disability Resulting From Occupational Injury or Disease

- Where an employee
  - has been separated from the [civil] service
  - by reason of a disability resulting from
    - occupational injury or
    - disease as defined in the workmen's compensation law,
  - **he or she shall be entitled to a leave of absence**
    - **for at least one year**,
    - Unless his or her disability is of such a nature as to
      - permanently
      - incapacitate him or her
      - for the performance of the duties of his or her position.

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CVL §§72 & 73 - LOA & Reinstatement - Ordinary Disability

- **NY Civil Service Law § 72. 4**
  - If an employee
    - Is placed on leave pursuant to this section
    - is not reinstated within one year after the date of commencement of such leave,
    - **his or her employment status may be terminated in accordance with the provisions of § 73.**
- **NY Civil Service Law § 73**
- When an employee
  - has been continuously absent from and
  - unable to perform the duties of his position
  - for one year or more
  - by reason of a disability, other than WC,
  - his
    - **employment status may be terminated and**
    - his position may be filled by a permanent appointment.

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Taylor Law & CVS § § 72 & 73 – Ordinary Disability

- *Economico v Village of Pelham*, 13 PERB ¶ 7528, 50 NY2d 120 (1980) (§ 73): due process requires a **post-termination hearing** when the facts underlying the statute are in dispute.
- *Prue v. City of Syracuse*, 24 PERB ¶ 7540, 78 NY2d 364 (1991)(§ 73): due process additionally requires **pretermination notice and minimal opportunity to be heard,** following *Cleveland BOE v. Loudermill,* 470 US 532.
- *Hurwitz v. NYS Dept Social Services*, 26 PERB ¶ 7512, 81 NY2d 182 (1993)(§ 73): per *City of Syracuse*, **pretermination** due process amounts to no more than opportunity for employee to present opposing views on questions of duration and fitness.

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Taylor Law & CVS § 71 – Occupational Disability

- ***Village of Old Brookville*, 16 PERB ¶ 4571 (1983) (§ 209-a.2(b)):**
  - "Where some state law **takes a matter out of the discretionary authority of an employer** and mandates alternative procedures or specific substantive provisions, there is no Taylor Law duty to negotiate."
  - "A demand relating to a subject treated by a statue is negotiable so long as the statute does not clearly preempt the entire subject matter and the demand does not diminish or merely restate the statutory benefits. "
  - "**Where there is any legitimate uncertainty that a statute covers the same ground as a demand, we will not determine the demand to be non-mandatory on the ground of statutory preemption."**

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Taylor Law & CVS § 71 – Occupational Disability

- ***Greenburgh No. 11 UFSD*, 25 PERB ¶ 7518 (1991):**
  - "**CSL § 71 does not mandate the discharge of an employee nor does it specify the procedural step to be taken to effectuate discharge**."
- ***Allen v. Howe,* 84 NY2d 665 (1994**):
  - "§§ 71 and 73 strike a **balance between the recognized substantial State interest in an efficient civil service and the interest of the civil servant in continued employment** in the event of a disability."
  - Although terminations under CSL § 71 promote a governmental interest in a productive and economically efficient civil service, we recognize substantial interests of employees in their continued employment.

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Taylor Law & CVS § 71 – Occupational Disability

- ***Town of Cortlandt,* 30 PERB ¶ 3031 (1997), aff'd 30 PERB ¶ 7012 (1997):**
  - "The questions is whether the Town's exercise of the discretion bestowed under CSL § 71 must be bargained or whether CSL 71 plainly and clearly establishes a legislative intent to exempt an employer from a duty to bargain discharges …"
  - "**There is nothing in CSL § 71 which deals explicitly with collective negotiations under the Act, nor is there anything inescapably implicit in that statute which establishes the Legislature's plain and clear intent to exempt the Town from the State's strong public policy favoring the negotiation of all terms and conditions of employment.**"
  - "Mandatory collective negotiations is intended to permit and promote the mutual reconciliation of competing interests".
- NY Supreme Court (Westchester Co): "**While an employer is permitted to terminate an employee who has been disabled by an occupational injury for more than one year, there is no requirement that it do so and no express prohibition against negotiation of an employer's exercise of its prerogative**."

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Taylor Law & CVS § § 72 & 73 – Ordinary Disability

- *Town of Wallkill,* 44 PERB ¶ 4529 (2011) (§73)(§209-a.1(d):
  - "The analysis in *Town of Cortlandt (§ 71 case)* is equally applicable to disability terminations due to non-occupational injuries or illnesses.
  - **"CSL § 73 has no language at all relating to collective negotiations, and legislative intent to exempt these kinds of terminations from the duty to bargain is not implicit in any language in the statute."**
- *City of New Rochelle*, 47 PERB ¶ 3004 (2014) (§72)(§ 209-a.1(d)
  - Procedures for granting and terminating sick leave and returning to work are mandatorily negotiable, unless there is merit to any of the employer's defenses.

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Taylor Law & CVS § 71 – Occupational Disability

- ***City of Long Beach,* 50 PERB ¶ 4503 (2017)(§ 71 case):**
  - City provided notice to employee of intent to terminate and opportunity for hearing; it alleged that unilateral implementation of procedure for terminating employee under § 71 was proper since it provided DP
    - ALJ relied on *Town of Cortlandt and* on *Town of Wallkill*
    - **The requirements of due process operate independently of the requirements of the Act;**
    - **parties are obligated to meet the demands of each**
  - *Held*: City unilaterally established a DP procedure (notice, an opportunity to be heard) without bargaining
  - City's conduct demonstrated an intent to terminate the employee as well as create a process to pursue that aim.
- ***City of Long Beach,* 50 PERB ¶ 3036 (2017), aff'd 51 PERB ¶ 7002 (2018):**
  - City's statutory duties are independent of and exceed its constitutional obligation to provide due process
  - "The absence of pre-termination procedures in the statute cannot be read as preempting an employer's duty to bargain."

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CSL §71-73 Chronology

Village of Pelham (§ 73)	1980	DP requires post-termination hearing when facts in dispute
Town of Brookville (§ 71)	1983	Any legitimate uncertainty of mandate defaults to mandatory
Prue v City of Syracuse (§ 73)	1991	DP requires pretermination notice & opportunity to be heard
Greenburgh # 11 UFSD (§ 71)	1992	§ 71 does not mandate termination or specify procedures
Hurwitz v. NYS Dept SS (§ 73)	1993	DP pretermination permits evidence on duration and fitness
Allen v Howe (§ 71)	1994	§§ 71/73 – balance between state and employee interests
Town of Cortlandt (§ 71)	1997	Procedure for termination is not preempted by the statute
Town of Wallkill (§ 73)	2011	Applies Cortlandt to § 73 cases; no preemption re: procedures
City of New Rochelle (§ 72)	2014	LOA and termination procedures are mandatory subjects
City of Long Beach (§ 71)	2017	DP requirements are independent of obligation to bargain, the parties maintain a duty to satisfy both

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CVL § 75(1) Removal and other Disciplinary Action

- **1. Removal and other disciplinary action.**
  - A person described [below]
    - **Shall not be removed or otherwise subjected to any disciplinary penalty**
    - Except for
      - Incompetency or
      - Misconduct
      - Shown
        - After a hearing
        - Upon stated charges
        - Pursuant to this section

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CVL § 75(2) Removal and other Disciplinary Action

- 2. **Procedure.**
  - An employee
    - who at the time of questioning
    - appears to be a
      - potential subject
      - of disciplinary action
    - shall
      - have
        - a right to representation by
        - his or her certified or recognized employee organization under article fourteen of this chapter and
      - be notified
        - in advance,
        - in writing,
        - of such right.

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CVL § 76(4) Appeals from Determinations in Disciplinary Proceedings

4. Nothing contained in section seventy-five or seventy-six of this chapter
- shall be construed to repeal or modify any
  - general,
  - special or
  - local law or
  - charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division.
- Such sections may be
  - supplemented,
  - modified or
  - replaced
- by agreements negotiated between
  - the state and
  - an employee organization
  - pursuant to article fourteen of this chapter.

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Taylor Law & CVL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

Antinore v. State of NY – 8 PERB ¶ 7501, 79 Misc2d 8 (1974), *revd* 8 PERB ¶ 7513, 49 AD3d 6 (1975), *affd* 9 PERB ¶ 7528, 40 NY2d 921 (1976).

- *NY Supreme Court (Monroe Co)* held that agreement between the State and employee organization as to disciplinary procedures for unit employees, absent waiver by individual, cannot replace Civil Service Law disciplinary procedures applicable to State employees or his constitutional right to due process and equal protection of laws.
- *Appellate Div (4th Dept)*, *revd*, held that the provision of an agreement as to disciplinary procedures are valid and constitutional to the extent they permit §§ 75 & 76 to be replaced as the sole disciplinary procedure.

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Taylor Law & CVL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

City of Auburn – 10 PERB ¶ 3045 (1977), *revd* 11 PERB ¶ 7016, 91 Misc2d 909 (1977), *affd* 11 PERB ¶ 7003, 62 AD2d 12 (1978), *affd*, 12 PERB ¶7006, 46 NY2d 1034 (1979).

IP case: City filed § 209-a.2(b) against PBA for discipline proposals

- *PERB:* Held: §§ 75 & 76 may be supplemented, modified or replaced by agreements negotiated by NYS and its employee organizations
  - For all others public employers, §§ 75 & 76 are preemptive and the subject matter is not open to negotiation
- *NY Supreme Court (Albany Co)* held that PERB construction was unreasonable. § 76.4 does not clearly prohibit negotiations between a municipal employer and an employee organization regarding disciplinary procedures; discipline procedures not *per se* prohibited
- *Appellate Div (3rd Dept)* held that a public employer's power to bargain collectively, while broad, is not unlimited. An employer is free to negotiate any matter, but may do so only in the absence of a "plain and clear" prohibition in statute or controlling decision law or public policy; safeguards of §§ 75 & 76 can be waived by an employee without violating due process and equal protection.

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Taylor Law & CVL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

New York Attorney General's Opinion, 15 PERB ¶ 8003 (1981)

- Following the 1972 Amendments to § 76, we conclude that an agreement between a local government and an employee organization under the Taylor Law may include provisions on discipline and removal that supplement, modify or replace sections 75 and 76 of the Civil Service Law.
- An employee represented by such an employee organization would, through the employee organization's assent to the agreement, waive his rights under sections 75 and 76.
- It is logical that the holding in *Antinore* to the effect that an employee is bound by his union's agreement, should apply. We believe that this is what the Court decided in *Auburn*, when it cited *Antinore*.

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§ 209 Resolution of Disputes in the Course of Collective Negotiations - §209 and §209.4

4. On request
    - of either party or
    - upon its own motion, and
- in the event the board determines that
    - an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of [affected employees],
- the board shall render assistance as follows:
    - (c) (i) upon petition of either party, the board shall refer the dispute to a public arbitration panel as ...provided:
    - (e)- (g) [for specified law enforcement]…shall only apply to the terms of collective bargaining agreements directly relating to compensation. .. , and shall not apply to non-compensatory issues…including disciplinary procedures, …

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Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action

PBA of the City of New York (NYCPBA)(sometimes Orangetown) 35 PERB ¶ 3034 (2002), *affd* 36 PERB ¶ 7014 (2003), *affd* 37 PERB ¶ 7012, 13 AD3d 879 (2004), *affd*, 39 PERB ¶ 7006, 6 NY3d 563 (2006).

DR-072, -100, -101: whether PO discipline contained in expired CBA is mandatorily negotiable (§ 76.4)

- *PERB:* Here, police discipline is subject of special laws that leave discipline of police to the discretion of the Police Commissioner; discipline is prohibited subject
- *NY Supreme Court (Albany Co)*: *affd* PERB; discipline and internal investigations were prohibited subjects of bargaining that are reserved to the Commissioner
- *Appellate Division (3rd Dept)*: *affd* trial court; the City charter evinced a clear legislative intent to vest the Commissioner with broad authority over police discipline
- *NY Court of Appeals: affd*, discipline may not be subject of bargaining when legislation has expressly committed authority to local officials; declared invalid a provision in parties expired CBA relating to police discipline

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Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

State of NY (Div State Police), 37 PERB ¶ 6601 (2004), *revd* 38 PERB ¶ 3007 (2005), *affd* 39 PERB 7013 (2006).

DR-112: whether proposals that reflect department policies that predate §§ 75 & 76 are mandatorily negotiable

- *ALJ:* mandatory, Executive Law § 215 does not remove discipline from negotiations
- *PERB:* *revd*, Superintendent possessed sole authority that predated §§ 75 & 76; proposal is prohibited; prior negotiation not act to change the nonmandatory nature
- *NY Supreme Court (Albany Co)*: *affd* PERB; previous negotiations regarding discipline not establish discipline as permissible

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Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

State of NY (Div of Police) 39 PERB ¶ 3023 (2006), *annulled* 40 PERB ¶ 7003 (2007), *pet dismissed,* 41 PERB ¶ 7503, 43 NY3d 125 (2008), *affd* 41 PERB ¶ 7511, 11 NY3d 96 (2008).

IP: whether NYS's denial of representative during critical incident review constituted a unilateral change in violation of § 209-a.1(d); under CSL §75, was change a mandatory subject of bargaining?

- *PERB: affd* ALJ, based on *NYCPBA*, unilateral change deals with a prohibited subject
- *NY Supreme Court (Albany Co)*: PBA petition to annul granted; process leading up to decision of discipline is not discipline, Executive Law not address investigations; proposal is mandatory subject
- *Appellate Division (3rd Dept)*: dismissed on other grounds (standing)
- *NY Court of Appeals*: *affd (presumed standing), pet dismissed;* parties' negotiated right to representation for administrative interrogations essentially waived representation rights during critical incident reviews

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Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

City of New York 40 PERB ¶ 6601 (2007), *affd* 40 PERB ¶ 3017 (2007), *pet to annul dismissed* 41 PERB ¶ 7001, 24 Misc3d 1240(A) (2008), *dismissed as moot*, 41 PERB ¶ 7004, 54 AD3d 480 (2008), *lv for appeal denied*, 42 PERB ¶ 7001, 12 NY3d 701 (2009).

DR-119: whether safety proposal related to staffing and premium pay proposal for lack of right to negotiate discipline were mandatory

- *ALJ:* staffing was non-mandatory, premium pay was mandatory since essence of demand was compensation
- *PERB: affd*, rejected *Cohoes* conversion theory; did not transform non-mandatory subjects outside expired CBA into mandatory subjects; essential nature of premium pay is compensation
- *NY Supreme Court (Albany Co)*: *affd*, premium pay proposal held mandatory, PERB's finding not unreasonable; petition to annul PERB's finding on premium pay dismissed
- *Appellate Division (3rd Dept)*: dismissed as moot (pending appeal, arbitration panel issued award)

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Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

Village of Tarrytown 40 PERB ¶ 4540 (2007), *affd* 40 PERB ¶ 3024 (2007).

IP/209: whether PBA violated § 209-a.2(b) by including PBA's "Bill of Rights" for police disciplinary procedures and procedures to investigate police misconduct that lead to discipline in interest arbitration petition

- *ALJ:* proposal prohibited, based on *NYCPBA*
- *PERB:* *affd*, PBA's claim that *NYCPBA* distinguished between police disciplinary proposals and procedures related to investigation rejected; proposal prohibited

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Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

Town of Wallkill 42 PERB ¶ 3017 (2009), *pet dismissed* 43 PERB ¶ 7005 (2010), *revd* 44 PERB ¶ 7506, 84 AD3d 968 (2011), *affd* 45 PERB ¶ 7508, 19 NY3d 1066 (2012).

IP/209: alleged violation of §209-a.1(d) when Town unilaterally implemented changes to Town Code that changed discipline procedures from expired CBA provisions to § 75; Town petitioned for judgment declaring, as valid, modifications to local law that predated §§ 75 & 76

- *PERB:* unilateral action violated § 209-a.1(d)
- *NY Supreme Court (Albany Co)*: *pet dismissed*, declared local law invalid to the degree inconsistent with CBA (*Auburn*)
- *Appellate Division (2nd Dept)*: *revd*, PO discipline is prohibited, based on *NYCPBA*
- *NY Court of Appeals: affd,* preexisting law vested PO disciplinary authority with Town Board; is a prohibited subject

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Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

City of Middletown 42 PERB ¶ 3022 (2009), *revd* 43 PERB ¶ 7002 (2010)

IP/209: did PBA interest arbitration proposal that included "Bill of Rights" and police discipline policy that included veterans and volunteer firefighter POs violate § 209-a.2(b)?

- *PERB:* proposal not prohibited for veterans and volunteer firefighters, no violation
- *NY Supreme Court (Albany Co)*: *revd*, it was error to exclude veterans and volunteer firefighter police officers from the general population; the City charter specifically vested local officers with discretion regarding discipline; proposal seeking bargaining over discipline affecting veterans and volunteer firefighters POs is prohibited
- Accord PERB no deference where it analyzes the relative weight to be given to competing policies

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Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

City of Schenectady 46 PERB ¶ 3025 (2013), *pet to annul dismissed* 47 PERB ¶ 7004 (2014), *affd* 49 PERB ¶ 7002, 136 AD3d 1086 (2016).

IP: alleged violation of §209-a.1(d) when Town unilaterally announced it would no longer apply the discipline procedures from expired CBA provisions and instead revert to § 75

- *PERB:* *affd* ALJ, held violation, preemption not clear
- *NY Supreme Court (Albany Co)*: *pet dismissed,* authority under Taylor Law superseded unilateral authority in SCCL
- *Appellate Division (2nd Dept)*: *affd*, no right to revert to SCCL what predates Taylor Law; SCCL not clear preemption

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§ 209 Resolution of Disputes in the Course of Collective Negotiations - §209 and §209.4

4. On request
   - of either party or
   - upon its own motion, and
- in the event the board determines that
  - an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of [affected employees],
- the board shall render assistance as follows:
  - **(c) (i) upon petition of either party, the board shall refer the dispute to a public arbitration panel as ...provided:**
  - (e)- (g) [for specified law enforcement]…shall only apply to the terms of collective bargaining agreements directly relating to compensation. .. , and shall not apply to non-compensatory issues…including disciplinary procedures, …

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§ 209 Resolution of Disputes in the Course of Collective Negotiations -§ 209.4(c)

City of Batavia, 17 PERB ¶ 3007 (1984)

Employer filed petition for interest arbitration after the CBA expired; Union filed IP

- *Issue:* did Employer violate Triborough Amendment by filing the petition
- *Held:* § 209-a.1(e) does not make the filing of a petition an improper practice. The problem would arise only when an employer actually altered terms of an expired agreement

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§ 209 Resolution of Disputes in the Course of Collective Negotiations

City of Kingston, 18 PERB ¶ 8002 (1985)

- City filed petition for interest arbitration and Director of Conciliation determined that interest arbitration process should go forward, despite obligation to maintain status quo
  - *Held*: participation in the panel selection process will not be deemed a waiver of the labor organization's right to challenge filing of a petition in an improper practice charge

City of Kingston, 18 PERB ¶ 3036 (1985)

- Union filed IP alleging City committed an improper practice by filing the petition for interest arbitration
  - *Held*: City did not commit an improper practice by the mere filing of the petition
  - Under § 209-a.1(e), status quo could not be changed except by negotiated agreement
  - The Board declined to process the petition, as futile.

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§ 209 Resolution of Disputes in the Course of Collective Negotiations

City of Yonkers, 46 PERB ¶ 3027 (2013)

City filed a petition for interest arbitration; Director of Conciliation declined to process

- *Held:* Board declined to depart from its decades-long holding in *City of Kingston*, that an employer lacks an independent right to initiate interest arbitration without the employee organization' s consent.
- PERB noted that even with the 2013 amendments to §209 of the Act, the employer still has a statutory obligation to maintain the status quo and cannot make use of the newly enacted alternative arbitration procedure without the consent of the employee organization.

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§ 209 Resolution of Disputes in the Course of Collective Negotiations

City of Ithaca (Ithaca I) 48 PERB ¶ 4568 (2015), affd 49 PERB ¶ 3030 (2016)

IP case - The parties commenced negotiations in early 2012 for the CBA that expired 12/31/2011; the PBA declared impasse in July 2013 and opposed the City's interest arbitration petition filed in 2014, insisting on the § 209-a.1(e) status quo; in 2015 City filed § 209-a.2(b), claiming that PBA waived its right to negotiate for 2012-2013 when it refused consent

- *Held:* ALJ found no evidence of clear, unmistakable and unambiguous waiver by the PBA; no bad faith bargaining
- *Held:* Board affirmed the ALJ's finding of no waiver; no basis to find that either party failed to bargain in good faith, instead they exhausted the conciliation procedures; City had satisfied its duty to negotiate during the period following PBA's declaration of impasse.

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§ 209 Resolution of Disputes in the Course of Collective Negotiations

City of Ithaca (Ithaca II) 50 PERB ¶ 3006 (2017)

Petition: Director of Conciliation declined to process the PBA petition for interest arbitration for 2012-2013, based on the Board's decision in Ithaca I that the City satisfied its duty to negotiate in good faith for the for the duration of an award

- *Held:* Board reversed the Director, distinguished between questions of arbitrability (per § 205.6 pf the Rules) and questions of eligibility (related to procedural and substantive issues); remanded to the Director
  - Instant dispute is one of arbitrability, not eligibility because objections to arbitrability are directed at whether the subject matter of the dispute sought to be submitted to compulsory arbitration fall within the scope of interest arbitration
  - Arbitrability goes to the character of the dispute (what proposals may be submitted); eligibility goes to the character of the parties (who may petition for interest arbitration), reaffirming *Rensselaer*.

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§ 209 Resolution of Disputes in the Course of Collective Negotiations

City of Ithaca (Ithaca III) 51 PERB ¶ 4503 (2018), affd 51 PERB ¶ 3020 (2018)

IP: City filed IP alleging PBA violated § 209-a.2(b) when it submitted in 2016 a petition for interest arbitration for the 2012-2013 period after the Board found duty satisfaction by City

- *Held*: Board's refusal to process the interest arbitration petition pursuant to Kingston had the effect of denying finality to either the employer or employee organization, and does so in contravention of the statutory language."
- The Kingston Board erred in assuming that interest arbitration would be "futile" where the employee organization asserted its Triborough Amendment rights. The Kingston Board failed to recognize that processing an interest arbitration petition under circumstances such as those presented here could substantially advance the policies of the Act, even if the result would inevitably be an award confirming the status quo. It would, at a minimum, punctuate the end of negotiations and establish the status quo for the duration of the award. This avoids the delay that has left the parties caught up in procedural brinkmanship years after the declaration of impasse.

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§ 209 Resolution of Disputes in the Course of Collective Negotiations

Village of Saranac Lake, 51 PERB ¶ 3034 (2018)

IP/209.4 Village filed a petition for interest arbitration for period and PBA declined; Director of Conciliation declined to process

- *Held:* Parties exhausted all available options regarding negotiation and were no longer required to negotiate over matters covered by the status quo, relying on *Ithaca III*; PBA violated Sec 209-a.2(b)

- From *Ithaca III*: "The policies underlying § 209.4 of the Act are best served by treating the status quo right as a shield, and not allowing it to be deployed as a sword to reopen the negotiations for which interest arbitration and its resultant finality was avoided."

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Q&A

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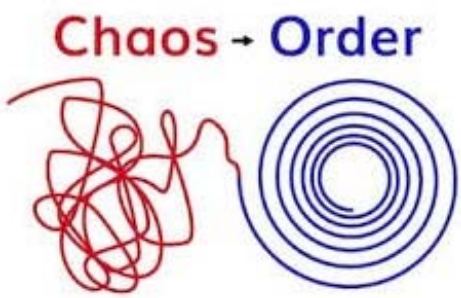

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2019 NEW YORK STATE BAR ASSOCIATION FALL MEETING

NEGOTIATING STATUTORY PROCEDURES IN THE PUBLIC SECTOR

September 20, 2019

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[1] We would like to extend our appreciation to Lamb & Barnosky, LLP Law Clerk Leighann George, for her assistance in preparing this outline.

I. NEGOTIABILITY OF STATUTORY PROCEDURES

A. Background

1) PERB case law initially held that proposals seeking to incorporate statutory language into collective bargaining agreements were nonmandatory subjects of bargaining. *See e.g.*, *Chateaugay Cent. Sch. Dist.*, 12 PERB ¶ 3015 (1979); *City of New Rochelle*, 8 PERB ¶ 3071 (1975).

2) However, in *City of Cohoes*, PERB reversed this precedent, finding it "lacking in persuasive rationale." *City of Cohoes*, 31 PERB ¶ 3020 (1998), *confirmed*, 32 PERB ¶ 7026 (Sup. Ct., Albany Co.), *aff'd*, 276 A.D.2d 184, 33 PERB ¶ 7019 (3d Dep't 2000), *lv. denied*, 96 N.Y.2d 711, 34 PERB ¶ 7018 (2001).

3) PERB held that where "the bargaining proposal duplicates in whole or part the language of a statute [it] is not, by itself, reason to treat the proposal as a nonmandatory subject of negotiation." *City of Cohoes*, 31 PERB ¶ 3020 (1998). However, PERB left open the possibility that "the nature of the statutory provision sought to be incorporated into a contract or award might raise policy considerations significant enough to render a specific reiteration proposal nonmandatory or prohibited." *Id.*; *see also Town of Blooming Grove*, 51 PERB ¶ 3028 and 51 PERB ¶ 3029 (2018) (a proposal stating that General Municipal Law § 207-c benefits would not be included as taxable wages does not raise policy considerations about

tax expertise to be a prohibited subject); *see also Village of Washingtonville*, 43 PERB ¶ 4586 (2010) (a proposal reiterating union members' rights to be free from discrimination on the basis of union membership "is precisely such a policy consideration that would distinguish the proposed non-discrimination clause from other reiterations of statutory rights found to be mandatory in nature" because PERB has exclusive jurisdiction over claims of discrimination on the basis of union activities).

II. GENERAL MUNICIPAL LAW (GML) §§ 207-A AND 207-C

A. Background

1) General Municipal Law § 207-a: provides for the payment of the full regular salary or wages, medical and hospital expenses of paid firefighters injured in the performance of their duties.

    a) Paid Firefighters are defined as "any paid officer or member of an organized fire company or fire department of a city of less than one million population, or town, village or fire district…" *See* N.Y. GEN. MUN. LAW § 207-a(1).

2) General Municipal Law § 207-c: a parallel provision, provides the same benefits for police officers.

    a) The term "police officer" is defined broadly in the statute and includes, among other positions, any sheriff, undersheriff, deputy sheriff or corrections officer of the sheriff's department of any

county or any member of a police force of any county, city of less than one million population, town or village, any LIRR police officer, or any investigator or detective-investigator who is a police officer pursuant to the provisions of criminal procedure law. *See* N.Y. GEN. MUN. LAW § 207-c(1).

3) Benefits provided pursuant to these statutes: Firefighters and police officers are to be paid by the municipality "the full amount of [their] regular salary or wages," and "all medical treatment and hospital care furnished during [the] disability." *See* N.Y. GEN. MUN. LAW §§ 207-a(1), 207-c(1).

   a) If a firefighter is receiving benefits pursuant to General Municipal Law § 207-a(1) and receives an accidental disability retirement allowance pursuant to the Retirement and Social Security Law or retirement for line of duty disability, the § 207-a(1) benefits cease; however, he/she may be entitled to the difference between the amount of the allowance and the regular salary and wages until the mandatory retirement age is achieved. N.Y. GEN. MUN. LAW §§ 207-a(2), 207-a(4-a).

   b) Regular salary or wages defining accidental disability retirement allowance to be paid to disabled firefighter, includes salary increases paid to active firefighters that are negotiated after award

of disability allowance. *See Matter of Mashnouk v. Miles*, 15 PERB ¶ 7507, 55 N.Y.2d 80 (1982).

c) "Regular salary or wages" includes salary decreases applied to active firefighters following disability retirement allowance or pension award. *Whitted v. City of Newburgh*, 126 A.D.3d 910, 5 N.Y.S.3d 510 (2d Dep't 2015).

4) Statutory Medical Examinations: Pursuant to both statutes, the employer is entitled to have the employee examined and treated by a doctor selected by the employer and has the right to order an employee whose disability is not so severe as to permit retirement to report for light duty. *See* N.Y. GEN. MUN. LAW §§ 207-a(1), 207-c(1).

5) An employee receives benefits until any one of the following events occur:

a) the disability ceases; N.Y. GEN. MUN. LAW §§ 207-a(1), 207-c(1).

b) the employee retires pursuant to any applicable provision including reaching the statutory mandated retirement age; N.Y. GEN. MUN. LAW §§ 207-a(2), 207-a(4), 207-c(2), 207-c(5).

c) the employee refuses reasonable medical treatment or medical inspections; N.Y. GEN. MUN. LAW §§ 207-a(2), 207-c(2); *see also Kauffman v. Dolce*, 216 A.D.2d 298, 627 N.Y.S.2d 750, (2d Dep't 1995).

d) the employee refuses to perform light duty work after having been found able to do so; *See* N.Y. GEN. MUN. LAW §§ 207-a(3), 207-c(3); or

e) the employee engages in outside employment. *See* N.Y. GEN. MUN. LAW §§ 207-a(6) (firefighters only); *see Faliveno v. City of Gloversville*, 228 A.D.2d 19, 653 N.Y.S.2d 202 (3d Dep't 1997) (firefighter forfeited rights to § 207-a benefits by engaging in the operation of rental properties that he owned).

B. <u>The Duty to Bargain</u>:

1) <u>Initial Eligibility Determination</u>: An employer's authority to make initial determinations through its "right to conduct [employees'] medical examinations, prescribe treatment and order them back to work" is not a mandatory subject of collective bargaining. *See City of Schenectady,* 25 PERB ¶ 3022 (*3d Dep't* 1992), *aff'd, Schenectady Police Benevolent Ass'n v. New York State Pub Empl. Relations Bd.*, 85 N.Y.2d 480, 28 PERB ¶ 7006 (1995); *City of Watertown v. PERB*, 95 N.Y.2d 73, 711 N.Y.S.2d 99, 33 PERB ¶ 7007 (2000).

2) <u>Medical Examinations</u>: An employer has the unilateral authority to require a waiver for the release of the employee's medical records that are relevant to the injury. *City of Schenectady, Supra.* However, procedures for medical examinations that affect an employee's eligibility for, or receipt of, benefits (including the ability to record medical examinations

performed by employer doctors) are a mandatory subject of bargaining. *See Town of Orangetown*, 40 PERB ¶ 3008, *confirmed*, 40 PERB ¶ 7008 (Sup. Ct., Albany Co. 2007).

3) Challenging Initial Eligibility Determinations: While employers are not required to bargain over the initial determination, employers are required to bargain over the procedures that employees use to challenge the initial determination. *See City of Watertown v. PERB*, 33 PERB ¶ 7007, 95 N.Y.2d 73 (2000) (stating that, because the statutes are silent regarding the procedures for contesting an initial determination, "the strong and sweeping presumption in favor of bargaining applies").

   a) A demand for a *de novo* review of the initial eligibility determination is a non-mandatory subject of bargaining. *City of Poughkeepsie*, 33 PERB ¶ 3029 (2000) (a proposal for a procedure contesting an initial determination was mandatorily negotiable, but seeking a *de novo* standard of review was not mandatorily negotiable).

4) Refusal of Medical Examinations or Treatment: If an employee refuses to undergo a medical examination or treatment, he/she will be deemed to have waived his/her rights to receive continued benefits. *DiPaolo v. County of Schenectady*, 85 N.Y.2d 527 (1995). However, a waiver will be found only when the directive is reasonable. *Cf. Kaufman v. Dolce*, 216

A.D.2d 298 (2d Dep't 1995) (refusal to undergo surgery not unreasonable in light of previously unsuccessful surgery and treatment).

a) The procedure utilized to challenge a directive to undergo medical treatment is negotiable. *City of Watertown v. PERB*, 33 PERB ¶ 7007, 95 N.Y.2d 73 (2000) (stating that, if a municipality "orders an officer to undergo surgery (as is its right), the officer may wish to have the opinion of a personal physician considered, pursuant to a negotiated procedure, before submitting to the knife").

b) Similar to a challenge to an initial determination, the procedure to challenge a directive to undergo medical treatment is negotiable. *Id.*

5) Light Duty: If a physician finds that an employee is unable to perform regular duties, but is able to perform specified light duties, and refuses to do so, the benefits will cease and the employee must report for light duty. *See* GEN. MUN. LAW §§ 207-a(3), 207-c(3). While employers are not required to bargain over the determination to order an employee to work light duty, employers are required to bargain over the procedures that employees use to challenge these initial directives. *See City of Watertown v. PERB*, 95 N.Y.2d 73 (N.Y. 2000) (General Municipal Law § 207-c does not remove the procedures for contesting those initial determinations from the strong and sweeping presumption in favor of mandatory bargaining).

6) Termination of Benefits: Procedures used by an employer to determine whether to terminate Gen. Mun. Law §§ 207-a and 207-c benefits are mandatorily negotiable. *City of Syracuse v. Pub. Employment Relations Bd.*, 279 A.D.2d 98, 719 N.Y.S.2d 401 (4th Dep't 2000) (the city could not unilaterally implement hearing process to make determinations). The procedure to be used to challenge an employer's decision to terminate benefits is likewise mandatorily negotiable. *Id.*

7) Some Related Negotiable Issues Include:

   a) The deadline to file the appeal; *see City of Middletown Police Benevolent Association*, 42 PERB ¶ 3022 (2009) (the proposed 15-day time limitation for making the initial determination and filing an appeal of the determination was mandatorily negotiable).

   b) Procedure to request the appeal of the initial determination; *Town of Southampton*, 43 PERB ¶ 4547 (2010) (the procedure to request an appeal to the medical review board was mandatory).

   c) Who decides the appeal; *County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (a procedure that allowed employees to request a hearing held by a rotating list of four potential hearing officers was mandatory); *Town of Southampton*, 43 PERB ¶ 4547 (2010) (the proposal for a medical review board to hear appeals of initial determinations, as well as the appointment

of a neutral third doctor in the event physicians are not able to agree, was mandatorily negotiable).

d) Standard of Review; *see City of Rye*, 46 PERB ¶ 4520 (2013) (the standard of review intended by the proposal was not a prohibited *de novo* standard); *Town of East Hampton*, 42 PERB ¶ 4534 (2009) (a proposal clarifying the standard of review was permissible).

e) Type of evidence to be considered by the decision-maker; *City of Middletown Police Benevolent Association*, 42 PERB ¶ 3022 (2009) (a procedure to request reconsideration of the initial determination through submission of additional information was mandatory); *Town of Southampton*, 43 PERB ¶ 4547 (2010) (finding the entire proposal for appealing initial determinations to be mandatorily negotiable; included a proposal about type of evidence to be considered by the neutral doctor).

f) Who pays the decision-maker's fees; *see County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (proposal which contained this language was mandatory).

g) Transcript issues (*e.g.*, whether a hearing transcript is required; who pays the costs; *etc.*); *see County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (proposed procedure

containing language that the parties would split the transcript costs found to be mandatorily negotiable).

h) Whether the decision is binding on the parties; *County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (finding the entire proposal for 207-c hearing procedures mandatorily negotiable which stated that the decision was final and binding).

i) The procedure to appeal the final decision; *County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (proposal that the hearing officer's decision only be reviewable pursuant to C.P.L.R. Article 78); *Town of Southampton*, 43 PERB ¶ 4547 (2010) (proposal that the neutral doctor's decision only be subject to review in a court or other forum of competent jurisdiction was mandatory).

8) Miscellaneous Issues

a) Taxation of Benefits*:* Whether to withhold federal income tax from § 207-c benefits is a mandatory subject of negotiations. *Westchester Cty. Corr. Officers*, 33 PERB ¶ 3025, *aff'd sub nom.*, *Cty. of Westchester v. PERB*, 33 PERB ¶ 7016 (Albany Co. 2000), *aff'd*, 278 A.D.2d 414, 33 PERB ¶ 7507 (2d Dep't 2000).

b) Employee Eligibility Status: The employer's right to recover benefits improperly paid to an employee is not a mandatory subject of collective bargaining. *Cty. of Westchester v. Westchester Cty.*

Correction Officers Benevolent Ass'n, Inc., 717 N.Y.S.2d 651 (2d Dep't 2000) (permitting the city to commence an action for improperly paid benefits even though the collective bargaining agreement was silent on the issue). A proposal for the continuation of benefits pending an appeal pursuant to a proposed GML § 207-c light duty assignment, however, is mandatorily negotiable. *Baldwinsville Police Benevolent Ass'n*, 44 PERB ¶ 3031 (2011) (the proposal sought a "contractual codification of a unit member's constitutionally protected property right of continued receipt of GML § 207-c benefits after contesting a light duty assignment through the submission of contrary medical evidence").

c) Cohoes Conversion Theory of Negotiability: Matters that are non-mandatory in nature may become mandatorily negotiable subjects of bargaining when the collective bargaining agreement covers them. *City of Schenectady*, 34 PERB ¶ 4505 (2001).

III. CIVIL SERVICE LAW § 75

A. Background

1) Civil Service Law § 75 states that covered employees may be disciplined or removed from their position only upon a finding of "incompetency or misconduct shown after a hearing upon stated charges." *See* N.Y. CIV. SERV. LAW § 75(1).

2) The employer has the burden of proving that the employee is incompetent or has engaged in misconduct. N.Y. CIV. SERV. LAW § 75(2). This provision also provides employees with "Weingarten rights" (*i.e.*, representation) during questioning when the employee may be a potential subject of disciplinary action. *See id.* If employees are not provided with representation, the evidence obtained during the meeting with supervisors, or any evidence or information obtained as a result of the questioning, may be excluded from the hearing record. *See id*.

3) A hearing held pursuant to this statute must be held by the officer or body having the power to remove the person against whom the charges are preferred (*i.e.*; the appointing authority) or by a hearing officer designated by the appointing authority in writing for that purpose. *See id*. The hearing officer is vested with all of the powers of the officer or body with removal power and must make a record of the hearing, which is referred to the officer or body for review and decision. *See id.*

4) Employees covered by Civil Service Law § 75 must receive written notice of the charges and specifications. Employees are given eight days to reply to the charges. *See id.* They also have the right to be represented at the hearing and to call witnesses. *See id.*; *see* N.Y. CIV. SERV. LAW § 209-a(1)(g).

5) Pending the *hearing and* determination of the § 75 hearing, an employee may be suspended without pay for a maximum of 30 calendar days (emphasis added). N.Y. CIV. SERV. LAW § 75(3).

6) If an employee is found guilty of one or more of the charges or specifications against them, the penalty or punishment may consist of a reprimand, a fine of up to $100, a suspension without pay for a period not exceeding 60 calendar days, a demotion in grade and/or title, or termination. *See id.* If the employee is found not guilty, the employee is entitled to full reimbursement of pay, less any unemployment insurance received, from the initial serving of the charges and specifications. *See id.*

B. <u>Duty to Bargain</u>

1) In general, discipline and discharge procedures are mandatory subjects of negotiation, absent legislative intent to the contrary. *See e.g., State of New York*, 37 PERB ¶ 6601 (2004), *citing City of Utica*, 31 PERB ¶ 3045 (1998).

2) The rights granted to employees in Civil Service Law §§ 75 and 76 (which relates to appeals of disciplinary actions pursuant to § 75) "may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of [the Civil Service Law]." N.Y. CIV. SERV. LAW § 76(4); *see also Antinore v. State*, 40 N.Y.2d 921, 358 N.E.2d 268 (N.Y. 1976) (affirming the 4th Dep't decision holding that negotiated provision for binding arbitration in

disciplinary proceedings was constitutional but does not require reading procedural safeguards into arbitration provisions); *Grippo v. Martin*, 257 A.D.2d 952, 686 N.Y.S.2d 118 (3d Dep't 1999) (holding that employees may, pursuant to the provisions of the collective bargaining agreement, waive rights granted pursuant to Civ. Serv. Law §§ 75, 76). *But see* part IV below regarding certain employers of police officers for whom bargaining is prohibited by local laws.

3) Alternate disciplinary procedures for employees who are entitled to the protections of § 75 are mandatory subjects of collective bargaining. *Auburn Police Local 195 v. Helsby*, 46 N.Y.2d 1034 (N.Y. 1979).

4) Issues that May Be Negotiated Include:

   a) Hearing Procedure

      i. The mechanism to appeal discipline (*e.g.*, a contract grievance; a hearing before an arbitrator; *etc.*); *City of Mount Vernon*, 31 PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (a proposal stating that written notice to appeal discipline must be filed with the Chief of Police within three days of a meeting to attempt to resolve disciplinary charges was mandatory).

      ii. Deadline to answer the charges; *Id.*

      iii. The scope of the decision-maker's authority; *see City of New Rochelle*, 13 PERB ¶ 3082 (1980) (a proposal

allowing the hearing officer to determine the employee's guilt or innocence and a penalty was mandatory);

iv. The standard of review; *City of Mount Vernon*, 31 PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (proposal containing a de novo standard of review based upon the evidence reviewed by the arbitrator at the hearing was mandatory).

v. Who pays decision-maker's fees; *see City of New Rochelle*, 13 PERB ¶ 3082 (1980) (proposal containing language splitting the fees of the hearing officer was mandatory); *City of Mount Vernon*, 31 PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (proposal containing language to split the fees of the arbitrator was mandatory).

vi. Transcript issues (*e.g.*, whether a transcript is required; who pays costs; *etc.*); *City of Mount Vernon*, 31 PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (stating that the cost of the arbitrator and necessary expenses of the hearings will be shared equally by the union and employer).

vii. Whether the decision is binding; *Incorporated Village of Malverne*, 42 PERB ¶ 4530 (2009) (proposal stating that the decision of the arbitrator for discipline in lieu of procedures pursuant to Section 75 of the Civil Service Law is binding was mandatory), *City of Mount Vernon*, 31

PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (proposal stating that the decision of the arbitrator is binding was mandatory).

IV. POLICE DISCIPLINE

A. Public Policy Conflicts

1) The existence of statutes governing police discipline that predate Civil Service Law § 75 can make police discipline a prohibited subject of bargaining. Cases involving these statutes generally hold that the policy favoring unilateral control over police disciplinary procedures prevails over the Taylor Law public policy to bargain over terms and conditions of employment, including employee discipline.

2) In *Patrolmen's Benevolent Association of the City of New York v. PERB*, the Court of Appeals held that, where a provision of law discloses a legislative intent to leave disciplinary authority to the employer, discipline is a prohibited subject of bargaining pursuant to public policy. *Patrolmen's Benevolent Association of the City of New York v. PERB*, 6 N.Y.3d 563, 815 N.Y.S.2d 1, 39 PERB ¶ 7006 (N.Y. 2006).

3) Statutes predating Civil Service Law § 75 are considered "special laws" because Civil Service Law § 76(4) states that, "[n]othing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal of suspension of officers or employees in the

competitive class of the civil service of the state or any civil division." N.Y. CIV. SERV. LAW § 76(4).

B. <u>Examples of "Special Laws" Pursuant to which Discipline is a Prohibited Subject of Bargaining</u>

1) Rockland County Police Act (L 1936, ch. 526) (applies to village police officers in Rockland County).

2) Westchester County Police Act (L 1936, ch. 104), N.Y. UNCON. LAWS § 5711-q (applies to village police officers in Westchester County).

3) Second Class Cities Law & Certain City Charters

   a) *City of Schenectady v. PERB*, 30 N.Y.3d 109, 64 N.Y.S.3d 644, 50 PERB ¶ 7006 (N.Y. 2017) (the Second Class Cities Law makes police disciplinary procedures a prohibited subject of bargaining).

   b) *Russo v. Burke*, 131 A.D.3d 969, 16 N.Y.S.3d 579 (2d Dep't 2015) (City of Mount Vernon's city charter provision relating to police discipline predated Civil Service Law §§ 75 and 76 and, thus, had control for matters concerning police disciplinary procedures).

4) City of New York. New York City Charter § 434 and Administrative Code of the City of New York § 14-115; *see also Patrolmen's Benevolent Association of the City of New York v. PERB*, 6 N.Y.3d 563, 815 N.Y.S.2d 1, 39 PERB ¶ 7006 (N.Y. 2006).

5) Town Law § 155 (with exceptions)

a) Local laws passed pursuant to Town Law § 155 will make police discipline a prohibited subject of bargaining. *Matter of Wallkill v. CSEA*, 19 N.Y.3d 1066 (N.Y. 2012); *see also Town of Goshen v. Town of Goshen Police Benevolent Ass'n*, 42 Misc. 3d 236, 976 N.Y.S.2d 342 (Orange Cty. Sup. Ct. 2013) (the Town's 2013 Local Law is a valid exercise of its authority to remove police discipline from the scope of the CBA), *aff'd, appeal dismissed sub nom., Town of Goshen v. Town of Goshen Police Benevolent Ass'n*, 142 A.D.3d 1092, 38 N.Y.S.3d 219 (2d Dep't 2016).

b) Note that the full implications of these decisions are uncertain. There is no reported case law stating whether the court's reasoning applies to other governmental subdivisions and there is an open question as to whether *Wallkill* applies to towns that have not passed similar laws. *See Town of Greece v. Uniformed Patrolmen's Ass'n of Greece Police Dep't*, 147 A.D.3d 1382, 48 N.Y.S.3d 560 (4th Dep't 2017) (town's newly-adopted disciplinary rules and regulations did not apply retroactively to disciplinary matter brought prior to their enactment). *Town of Harrison PBA v. Town of Harrison*, 69 A.D.3d 639, 892 N.Y.S.2d 495 (2d Dep't 2010) (grievances for failure to provide representation to police officers pursuant to Civ. Serv. Law § 75(2) were barred because

police discipline was governed by the Westchester County Police Act).

6) Village Law § 8-804

a) Village Law § 8-804 contains language mirroring Town Law § 155 with regard to disciplinary procedures. The predecessor of Village Law § 8-804 was Village Law § 188-f, which was enacted in 1924. *See* L. 1924 ch. 494; *see also Lewis v. Bd. of Trustees of Vill. of Canajoharie*, 13 A.D.2d 592, 593, 212 N.Y.S.2d 677, 678 (3d Dep't 1961) (noting that Village Law § 188-f and Town Law § 155 provide for similar punishments). As of the date of this presentation, there is no decision holding that procedures for police discipline in New York State villages subject to Village Law § 8-804 are a prohibited subject of bargaining. *But see Village of Tarrytown*, 40 PERB ¶ 3024 (2007) at n. 27 (stating Village Law § 8-804, enacted in 1972, is a general law that does not predate Civil Service Law §§ 75 and 76 and, therefore, does not render police discipline a prohibited subject of bargaining); *Incorporated Village of Malverne*, 42 PERB ¶ 4530 (2009) (discussing *Village of Tarrytown*).

7) Executive Law § 215 (New York State Police)

a) Discipline is a prohibited subject for New York State Police, even though Civil Service Law § 75 predated Executive Law § 215,

which provides in part, that members of the New York State Police can only be removed by the Superintendent of Police after a hearing. N.Y. EXEC. LAW § 215(3). This law also provides that the "superintendent will make rules and regulations subject to approval by the governor for the discipline and control of the New York State Police." *Id.*; *see also State of New York (Div. of State Police)*, 38 PERB ¶ 3007, *aff'd*, 39 PERB ¶ 7013 (2006).

b) One court, annulling PERB's decision that discipline was prohibited, has held that "the process leading up to the decision on whether or not to discipline, is not discipline" and is a mandatory subject of bargaining. *Police Benevolent Assn. of N.Y. State Troopers, Inc. v. New York State Pub. Empl. Relations Bd.*, 40 PERB ¶ 7003 (Sup Ct. Albany County 2007), *petition dismissed*, 41 PERB ¶ 7503, 43 A.D.3d 125, 840 N.Y.S. 2d 828 (3d Dep't 2008), *aff'd*, 41 PERB ¶ 7511, 11 N.Y.3d 96, 863 N.Y.S.2d 387 (2008).

V. CIVIL SERVICE LAW §§ 71 AND 73

A. Background

1) Civil Service Law § 71 allows a public employer to remove an employee from his/her position when the employee has been unable to perform the duties of the position for a cumulative year or more due to a work-related disability, or two years if the disability was caused by a work-related

assault. Within one year after the disability ends, the employee may apply to the appropriate municipal office for a medical examination so that he/she may be reinstated to his/her former position or a similar position if found to be fit to perform his/her job duties. N.Y. CIV. SERV. LAW § 71; *see also Jacobson v. N.Y. State Dep't of Labor*, 274 A.D.2d 809, 711 N.Y.S.2d 61 (3d Dep't 2000); *Allen v. Howe*, 84 N.Y.2d 665, 621 N.Y.S.2d 287 (1994).

2) Similarly, Civil Service Law § 73 enables a public employer to remove an employee who has been continuously absent from, and unable to perform the duties of, his or her position for a consecutive year or more by reason of a non-work-related disability. N.Y. CIV. SERV. LAW § 73. Within one year after the disability ends, the employee may apply to the appropriate municipal office for a medical examination so that he/she may be reinstated to his/her former position or a similar position if found to be fit to perform his/her job duties.

3) The separation of an employee pursuant to Civil Service Law § 71 or 73 does not result in a discontinuance of his/her benefits pursuant to General Municipal Law §§ 207-a or 207-c. *Stewart v. County of Albany*, 300 A.D.2d 984, 750 N.Y.S.2d 912 (3d Dep't 2002) (termination of employment pursuant to Civil Service Law § 71 does not involve termination of benefits pursuant to General Municipal Law § 207-c); *Connor v. Bowles*, 63 A.D.2d 956, 405 N.Y.S.2d 762 (2d Dep't 1978)

(General Municipal Law § 207-c benefits may only be discontinued pursuant to the statute).

4) A State employee who is terminated pursuant to Section 71 must be given pre-termination notice and an opportunity to be heard to contest the decision to be placed upon Section 71 leave. 4 N.Y.C.R.R. § 5.9. New York State Civil Service Regulations Section 5.9 requires that written notice be provided within 21 days of the employee's initial placement on a Section 71 leave of absence and at least 30 days before making the decision to terminate his/her employment. 4 N.Y.C.R.R. § 5.9. There is no similar regulation with regard to Section 73. *Id.*

5) Courts have reversed terminations pursuant to Section 71 due to the employer's failure to provide employees at least as extensive as those provided in the regulations. *See e.g., Cooke v. City of Long Beach,* 247 A.D.2d 538, 669 N.Y.S.2d 312 (2d Dep't 1998).

B. <u>Duty to Bargain</u>

1) The procedures for terminating an employee pursuant to Civil Service Law §§ 71 and 73, which permit, but do not require, an employer to terminate an employee after a one year leave of absence, are a mandatory subject of bargaining. *City of Long Beach,* 50 PERB ¶ 3036 (2017), *aff'd,* 51 PERB ¶ 7002 (N.Y. Sup. Ct.); *Town of Cortlandt,* 30 PERB ¶ 3031 (1997) (the employer was required to bargain prior to implementing a policy pursuant to Civil Service Law §§ 71 and 73), *confirmed sub nom.*

Town of Cortlandt v. Public Empl. Relations Bd., 30 PERB ¶ 7012 (Sup. Ct. Westchester County 1997); *City of White Plains*, 49 PERB ¶ 4575 (2016) (a firefighters' union did not commit an improper practice when it refused to commence single-issue negotiations on Civil Service Law Section 71 and 73 procedures); *Town of Wallkill Police Benevolent Ass'n, Inc.*, 44 PERB ¶ 4529 (2011).

2) In *City of Long Beach*, the Board held that a unilaterally forced pre-termination procedure notifying an employee of a termination hearing was a mandatory subject of bargaining. 50 PERB ¶ 3036 (2017).

3) *But see matter of Enlarged City of Sch. Dist. Of Middletown N.Y. the Civil Serv. Empls. Assn., Inc.*, 148 A.D.3d 1146, 49 N.Y.S.3d 560 *(2nd Dep't 2017)* (upholding permanent stay of arbitration over employer's decision to separate employee pursuant to Civil Service Law § 71).

4) An analogy can be made to negotiable issues for General Municipal Law § 207-c procedures because there are no cases discussing these issues pursuant to Civil Service Law §§ 71 and 73:

    a) Procedure to Challenge the Employer's Decision to Terminate

        i. Deadline to Appeal; *Cf. City of Middletown Police Benevolent Association*, 42 PERB ¶ 3022 (2009) (deadline to appeal 207-c initial determinations).

        ii. Who Hears the Appeal; *Cf. Town of Southampton*, 43 PERB ¶ 4547 (2010) (proposal to establish medical review

board to hear appeals of 207-c determinations was mandatorily negotiable); *City of Rye*, 46 PERB ¶ 4520 (2013) (proposal that appeals be heard pursuant to a due process hearing before a hearing officer was mandatorily negotiable); *County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (a procedure that allowed employees to request a hearing held by a rotating list of four potential hearing officers was mandatory).

iii. The type of evidence to be considered; *Cf. Town of Southampton*, 43 PERB ¶ 4547 (2010) (finding the entire proposal for appealing initial determinations to be mandatorily negotiable; included a proposal about type of evidence to be considered by the neutral doctor); *City of Middletown Police Benevolent Association*, 42 PERB ¶ 3022 (2009) (a procedure to request reconsideration of the initial determination through submission of additional information was mandatory).

iv. Standard of Review; *Cf. Town of East Hampton*, 42 PERB ¶ 4534 (2009) (a proposal clarifying the standard of review was permissible).

v. Whether the decision is binding; *Cf. County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011)

(finding the entire proposal for 207-c hearing procedures mandatorily negotiable which stated that the decision was final and binding).

THIS OUTLINE IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.

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GENERAL MUNICIPAL

LAW SECTIONS

207-a & 207-c

&

THE TAYLOR LAW

CASE HISTORY

Prepared by PERB Administrative Law Judge
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&
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PREFACE

The following document attempts to capture the chronological development of the relevant case history primarily associated with interest arbitration demands relating to Section 207-a & 207-c benefits. Excerpts from each case have been selected with certain language *italicized* for emphasis is hopes of lending clarity to the subject matter. Commentary is also presented via the insertion of footnotes in the text of certain cases (see Footnote Summary starting at pg. 28, *infra*).

Statutory Interpretation
Applicable Standard of Review

City of Schenectady v PERB (Crt. of Appeals – March 28, 1995)
85 NY2d 480; 28 PERB ¶ 7005

It is settled that the Taylor Law (Civil Service Law § 200 *et seq.)* generally requires bargaining between public employers and employees regarding terms and conditions of employment *(see, Matter of Board of Educ v New York State Pub Empl Relations Bd,* 75 NY2d 660, 667, quoting *Matter of Cohoes City School Dist v Cohoes Teachers Assn,* 40 NY2d 774, 778). The policy of such bargaining in this State is "strong" and "sweeping." Even that policy, however, is negated under special circumstances. It is unquestioned that the bargaining mandate may be circumscribed by "plain" and "clear" legislative intent or by statutory provisions indicating the Legislature's "inescapably implicit" design to do so *(Matter of Webster Cent School Dist v Pub Empl Relations Bd,* 75 NY2d 619, 627, *supra; see also, Matter of Board of Educ,* 75 NY2d 660, 667, 668, *supra).*

Watertown v PERB (Crt of Appeals - May 9, 2000)
95 NY2d 73; 33 PERB ¶ 7007

The Taylor Law (Civil Service Law § 200 *et seq.*) requires public employers to bargain in good faith concerning all terms and conditions of employment (*Matter of Schenectady Police Benev Assn v New York State Pub Empl Relations Bd,* 85 NY2d 480, 485, *supra; see also,* Civil Service Law §§ 202, 203, 204 [1]). As we have time and again underscored, the public policy of this State in favor of collective bargaining is "strong and sweeping" (*see, e.g., Matter of Board of Educ v New York State Pub Empl Relations Bd,* 75 NY2d 660, 667; *Matter of Cohoes City School Dist v Cohoes Teachers Assn,* 40 NY2d 774, 778). The presumption in favor of bargaining may be overcome only in "special circumstances" where the legislative intent to remove the issue from mandatory bargaining is "plain" and "clear" (*Matter of Schenectady Police Benev Assn v New York State Pub Empl Relations Bd, supra,* at 486), or where a specific statutory directive leaves "no room for negotiation" (*Matter of Board of Educ v New York State Pub Empl Relations Bd, supra,* at 667).

To be sure, where a statute clearly "forecloses negotiation" of a particular subject, that subject may be deemed a prohibited subject of bargaining (*see, Matter of Board of Educ v New York State Pub Empl Relations Bd, supra,* at 667; *see also, Matter of Cohoes City School Dist v Cohoes Teachers Assn, supra,* at 778 [school board's authority to make tenure decisions was a prohibited subject of negotiation]).

Generally, however, bargaining is mandatory even for a subject "treated by statute" unless the statute " 'clearly preempt[s] the entire subject matter' " or the demand to bargain " 'diminish[es] or merely restate[s] the statutory benefits' " (Lefkowitz, Osterman and Townley, Public Sector Labor and Employment Law, at 498 [2d ed 1998], quoting *Matter of City of Rochester [Rochester Police Locust Club],* 12 PERB ¶ 3010). Absent "clear evidence" that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining (*see,*

of Educ v New York State Pub Empl Relations Bd, supra, at 670).

PERB's Role

City of Schenectady v PERB (Crt. of Appeals – March 28, 1995)
(supra)

First, concerning the standard of review, we recognize that an administrative agency's determination requires deference in the area of its expertise *(see, Rosen v Pub Empl Relations Bd,* 72 NY2d 42, 47-48). Where, however, the matters at issue involve statutory interpretation, such deference is inapplicable *(id.; Matter of Webster Cent School Dist v Pub Empl Relations Bd,* 75 NY2d 619, 626). This case involves only statutory interpretation.

Watertown v PERB (Crt of Appeals - May 9, 2000)
(supra)

Because Section 207-c does not remove the review procedures from the scope of collective bargaining, bargaining is mandatory if the procedures qualify as a "term and condition" of employment. PERB, as the agency charged with interpreting the Civil Service Law, is "accorded deference in matters falling within its area of expertise" (*Matter of Board of Educ v New York State Pub Empl Relations Bd, supra,* 75 NY2d, at 666). Whether a dispute involves a "term and condition" of employment is generally committed to PERB's discretion, and we may not disturb PERB's determination unless the agency's ruling is irrational (*see, id.,* at 670-671).

Here, there is no basis to disturb PERB's determination that the grievance procedures are a term and condition of employment. PERB's finding fell well within the definition of terms and conditions adopted by this Court, in connection with the broad public policy favoring collective bargaining (*see, e.g., Matter of Newark Val Cent School Dist v Pub Empl Relations Bd,* 83 NY2d 315, 321-322 [issue of smoking ban on school buses subject to mandatory bargaining, because Public Health Law contained "no explicit or implied prohibition against smoking"]; *Matter of Board of Educ v New York State Pub Empl Relations Bd, supra,* 75 NY2d, at 670-671 [employee disclosure requirements held mandatory subject of negotiation]). Indeed, grievance and arbitration procedures have been "clearly recognized" as terms and conditions of employment subject to mandatory bargaining (Lefkowitz, Osterman and Townley, Public Sector Labor and Employment Law, *supra,* at 477).

Dissenting Opinion ----------Rosenblatt, J.

Normally, the scope of our review of matters within PERB's expertise, including the reach of mandatory bargaining, is limited (*see, Matter of Rosen v Pub Empl Relations Bd,* 72 NY2d 42, 47-48; *Matter of West Irondequoit Teachers Assn v Helsby,* 35 NY2d 46, 50-51). When the dispute, however, centers on whether a municipality's implementation of a statute was the subject of mandatory bargaining, this Court has declared the issue one

of statutory construction for a court's *de novo* review, warranting no special deference to PERB (*see, Matter of Schenectady Police Benev Assn v New York State Pub Empl Relations Bd,* 85 NY2d, at 485, *supra; Matter of Webster Cent School Dist v Pub Empl Relations Bd,* 75 NY2d 619, 626). This Court said as much in *Schenectady,* dealing with PERB's determination as to a municipality's implementation of General Municipal Law § 207-c (85 NY2d, at 485, *supra*).

Poughkeepsie v PERB (Crt of Appeals March 28, 2006)
6 NY3d 514; 95 PERB ¶ 7005

This appeal presents no question of statutory interpretation. Instead, the issue is whether PERB decided the City's improper practice charge based upon a reasonable reading of the Association's proposed contract language. PERB, as the agency charged with interpreting the Civil Service Law, is accorded deference in matters falling within its area of expertise, including the resolution of improper practice charges (*see Matter of County of Nassau [Nassau Community Coll] v New York State Pub Empl Relations Bd*, 76 NY2d 579, 585 [1990]). Because these matters are consigned to PERB's discretion, we may not disturb its determination unless irrational (*City of Watertown*, 95 NY2d at 81).

GML § 207-a & c
Significant Holding

City of Schenectady v PERB (Crt. of Appeals – March 28, 1995)
(supra)

The issue here is whether General Municipal Law § 207-c requires mandatory bargaining *before* a police officer who is injured in the line of duty or becomes ill during the performance of duty *can be forced to* (1) perform light duty, (2) undergo surgery at the direction of the City or (3) waive the confidentiality of medical records. Because the Appellate Division properly concluded that none of these matters is subject to mandatory bargaining, we affirm.

Turning to the specific issues before us, we hold that General Municipal Law § 207-c authorizes the City to require both light duty and, under the appropriate circumstances, even surgery, *where reasonable*.[1] As for light duty, General Municipal Law § 207-c (3) provides that where, in the opinion of a physician or health authority, a police officer is "unable to perform his regular duties as a result of ... injury or sickness but is able, in their opinion, to perform specified types of light police duty," the officer is entitled to receive salary and other benefits *only if that light duty is performed*. That the City ordered the officers to submit to light duty is consistent with the authority given in this provision.

The PBA claims that General Municipal Law § 207-c does not authorize surgery absent bargaining. However, General Municipal Law § 207-c (1) clearly provides otherwise. After stating that an officer who is injured in the performance of his duties or becomes ill in the performance of his duties is entitled to salary, wages and medical benefits, the statute provides that these benefits *may be withheld if the officer refuses to undergo surgery*. Regarding this claim, the statute provides, in part,

"Provided, however, and notwithstanding the foregoing provisions of this section, the municipal health authorities or any physician appointed for the purpose by the municipality, after a determination has first been made that such injury or sickness was incurred during, or resulted from, such performance of duty, may attend any such injured or sick policeman, from time to time, for the purpose of providing medical, *surgical* or other treatment" (emphasis supplied).

The section goes on to provide that anyone who refuses to accept "medical treatment or hospital care" waives the right to benefits under the section. Unquestionably the Legislature contemplated that municipalities would, *where appropriate and reasonable*, require police officers to submit to corrective surgery, or forfeit benefits under the statute. Although the waiver issue is not as clear, we determine that the Appellate Division reached the correct result by narrowing the City's waiver requirement to only those items necessary for the City's determination of the nature of the officer's medical problem and its relationship to his or her duties.[2]
Finally, it should be clear that the procedures for implementation of the requirements of GML § 207-c are not before us. Those procedures may or may not be subject to bargaining. For example, no reason has been shown here why officers *should not be permitted the opportunity to obtain and have considered the views of their personal*

physicians as to surgery.

Prior History (in part)

Board Decision --- (April 30. 1992)
25 PERB ¶ 3022

The City's third preemption theory raises an issue of legislative intent. The Legislature may, of course, exempt terms and conditions of employment from the scope of compulsory negotiations by sufficiently plain and clear evidence of that intent. Having reviewed GML § 207-c and the cases arising thereunder, we find sufficient evidence of that intent regarding *the City's imposition of a light duty assignment and its imposition of the requirement that employees submit to surgery as ordered by the City or forfeit GML § 207-c benefits.* In both of these respects, but not otherwise, *GML § 207-c by its terms defines both the employer's and employee's rights and obligations and it further specifies the consequences to the employee for noncompliance*. *Superimposed upon this statutory scheme in these respects is a judicially created system of due process hearing protections.*[3]

We express no opinion as to whether and to what extent *the procedural implementation of these two requirements might be mandatorily negotiable* because those questions are not raised in this case.

DePoalo v County of Schenectady (Crt. of Appeals – May 2, 1995)
85 NY2d 527

First, we conclude that the plain wording of General Municipal Law § 207-c authorizes the municipality to make a determination that the injury or illness was related to work performance.

We hold that General Municipal Law § 207-c authorizes a municipality to direct an applicant to undergo a medical examination to provide information upon which the municipality may make a determination that an injury or illness occurred in the performance of duty *prior to* the awarding of benefits. This conclusion results both from the plain wording of the statute and from the purpose of General Municipal Law § 207-c.

We therefore conclude that the language of General Municipal Law § 207-c clearly authorizes such municipalities to require an independent medical examination *prior to* a determination of eligibility for receipt of benefits under the statute.

The Appellate Division, in a single order, reversed in each proceeding and dismissed the respective petitions, finding that *an applicant for benefits under General Municipal Law § 207-c must establish both a disability and a causal connection between the injury or illness and the performance of the applicant's work duties.*[4] The Court found further that the applicant may be directed to submit to a predetermination examination to resolve uncertainty concerning either element, maintaining that to find otherwise would deprive

the municipality of its right to deny fraudulent or questionable claims (the order of the Appellate Division affirmed, with cost)

Uniform Firefighters v City of Cohoes (Crt. of Appeals – May 9, 2000)
94 NY2d 686

Facts

In the fall of 1997, six members of the City of Cohoes Fire Department, who were receiving disability payments under General Municipal Law § 207-a, were examined by the City's physician for the purpose of evaluating their physical ability to return to full duty or to perform light duty assignments. The physician found that five of the firefighters were capable of performing light duty tasks and one was able to return to full duty. Each was then given a written order on October 31, 1997 to report for those assignments on November 10, 1997.

Ruling

The first issue before us on this appeal is appellant firefighters' claim that an evidentiary hearing was required regarding their capability, medically, to perform light duty assignments *before* an order to return could be issued. It is not disputed by the City here, and we agree, that the right of a disabled firefighter to receive General Municipal Law § 207-a disability payments is a property interest giving rise to procedural due process protection, under the Fourteenth Amendment, *before* those payments are terminated.---- All that remains to be determined then, is what process is constitutionally due those appellants.

[A]lthough an administrative hearing may ultimately be required before Section 207-a payments are terminated), recipients are not entitled to a hearing -- as claimed by appellants here--*prior to* the issuance of a report for light duty order. Indeed, an order to report for duty made, as here, only after a medical determination of capability (*see,* General Municipal Law § 207-a [1], [3]) does not trigger a hearing *unless a firefighter on Section 207-a status has brought that determination into issue by the submission of a report by a personal physician expressing a contrary opinion. Once evidence of continued total disability has been submitted, we agree with the Appellate Division that the order to report for duty may not be enforced, or benefits terminated, pending resolution of an administrative hearing, which itself is subject to review under CPLR article 78.* We suggested this outcome in *Matter of Schenectady Police Benevolent Assn v New York State Pub. Empl. Relations Bd* (85 NY2d 480) in finding "no reason . . . why officers should not be permitted the opportunity to obtain and have considered the views of their personal physicians as to [the propriety of a public employer's order under General Municipal Law § 207-c to submit to] surgery" (*id.,* at 487).
While certainly disabled firefighters receiving Section 207-a benefits have an important private interest in continuing to receive them, they are protected in the first instance in that they cannot be ordered back to duty *before* the public employer's physician has found them capable of performing light duty (*see,* General Municipal Law § 207-a [3]). *Then, it*

hardly seems unduly burdensome to require the firefighter to submit a medical report from a personal physician disputing the governmental physician's finding, as a condition for continued receipt of Section 207-a disability benefits pending a hearing. Moreover, even in the unlikely event of a temporary cessation of benefits due, for example, to a delay in obtaining a physician's report, any loss ultimately found to be erroneously imposed can be rectified by "back pay for benefits lost or restoration of leave credits improperly used" (*Matter of DePoalo v County of Schenectady,* 85 NY2d 527, 532).

Decided the Same day

Watertown v PERB (Crt of Appeals - May 9, 2000)
(supra)

Ruling

Under General Municipal Law Section 207-c, disabled police officers who suffer injury or illness in the course of employment may continue to receive their salary, but the City has the right to conduct their medical examinations, prescribe treatment and order them back to work--for full or light duty--if it deems them capable. As we held in *Matter of Schenectady Police Benev Assn v New York State Pub Empl Relations Bd* (85 NY2d 480), the City's authority under Section 207-c to make initial determinations as to these matters is not a mandatory subject of collective bargaining. Today, we decide the question explicitly left open in *Schenectady:* whether Section 207-c also removes the procedures for *contesting those initial determinations* from the strong and sweeping presumption in favor of mandatory bargaining. We conclude that it does not.

Our holding today in no way diminishes the City's right to make *initial determinations* under Section 207-c, as recognized in *Schenectady,* or the City's right to conduct an initial medical examination, as recognized in *DePoalo*. No one disputes the City's right to make the *initial determination* as to whether an officer has been injured in the line of duty, to have a physician of its choosing examine the injured officer, to prescribe medical or surgical treatment indicated by its examination, to order any officer it deems capable back to work and to discontinue benefits if an officer ignores a back-to-work order.

These are significant rights. Indeed, *these rights give the City a distinct advantage over the officer, because the City has the discretion to set the criteria upon which these decisions will be made and to enter a final, binding order.*[5] The only question before us is what happens when an officer raises a genuine dispute concerning the City's determination. If the City, for example, orders an officer to undergo surgery (as is its right), the officer may wish to have the opinion of a personal physician considered, *pursuant to a negotiated procedure, before submitting to the knife.* As we noted in *Schenectady,* Section 207-c does not mandate the procedures to be followed in such a situation*. Rather, those procedures have been left by the Legislature to the arena of collective bargaining.* [In a corresponding footnote, the Court's majority stated:

> It is of no significance that, even under the dissent's view, an officer seeking

to have a personal physician's opinion considered before submitting to surgery might be entitled to a due process hearing or article 78 review (*see,* dissenting opn, at 92-93). *The question before us is whether the parties are required to bargain the forum in which the physician's opinion will be considered. Since Section 207-c does not speak to that question, the presumption in favor of mandatory bargaining applies.*

Dissenting Opinion ----------Rosenblatt, J

The practical effect of the proposal is evident. The municipality's initial determination must be submitted to an arbitrator who would be entirely free to follow or overturn the municipality's determination. The arbitrator would not be bound by the decisional law protecting, both substantively and procedurally, the prerogatives of municipalities in determining eligibility for these statutory entitlements. Mandatory bargaining of the proposal before us would, in practice, negate the holdings in both *DePoalo* and *Schenectady.* In the end--and that is where it counts--a municipality's initial "determination" would be a matter of no consequence.

The majority finds it of "no significance that ... an officer seeking to have a personal physician's opinion considered before submitting to surgery *might* be entitled to a due process hearing or article 78 review" (majority opn, at 84, n 2 [emphasis added]). We left no doubt, however, on this point. We unanimously held today, in *Matter of Uniform Firefighters v City of Cohoes* (94 NY2d 686, 691), that "the right of a disabled firefighter to receive General Municipal Law § 207-a disability payments is a property interest giving rise to procedural due process protection, under the Fourteenth Amendment." Thus, although Section 207-c specifically authorizes municipalities to make eligibility determinations, applicants for disability benefits are still entitled to due process hearings. Accordingly, applicants have an opportunity to present their own evidence, including the opinions of their personal physicians. Moreover, if applicants are dissatisfied with the outcome of the hearing, judicial review through article 78 of the CPLR is available.

Majority Opinion ------ Rebuttal

[W]e conclude that the procedure for contesting the *City's determinations* under Section 207-c are a mandatory subject of bargaining.

The dissent insists, first, that Section 207-c represents a wholesale, unequivocal grant of unrestricted authority to municipalities. That premise is not supported by the statute. Section 207-c, in fact, was a legislative compromise that gave certain rights to employees and other rights to municipalities. As we held in *Schenectady,* the rights explicitly given to the City by the statute are outside the scope of mandatory bargaining. But in *Schenectady* we also unanimously recognized a distinction *between initial determinations and other matters. The statute does not remove from mandatory bargaining those other matters--such as review procedures--that the Legislature chose not to address.*

There is, moreover, no merit to the dissent's argument that, if Section 207-c disputes are

submitted to arbitration, arbitrators will ignore our decisional law and inflict a "legislatively unintended impact on the municipal purse" (*see,* dissenting opn, at 89). Rather, if the result of negotiation is that--as the union asks--Section 207-c disputes are submitted to arbitration, *arbitrators would resolve disputes where an employee submits evidence that the City's determination in a specific case was not in accord with the facts.* Such disputes are commonplace regarding *any* employee right or benefit, as the Legislature surely knew when it enacted Section 207-c. Yet the Legislature said nothing about the procedures for resolving Section 207-c disputes. Thus, since there is no "plain" and "clear" evidence that the Legislature intended otherwise, the grievance procedures for resolving Section 207-c disputes must be determined--just as any other grievance procedures are determined--through the collective bargaining process.

Prior History
Demand at Issue

Article 14, Section 12---Miscellaneous Provision---the PBA is not seeking to divest any (purported statutory) right the City may have under § 207(c) *to initially determine whether the officer was either injured in the line of duty or taken sick as a result of the performance of duty*, but rather, the PBA seeks to negotiate *the forum---and procedures* associated therewith---through which disputes related to *such determinations* are processed, to wit: should the officer disagree with the City's conclusion, the PBA proposes the expeditious processing of all disputes related thereto to final and binding arbitration pursuant to PERB's Voluntary Disputes Resolution Procedure.[6]

ALJ Decision - J. Albert Barsamian ---- (June 27, 1997)
30 PERB ¶ 4609

As to the City's argument that binding arbitration would replace judicial review in the form of a CPLR 78 procedure, that is also rejected for the reason that judicial review remains available even after binding arbitration, albeit, via Article 75 instead of Article 78. There is nothing contained in GML § 207-c that explicitly provides that Article 78 shall be the sole and exclusive appellate mechanism.

With Article 78 review, as is currently the standard appellate remedy for appeals from administrative decisions, a municipality's right to make the initial determination in § 207-c cases is not affected; nor is that right changed by an Article 75 review provided for in appealing decisions of arbitrators. That right remains whether or not an arbitration stage is added, and regardless of whether judicial review is provided by Article 78 or Article 75*. Neither the City's right to initially decide nor an appellant's right to judicial review are extinguished by a finding that a demand to insert binding arbitration to the § 207-c process is mandatorily negotiable*.

Board Decision ---- (December 11, 1997)
30 PERB ¶ 3072

As GML § 207-c provides no procedural framework for determining whether an employee

has been disabled in the line of duty, and as such eligibility determinations clearly affect terms and conditions of employment, a demand for a dispute resolution procedure ending in arbitration, which permits for subsequent judicial review under CPLR Article 75, rather than review under CPLR Article 78, is mandatorily negotiable.

City of Syracuse v PERB (Appellate Div. 4th Dept – December 27, 2000)[7]
279 A.D. 98; leave to appeal denied, 72 4 N.Y.S.2d 143
(4th Dept – March 21, 2001); 96 N.Y.2d 717 (Crt. of Appeals – July 2, 2001)

Facts

Two firefighters employed by the City were injured in the line of duty and began receiving salaries and benefits pursuant to General Municipal Law § 207-a. The City received medical reports indicating that both firefighters were capable of performing light duty work. Pursuant to General Municipal Law § 207-a (3), the City's fire chief ordered them to report for light duty assignments. The fire chief scheduled hearings before a deputy chief concerning the possible termination of the General Municipal Law § 207-a benefits of both firefighters. Prior to the hearing, the Union sent a letter to the fire chief advising him that the procedures to determine whether General Municipal Law § 207-a benefits should be terminated were a subject of mandatory bargaining and that the implementation of any procedures, including these hearings, without the approval of the Union would constitute an improper practice. Nevertheless, the City went forward with the hearing. At the conclusion of that hearing, the deputy chief found that the firefighter had willfully failed to comply in a reasonable and prudent manner with the fire chief's directive. The fire chief terminated the General Municipal Law § 207-a benefits of both firefighters.

Issue

We note that we do not address the issues whether the hearings were required to protect the due process rights of the firefighters (*see generally, Matter of Uniform Firefighters of Cohoes v City of Cohoes,* 94 NY2d 686, 691-693),*General Municipal Law § 207-a benefits,* or whether the hearings as conducted were fair and reasonable; *those issues are not before us. Rather, we must determine whether the City committed an improper practice by unilaterally implementing the procedures to be used in determining whether to terminate General Municipal Law § 207-a benefits.*

Ruling

After a lengthy discussion regarding the Court of Appeals decisions in both *Schenectady and Watertown* (*supra*), the 4th Dept found that "*the City could not unilaterally implement the procedures to be used in determining whether to terminate the 207-a benefits. These procedures were a subject of mandatory bargaining*."
We conclude that, *under the Taylor Law, the procedures to be used in determining whether to terminate General Municipal Law § 207-a benefits are a subject of mandatory bargaining.* The City's unilateral implementation of such procedures constituted an improper practice (*see,* Civil Service Law § 209-a [1] [d]).

Past Practice Defense - Rejected

The City next contends that it did not unilaterally change a term and condition of employment because the hearing procedures used here were an established past practice. At the improper practice hearing before the ALJ, the parties stipulated that there were no negotiated hearing procedures in place concerning the termination of General Municipal Law § 207-a benefits. There was no evidence that the hearing procedures used by the City for the firefighters had previously been used for General Municipal Law § 207-a issues. The fire chief testified that the hearing procedures used by the City were also used for disciplinary matters. PERB's determination that those disciplinary hearing procedures do not constitute a "past practice" for issues of termination of General Municipal Law § 207-a benefits is supported by substantial evidence (*see generally, 300 Gramatan Ave. Assocs. v State Div. of Human Rights,* 45 NY2d 176).

Prior History (in part)

Board Decision --- (April 27, 1999)
32 PERB ¶ 3029

The Board reversed the ALJ (Mayo)[8] who had dismissed the Union's charge finding, *inter alia*, that the "plain language of GML § 207-a as it relates to light duty circumscribes any bargaining mandate."

Issue

[W]hether the hearing procedures which the City fashioned are mandatorily negotiable subjects and, if so, whether those procedures change the City's practice.

Ruling

Having reviewed the record and considered the parties' arguments, including those at oral argument, we reverse the ALJ's decision. *The GML § 207-a hearing procedures are mandatory subjects of negotiation, the City was not exempted by law or policy from its duty to negotiate and the hearings held by the City unilaterally changed its practice.*

Discussion

If a hearing of some type is required as a matter of constitutional due process before benefits can be terminated, as the Association claims and as appears likely,[9] and assuming the City satisfied its constitutional obligations, *it would still not be exempt from its duty to negotiate those hearing procedures nor would it have satisfied its statutory duty*. *The City's statutory duties are independent of and exceed its constitutional obligations.* As was explained in *County of Greene,*[10] the judicial decisions set only the constitutional due process minimums. *The City is still obligated to satisfy its separate statutory duty to negotiate the procedures pursuant to which decisions are made as to whether the wages and economic benefits which are the subject of GML § 207-a will be*

paid.

In holding that the hearing procedures the City fashioned for use under GML § 207-a need not be negotiated, the ALJ drew a distinction between the hearing procedures used to determine an employee's initial eligibility for GML § 207-a benefits and ones used to assess continuing eligibility in a light duty context, noting that the former are mandatorily negotiable, but the latter are not. *There is not, however, any difference in negotiability analysis whether the decision involves an initial determination of GML § 207-a eligibility or a subsequent determination regarding an employee's continuing eligibility for benefits*. Whether benefits are denied upon a determination that the injury or illness was not duty related, either initially or upon reexamination after an initial grant of benefits, or upon a determination that an employee has refused a light duty assignment which the employee is capable of performing, the result is still a loss of salary and economic benefits. *All are simply procedures used to determine whether wages and economic benefits will be paid and are mandatorily negotiable for that reason.*

Poughkeepsie v PERB (Crt of Appeals March 28, 2006)
(supra)

Ruling

After examining the language in the Association's proposal in light of these related, established principles, PERB concluded that the disputed demands afforded a firefighter *de novo* review—in effect, a fresh determination of the claim by an arbitrator—rather than arbitral review of the City's initial determination, *using a procedure and standard of review tailored by the parties.*

Here, the proposed language calls for the arbitrator to resolve the firefighter's claim, not review the City's initial determination, and to decide all allegations and defenses, including assertions regarding timeliness; contemplates trial-type evidentiary hearings with witnesses; and even assigns burdens of proof according to the type of determination at issue. *We therefore find no irrationality in PERB's conclusion that the disputed demands set forth not a review procedure, but a redetermination procedure in derogation of the City's nondelegable statutory right to make initial determinations.*

Demand at Issue – Poughkeepsie 1

The Arbitrator shall have the authority to decide, *de novo,* the claim of entitlement [or continued entitlement][11] to GML 207-a benefits. The Arbitrator shall have the authority to consider and decide all allegations and defenses made with regard to the GML 207-a claim, including but not limited to assertions regarding the timeliness of the GML 207-a claim. In the event of a dispute between the parties as to the nature of the proceeding, the Arbitrator shall first decide whether the proceeding presents an issue of an applicant's initial entitlement to GML 207-a benefits or whether the proceeding presents an issue of termination of GML 207-a benefits. The burden of proceeding with evidence as to the nature of the issue(s) presented shall be on the member. In the event the Arbitrator decides that the matter presents an initial GML 207-a claim, the member shall have the

burden of proof by a preponderance of the evidence that he is entitled to receive the benefits set forth in GML 207-a with respect to an injury alleged to have occurred in the performance of his duties or to a sickness resulting from the performance of duties which necessitated medical or other lawful remedial treatment. In the event the Arbitrator decides the matter presents a termination of GML 207-a benefits, the Fire Department shall have the burden of proof by a preponderance of the evidence that the member is no longer eligible for GML 207-a benefits.

The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this procedure. The Arbitrator shall have no authority to make a decision on any issue not submitted or raised by the parties.

The decision and award of the Arbitrator shall be final and binding on all the parties.

ALJ – J. Albert Barsamian ---- (April 16, 1999)
32 PERB ¶ 4556

Applying *Watertown*, the ALJ found that the demand was mandatorily negotiable.

Board Decision ---- (June 21, 2000)
33 PERB ¶ 3029

Board reverses the ALJ: "the [Union] demanded a *de novo* hearing …[i]t is the inclusion of this language which renders nonmandatory the Association's demand for *de novo* review. Such demands are contrary to our decision in *Watertown* because we did not hold in *Watertown* that the union would be entitled to a *de novo* second hearing. *We merely determined that the union's demand to appeal to arbitration disputes over the initial determination were mandatorily negotiable as a reasonable substitute for Article 78 review.*

Our decision today *in no way affects our prior decision in Watertown regarding the ability of the parties to negotiate a review procedure which ends in arbitration*.

Demand at Issue – Poughkeepsie 2

The Union's demand remained unchanged except for the wording of the first sentence which eliminated the "*de novo*" reference and restructured the sentence to read: "The arbitrator shall have the authority to review the claim of entitlement [or continued entitlement] to GML 207-a benefits."

ALJ – Gordon R. Mayo ----- (December 12, 2002)
35 PERB ¶ 4616

Noting that the proposed review procedure "appears to be in accordance with the Board's decision in *Poughkeepsie 1* and the Court of Appeals' decision in *Watertown*, [and] is not

de novo in nature," the ALJ found the demand to be mandatorily negotiable.

Board Decision ----- (February 28, 2003)
36 PERB ¶ 3014

The Board reverses the ALJ stating:

At issue here is whether the Association's demands seek review of the City's determination regarding eligibility for GML § 207-a benefits or whether the demands seek review of the employee's underlying claims for GML § 207-a benefits. In *City of Watertown*, we determined that the PBA demand acknowledged the City's right to make the initial determination and merely requested that any such dispute over that initial determination be processed to arbitration pursuant to PERB's Voluntary Dispute Resolution Procedure. *The demand was a substitute appeal procedure in order to avoid commencing an Article 78 proceeding and was found on that basis to be a mandatory subject of negotiations.* Here, Section 12 of the Association's proposals also seeks arbitration, not of the City's initial determination of ineligibility, but of the employee's GML § 207-a claim. The ALJ erred in determining that the proposal seeks a review of the City's determination when the language in the section clearly seeks arbitration of the claim itself. Because the demand still seeks review of the merits of the claim, it is still, in essence, a demand for a *de novo* review.

Here, the Association's proposal regarding Section 12 is not a substitute for an Article 78 review, but a procedure for a determination on the merits of the employee's claim of eligibility for benefits. That this is the Association's intent is made clear by the language of Section 13, which, among other things, gives the arbitrator the authority to review the claim of entitlement to GML § 207-a benefits and sets forth the scope of the arbitrator's jurisdiction and the employee's and City's burdens of proof.

A similar conclusion must be reached with respect to Sections 18 and 19, which seek the same level of review of the termination of GML § 207-c benefits and Sections 21 and 22, which provides for review of light duty. None of the demands seek the review of the City's determination; what is sought is review of the underlying claims of the affected employee. Our decisions in *Watertown* and in *Poughkeepsie 1* make clear that a demand for a dispute resolution procedure ending in arbitration, which permits for subsequent judicial review under CPLR Article 75, rather than review under CPLR Article 78, is mandatorily negotiable. *Both decisions also make clear that it is the employer's determination, not the underlying claim, which is subject to review.*

Park v Kapica (Crt of Appeals – March 27, 2007)
8 NY3d 302

Facts

Petitioner, John Park, a police officer employed by the Town of Greenburgh, underwent surgery in June 2002 as the result of an injury he sustained while in the line of duty. He

was certified disabled from his duties pursuant to General Municipal Law § 207-c (1).

In March 2003, the Town's medical examiner concluded that Park could return to work in a sedentary capacity. Park's supervisor, Greenburgh Chief of Police John A. Kapica, directed him to return to light duty starting April 21, 2003. Park objected to the medical examiner's determination, submitted a report from his treating physician indicating that he had a "permanent total disability" and requested a hearing on the issue of his ability to return to work, which was granted. The hearing officer concluded that Park was fit to return to light duty, that his refusal to do so was without justification, and that the Town could recoup any section 207-c benefits paid to Park dating back to April 21, 2003, the date Kapica directed him to return to work in a light duty capacity.

Ruling

The right of a disabled officer to receive section 207-c disability payments constitutes "a property interest giving rise to procedural due process protection, under the Fourteenth Amendment, *before those payments are terminated*," and a due process hearing is triggered when an officer on section 207-c status submits evidence from his treating physician supporting the officer's claim of "continued total disability" (*Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d 686, 691, 692 [2000] [pursuant to the analogous provision General Municipal Law § 207-a, firefighters who contest a light-duty determination are entitled to a due process hearing]).

We have previously stated that section 207-c provides no definitive procedure that must be followed, and that such procedures may be the subject of collective bargaining (*see Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 NY2d 73, 80-81 [2000]). *The parties here have not collectively bargained a procedure to be followed when an officer contests a light-duty determination.*[12] Therefore, the Town was free to fashion a hearing remedy so long as its procedure afforded Park due process.

Here, Park's interest in the continued receipt of disability benefits was adequately protected by the Town's due process procedure. Although he chose not to participate in the hearing, he was nevertheless given the opportunity to contest the medical examiner's light-duty determination by presenting his own witnesses and cross-examining the Town's witnesses. Moreover, the Town did not terminate his disability benefits at any time prior to his hearing [and] the procedure followed by the Town sufficiently met the dictates of due process.

[A] municipality is not permitted to *recoup* section 207-c payments where, as here, the officer avails himself of due process protections by challenging the medical examiner's determination because such a challenge cannot be equated with a refusal to return to duty.[13]

SUBSEQUENT APPLICATION

ORANGETOWN POLICEMEN'S BENEVOLENT ASSN – Board Decision (June 27,

2007)[14] 40 PERB ¶ 3008; *confirmed*, 40 PERB ¶ 7008 (Sup. Ct. Albany Co. 2007).

Issue

[T]he only issue before us is whether the scope of negotiable procedures under GML § 207-c, as interpreted by relevant case law, includes the video or audio taping of a medical examination. The ALJ [Comenzo] found that was negotiable and we hereby affirm that finding.

Discussion

It is well-settled that pursuant to GML § 207-c, a municipality is granted the authority to make an initial eligibility determination about an officer's entitlement to the benefit (citing *DePoalo v County of Schenectady*, *supra*). Various subjects that are part of the municipality's initial determination under GML § 207-c are not negotiable, such as the waiver of confidentiality by the employee for the release of medical records relevant to the injury or illness for which the employee seeks GML § 207-c benefits (citing *City of Schenectady, supra*). In contrast, an employer's demand for an overbroad confidentiality waiver relating to a GML § 207-c examination is negotiable (*id*). Other procedural aspects of the initial determination have also been found to be mandatory subjects of negotiations (citing pre-*Watertown and Poughkeepsie* cases: *See Police Assn of New Rochelle*, 13 PERB ¶ 3082 (1980*); Local 589, Int Assn of Firefighters, v City of Newburgh*, 17 PERB ¶ 75 06 (Sup Ct Orange County 1984).[15]

It is incumbent upon the municipality when unilaterally adopting a policy or procedure beyond the statutory language of GML § 207-c to establish that its action is merely the codification of existing practice or policy. Absent such proof, as is the case here, an employer's unilateral implementation of GML § 207-c procedures is mandatorily negotiable (citing *Town of Cortlandt*, 30 PERB ¶ 3031 (1997) *conf sub nom Town of Cortlandt v Pub Empl Rel Bd*, 30 PERB ¶ 7012 (Sup Ct Westchester County 1997).
The Board has characterized the receipt of GML § 207-c benefits as akin to wages and, therefore, mandatorily negotiable:
. . . as GML § 207-c benefits are a form of wages, *procedures which condition, restrict or potentially deny an employee's receipt of those benefits are terms and conditions of employment within the meaning of the Act, which must be negotiated before they are adopted or implemented except as negotiations are preempted by law or public policy* (id).

In doing so, the Board has rejected arguments that GML § 207-c generally preempts any duty to bargain over the procedures by which the statutorily mandated payments of wages and health care expenses are made. In *Village of Hamburg,* 36 PERB ¶ 3030 (August 18, 2003), we held that "[t]he duty to bargain over GML § 207-c is not limited solely to procedures for the review of light-duty assignments or procedures for the termination of benefits." The Board's holding in *Village of Hamburg*, *supra*, quoted language from the decision of the Court of Appeals in *City of Watertown,* that "matters related to section 207-c, but not specifically covered by the statute, are mandatory subjects of bargaining." In

the *City of Watertown*, *supra*, the Court upheld our determination that a demand for arbitration of disputes involving eligibility for benefits under GML § 207-c was a mandatory subject of negotiations.

Ruling

Based on the exception filed in this case, the Board affirms the ALJ's conclusion that the video or audio taping of the medical examination under GML § 207-c is a mandatory subject of bargaining *not only because it is a procedure for accumulating evidence to be utilized by the PBA and employee in the review of the initial determination, but also because such a procedure for making the initial determination is not precluded from negotiations by the specific statutory language of GML § 207-c.*

Finally, the Board rejects the Town's reliance on the Court of Appeals' decision in *Poughkeepsie Professional Firefighters' Association v New York State Public Employment Relations Board.* In that decision, the Court confirmed our decision that the demand for a particular *de novo* review procedure regarding an employee's claim under GML § 207-a, rather than an employer's initial eligibility determination, was a nonmandatory subject of negotiations. *The Court's decision in Poughkeepsie Professional Firefighters' Association, supra, cannot be reasonably construed as prohibiting negotiations regarding a blanket prohibition against a procedure for accumulating evidence to be utilized in a procedure for challenging the employer's initial determination under GML § 207-c.*

Based on the foregoing, we deny the Town's exception and affirm the decision of ALJ.

CITY OF MIDDLETOWN – ALJ Fitzgerald (January 7, 2009)
42 PERB ¶ 4502, *affd* 42 PERB 3022 (September 17, 2009)

Demand at Issue

In the charge, the City asserts that the demand would limit the City's right to make an initial determination as to § 207-c eligibility and would substantially expand existing rights of employees by providing for a review by an arbitrator of the employer's initial decision of eligibility and light duty determinations, while employees continue to receive benefits. In its brief, the City essentially argues that the proposed timeline for processing an application, would deny it any meaningful review of the claim, while allowing an expanded record for review in an arbitration hearing. The City objects to the following language:

Section 3, *Application for Benefits*, at subsection 2(B):

The Claimant shall be permitted to file documentation to supplement the original application for benefits under the following circumstances:

1. After filing the application, but before the determination of the Claims Manager; and

2. As set forth in section 11 [hearing procedures].

Section 4, *Authority and Duties of Claims Manager*, at subsection 3:

A determination of initial eligibility by the Claims Manager shall be made within fifteen (15) calendar days of the date of the application, based upon the investigation without holding a hearing.

Section 7, *Performance of Regular of Specific Light Duty Assignments*, at subsection 2:

A Recipient who disagrees with the order to report and perform his/her regular or specific light duty and has conflicting medical documentation . . . shall submit the medical documentation to the Claims Manager within fifteen (15) calendar days . . . The Claims Manager shall review said medical evidence and within fifteen (15) calendar days of its receipt shall issue to the Chief and Recipient a decision as to whether the order to return . . . should be confirmed, modified or withdrawn. If the Recipient is dissatisfied with the decision he/she may, in writing, notify the Claims Manager of the need for a third (3rd) independent medical examination to be conducted pursuant to Section 11(2) of this procedure.

Section 11, *Hearing Procedures*, at subsection 1:

After requesting a hearing, the Claimant shall be permitted to submit additional information to the Claims Manager so long as said submission is made no later than thirty (30) calendar days prior to the date of the scheduled hearing. The Claims Manager shall review the documentation and inform the Claimant in writing within seven (7) calendar days of the submission, as to whether the determination that is the subject of the hearing will be modified. So long as the Claimant meets the time requirements in this provision, should the Claims Manager's determination remain unchanged, the record before the Arbitrator may include the additional submission of Claimant.

Ruling

Demands Found to be Mandatory

The Board expanded on its *Watertown* decision in *Poughkeepsie Professional Fire Fighters' Association, Local 596*, 33 PERB ¶ 3029 (2000), *holding that the appropriate arbitral review standard of an employer's § 207-c determination was limited to the standard of a Civil Practice Law and Rules (CPLR) Article 78 review[16] and that a demand for de novo review, or a new determination of eligibility by an arbitrator, was therefore nonmandatory.*

Evaluating the demand at issue within the above parameters, I find the demand does not infringe upon any rights reserved by statute to the City. *Those portions of the demand which would establish timelines for submission of documentation by the employee and determinations of the claims manager do not usurp the City's right to make eligibility determinations.*

As to the challenged language in the hearing procedure, the City argues that the procedure would provide for an improper review of its initial determinations, citing to the Court of Appeals decision in *Poughkeepsie II*. The assertion that the proposal at issue is so restrictive as to effectively provide for a *de novo* review by an arbitrator is rejected. *By the clear language of the demand, the scope of the arbitrator's review would be whether the City had a reasonable basis for its determination on the record before it. The proposal would allow the submission of further documentation to the claims manager only while the matter is pending decision or reconsideration by the claims manager. The record on review before the arbitrator is not greater than that record before the claims manager, thus, there is no improper scope of review in the arbitration hearing.*

Affirmed by Board Without Reference to CPLR Article 78

In the present case, PBA's GML 207-c proposal is mandatory under both *Watertown* and *Poughkeepsie*. Like the proposal in *Watertown*, *it seeks an arbitral process to resolve dispute over GML § 207-c benefits while at the same time recognizing the City's statutory right to determine initial eligibility. Contrary to the City's argument, permitting reconsideration by the claims examiner of the initial eligibility determination does not render the proposal nonmandatory; rather, it constitutes a further recognition of the City's statutory right under GML § 207-c.*

In addition, the proposal is mandatory under Poughkeepsie. It expressly proposed that the arbitrator's scope of review will be limited to determining whether the claims manager had a reasonable basis for the eligibility determination based upon the record before him or her. The mandatory nature on the proposal under Poughkeepsie is further bolstered by the proposed prohibition against either party presenting any new documentary evidence at arbitration.

TOWN OF EAST HAMPTON – ALJ Blassman (June 1, 2009)
42 PERB ¶ 4534

Demand at Issue

PBA proposals 15(B) through (D), denominated "GML § 207-c," propose a procedure for resolving disputes regarding an officer's eligibility for benefits for line-of-duty injuries under General Municipal Law (GML) § 207-c. The Town objects not only to the allegedly nonmandatory nature of the proposals, but to the fact that the PBA has modified them. The language of the proposals is set forth below . . . :

> B) An officer may elect to have all controversies regarding initial determinations by the Town over eligibility for benefits pursuant to GML § 207-c be decided at a hearing conducted by a neutral arbitrator selected pursuant to the Collective Bargaining Agreement's grievance procedure. The Arbitrator shall decided, based on a review of the law and the record, whether the Town's determination was proper. The decision of the Arbitrator shall be final and binding on the Town, the PBA and the officer,
>
> C) In disputed cases, where the Town decides an officer has sufficiently recovered from an injury to perform either light-duty or full-duty police work, the officer may elect to have the dispute resolved, in lieu of an evidentiary hearing, by a medical doctor mutually agreed upon by both parties. The doctor shall review all relevant medical documentation submitted by the Town and the police officer. Based on the medical documentation, the doctor shall determine whether the Town's decision was proper. The decision of the medical doctor shall be final and binding on the Town, the PBA and the officer.
>
> D) The officer may elect to have all controversies, other than disputes over an officer's fitness to return to work, regarding the discontinuation of § 207-c benefits, e.g. whether the officer refused corrective medical treatment or medical inspections, be decided at a hearing conducted by a neutral arbitrator selected pursuant to the Collective Bargaining Agreement's grievance procedure. The Arbitrator shall decided, based on review of the law and the record, whether the Town's determination was proper. The decision of the Arbitrator shall be final and binding on the Town, the PBA and the officer.

Ruling

Demands Found to be Mandatory

The Town argues that PBA proposals 15(B) through (D) are not mandatory because they require *de novo* review of the Town's original determination . . . . *The Town argues that the finding in City of Poughkeepsie, supra, means that the only type of GML § 207-c procedure that is mandatorily negotiable is one that is equivalent to a proceeding initiated pursuant to Article 78 of the Civil Practice Law and Rules.* It argues that, since new evidence cannot be considered in such a proceeding, GML § 207-c procedures that permit the consideration of new evidence are also nonmandatory.

I find that the Town's reading of *City of Poughkeepsie*, *supra*, is in conflict with *City of Watertown v. New York State Public Employment Relations Board* (" *Watertown* ") and

the Board's decision in *Town of Orangetown,* which was issued after *City of Poughkeepsie.*

In *Watertown*, *supra*, the Court of Appeals determined that, in contrast to a municipality's initial eligibility determinations, procedures to contest those initial determinations are mandatory. The Court stated that it was deciding the question it left open in *Schenectady Police Benevolent Association v. New York State Public Employment Relations Board* (" *Schenectady* "). In that case, the Court did not reach the question of whether procedures for the implementation of GML § 207-c requirements were mandatorily negotiable, but stated that it saw no reason "*why officers should not be permitted the opportunity to obtain and have considered the views of their personal physicians as to surgery*." Since the Court in *Watertown, supra,* answered the question left open in *Schenectady, supra*, in the affirmative, procedures challenging a municipality's initial determination are mandatorily negotiable even if they permit officers to submit the views of their personal physicians after the initial determination is reached. Further, in *Town of Orangetown,* the Board clearly stated that GML § 207-c procedures, including demands for the "arbitration of disputes involving eligibility for benefits under GML § 207-c," are mandatory.

If only Article 78 equivalent procedures were mandatorily negotiable, procedures that challenge initial eligibility determinations could not include the submission of new evidence. Then, the employee organizations would never have the opportunity to mandatorily negotiate procedures that would permit officers to submit medical evidence from their personal physicians, since municipalities may unilaterally issue eligibility decisions. Such a finding would not only make a nullity of the Court's finding in Watertown, supra, but would violate due process ----- Based upon the forgoing, the proposals are mandatory.

COUNTY OF CHEMUNG – Board Decision (August 19, 2011)
44 PERB ¶ 3026

Demand at Issue

Section 11 of the GML § 207-c proposal is entitled " Hearing Procedures," and states:

Hearing requests under the provision of this procedure shall be conducted by a neutral Hearing Officer, from a list of four Hearing Officers mutually agreed upon by the parties. The names of the Hearing Officers will be placed on a list numbered 1-4. When a hearing is requested, the Employer will request the first Hearing Officer on the list. Each name will be moved to the bottom of the list after each hearing. The fees and expenses of the Hearing Officer shall be borne equally by the parties. The Claimant/Recipient may be represented by a designated representative and may subpoena witnesses. Each party shall be responsible for all fees and expenses incurred in their representation. Either party or the Hearing Officer may cause a transcript to be made. The Claimant/Recipient and the Employer agree to share equally the costs of the transcript. After the hearing, the Hearing Officer shall render a determination which shall be final and binding upon all

parties.[17]

Any such decision of the Hearing Officer shall be reviewable only pursuant to the provisions of Article 78 of the Civil Practice Law and Rules.[18]

Ruling

Demand found to be mandatory

In the present case, we conclude that the proposed GML §207-c hearing procedure in §11 is mandatory under *Watertown.* Unlike *Poughkeepsie*, the proposed hearing procedure does not expressly or implicitly call for a *de novo* review of the Joint Employer's determination of a claim for statutory benefits subject to limited judicial review under CPLR Article 75. Instead, it proposes a hearing before a hearing officer resulting in a binding decision with the ultimate authority for resolving the dispute resting with the courts under CPLR Article 78. *In interpreting the proposal, we rely upon other provisions of the Association's GML §207-c proposal that expressly recognize the Joint Employer's statutory rights and authority including the right to render an initial determination.*

CITY OF RYE – ALJ Blassman (March 11, 2013)
46 PERB ¶ 4520

Demand at Issue

Also included in the PBA' s interest arbitration petition is proposal 17.ii which states:

> Adopt a GML section 207-c policy which provides for (a) the full accrual of all benefits payable by reason of the collective bargaining agreement while the member of the Police Association is disabled from performing his/her duties and (b) a procedure where once a member is determined by the City of Rye to be disabled pursuant to the provisions of GML section 207-c(1) [sic], and is subsequently directed to perform a full or light-duty assignment, he/she receive [sic] a due process hearing before an independent hearing officer.[19]

Ruling

Demand found to be mandatory

The City objects to PBA proposal 17.ii(b), which seeks a GML §207-c procedure that includes a "due process hearing before an independent hearing officer" to resolve disputes that arise when the City directs the officer to return to work from GML § 207-c leave. *The City argues that the demand is vague because it does not include a standard of review*. I find the City's argument to be without merit. In *City of Watertown v. New York State Public Employment Relations Board* ("*Watertown*") the Court of Appeals found mandatory a demand seeking to negotiate "*the forum-and procedures*" by which disputes regarding an employer's GML §207-c decisions can be heard. That demand, like the one

here, did not include a specific standard of review.[20]

The City alternatively argues that the demand is overbroad because it can be interpreted as including a prohibited standard of review that is inconsistent with GML §207-c. Pursuant to GML §207-c and GML §207-a, which accords similar benefits to another class of employees, municipalities have the authority to make initial eligibility determinations about an employee's entitlement to benefits under those statutes. Procedures seeking to review a municipality's determination pursuant to GML §207-c and GML § 207-a have been found to include a prohibited standard of review and to be nonmandatorily negotiable where the procedure grants an arbitrator a right to perform a *de novo* review of the statutory claim of entitlement to GML §207-a statutory benefits, "rather than limiting the arbitrator's binding power to reviewing the employer's determination." In *Chemung, supra*, the Board noted that the procedure found to be mandatory in *Watertown*, *supra*, was a proposed general arbitration clause.

The demand in this matter is similar to those found to be mandatory in *Watertown* and *Chemung, supra*. It is a general arbitration clause that does not "expressly or implicitly call for a *de novo* review" of the City's determination. Further, it does not seek a review procedure for the City's initial eligibility decision, but only its subsequent decisions directing officers to return to work from GML § 207-c leave. *Moreover, the Board has held that bargaining proposals are to be read as consistent with the law, "except in those circumstances in which the demand as written is patently unlawful." Therefore, I may not presume that the standard of review intended by the proposal is inconsistent with GML §207-c.*

CITY OF SYRACUSE – ALJ Fitzgerald (April 30, 2014)
47 PERB ¶ 4543

Demand at Issue

General Municipal Law § 207-a(a) Review Procedure

Local 280's revised proposal for a General Municipal Law (GML) § 207-a(a) Determination Review Procedure, dated May 16, 2013, reads as follows:

Section 9. Determination Review Procedure

1. In the event that a Firefighter wants to compel a review of the Chief' s Determination made pursuant to Section 6 hereof [Initial Determination], the applicant shall arrange for the appointment of a neutral arbitrator for such purpose through the procedures set for [sic] by PERB.[21]

2.The arbitrator will review the Chief's determination. After the hearing, the arbitrator shall

render a determination which shall be final and binding upon all parties. [Emphasis added][22]

3. Each party's counsel fees (if any) shall be the responsibility of the party incurring such services. The City shall bear the costs, fees and expenses of the arbitrator, except as provided herein.

4. The Arbitrator's Decision may only be reviewed pursuant to the standard of review set forth in Article 75 of the [Civil Practice Law and Rules (CPLR)].[23]

The above language is a modification of Local 280's original proposal on this issue, dated February 7, 2013, which provided, at § 9.2, as follows:

The arbitrator will review the Chief's determination *de novo* and shall give no deference to the Chief's original determination.[24]

City's Arguments

The City asserts in the charge that Local 280's amendment to the original proposal providing for a *de novo* review of the Chief's decision was only cosmetic in nature and that the proposal continues to be one for a *de novo* review. In its brief, the City asserts that the proposed language implicitly allows the arbitrator to conduct a *de novo* review, *and to consider evidence beyond that considered by the Chief*. It argues that the removal of the words *de novo* does not alter the nature of the proposal, *which sets no standard or limitation on the arbitrator's authority to review the determination or to consider new evidence,* citing to *Poughkeepsie Professional Firefighters Association, Local 596, IAFF, AFL-CIO (Poughkeepsie).* It also argues that a reading of the change from the existing language to that in the proposal supports its argument as to the nonmandatory nature of the demand, *because the language eliminates the existing arbitrary and capricious standard while providing no standard of review in its place.*

Ruling

Demand found to be mandatory

The City's claim that the revision to the initial proposal is merely cosmetic and that the language continues to constitute a *de novo* review of the firefighter's claim is without merit. The decision in *Poughkeepsie* is not on point, in that the language at issue in that matter expressly provided for the arbitrator to resolve the merits of a firefighter's underlying claim without any recognition of, or reference to, the City's initial determination. The proposal here, in providing that "[t]he arbitrator will review the Chief's determination," is not one for a *de novo* review, but a demand for an appeal process whereby the Chief's determination may be challenged. *Nor does the lack of a defined standard of review cause the demand to be nonmandatory*. In *City of Watertown*, the Court of Appeals upheld the Board's decision finding a proposal mandatory which provided for the processing of all disputes regarding the City's GML § 207 eligibility determinations to final and binding arbitration,

without reference to any specific standard of review.[25]

Further, language similar to that at issue here was found mandatory in *Chemung County Sheriff's Association, Inc.*, where the demand provided that hearings would be conducted by a neutral hearing officer, that the employee "may be represented by a designated representative and may subpoena witnesses", and that " [a]fter the hearing, the Hearing Officer shall render a determination which shall be final and binding upon all parties*...reviewable only pursuant to the provisions of Article 78 of the [CPLR]." Finding other provisions of the proposal to clearly recognize the employer's statutory right and authority to render the initial determination*, the Board found nothing in this language to expressly or implicitly call for a *de novo* review of the employer's decision. In this matter, as the City's right to make the initial determination in accordance with the GML is recognized in the parties' negotiated procedure, and the demand is *for an arbitral review procedure of that determination*, it is mandatory.

CITY OF CORTLAND – ALJ Sergent (December 18, 2017)
50 PERB ¶ 4590

Demand at Issue

General Municipal Law § 207-c

[T]he City objects to Section 10 of the PBA's General Municipal Law (GML) § 207-c proposal as it relates to arbitral review of the claim. This section provides, in relevant part:

Section 10 Determination Review Procedure
(a) In the event that an employee appeals from a determination of the Chief made pursuant to this policy, the appeal will be heard by one of the following arbitrators in rotating order: [to be agreed upon] . . .

(b) In the case where an employee is appealing the denial of an award of Section 207-c benefits, either as a result of an initial injury or illness or the recurrence of an injury or illness the burden of proof shall be on the employee and will constitute a preponderance of the evidence. In the case where the City has made a determination that the employee is no longer eligible for Section 207-c benefits or that the employee is eligible to work light duty, the burden of proof shall be on the City and shall be by a preponderance of the evidence.[26]

(c) The employee may be represented by representative [sic] of his/her choice and may subpoena witnesses[27]. . .A transcript shall be made, the cost of which shall be shared equally between the PBA, or in the event the employee is represented by a representative other than the PBA, the employee and Village. After the hearing, the Arbitrator shall render a determination which shall be final and binding upon all parties. Any such decision of the Arbitrator shall be reviewable only pursuant to the provisions of Article 75 of the Civil Practice Law and Rules. . .

City's Argument

The City asserts that . . . the proposal is nonmandatory because it allows the arbitrator to review an employee's claim in full, and impedes the employer's right under GML § 207-c to determine if an employee can return to work in a light duty capacity.

PBA's Argument

In response, the PBA "concedes that its demand calls for de novo arbitration to contest a City determination upon a GML § 207-c disability issue that is adverse to a unit employee. It further concedes that such demands under [*City of Poughkeepsie*] are nonmandatory." Nevertheless, the PBA asks that I disregard the Board's decision in *City of Poughkeepsie* and apply the Board's prior decision in *City of Watertown*, asserting that the two cases are fundamentally in conflict.

Ruling

Demand found to be nonmandatory

After extensively discussing *Watertown* and *Poughkeepsie 1 and 2,* ALJ Sergent stated:

In the instant matter, I find, *and the PBA concedes*, that the proposal seeks *de novo* review of the underlying GML § 207-c claim. *The proposal permits a hearing to be held before an arbitrator where the employee may subpoena witnesses and present new evidence. This level of inquiry goes beyond the Civil Practice Law and Rules (CPLR) Article 78 standard of review found to be mandatory by the Board in Poughkeepsie 1 and 2.*[28] Therefore, the proposal is nonmandatory.

CITY OF CORTLAND – Board Decision (July 27, 2018)
51 PERB ¶ 3014

Affirmed the ALJ's ruling regarding the PBA's GML § 207-c demand stating:

The ALJ engaged in a thorough examination of the Board's case law in this area, which we affirm and do not repeat here. As the ALJ explained, procedures for contesting a public employer's determinations under GML § 207-c are a mandatory subject of bargaining pursuant to *City of Watertown*. Proposals, however, that either on their face or implicitly seek to establish *de novo* binding arbitration procedures to appeal the underlying claim are nonmandatory.

The ALJ found that the PBA's proposal was nonmandatory because it sought *de novo* review of the underlying GML § 207-c claim. In this respect, the PBA conceded in its post-hearing brief to the ALJ that its proposal sought "a *de novo* arbitration to contest a City determination upon a GML § 207-c disability issue that is adverse to a unit employee." The PBA further conceded that such demands are nonmandatory pursuant to *City of Poughkeepsie*. The PBA asked the ALJ to disregard the Board's decision in *City of Poughkeepsie*, which the ALJ correctly declined to do.

Between the filing of the post-hearing briefs and the release of the ALJ's decision, the PBA's representative changed. In its exceptions, the PBA no longer asserts that the Board should not apply *City of Poughkeepsie*, and we consider it to have abandoned that argument. The PBA now asserts, however, that its proposal does not seek *de novo* review of a City determination upon a GML § 207-c disability issue.

Initially, having not raised this argument or factual precedent to the ALJ, the PBA may not raise the issue to us for the first time on exceptions. Although the PBA's representative has changed, the PBA did not seek to reopen the record before the ALJ to change its position or present any new arguments. In these circumstances, we find that the PBA has not presented any compelling reasons for us to consider this previously unraised argument for the first time on exceptions.

Even were we to consider this argument, we would find that the proposal here seeks review of the employee's underlying claim and is nonmandatory pursuant to *City of Poughkeepsie*. *The PBA's proposal makes no reference to the City's determination and does not recognize the City's right to make the initial determination.* Instead, the proposal here, like the proposal found nonmandatory in *City of Poughkeepsie*, seeks arbitration not of the City's initial determination of ineligibility, but of the employee's underlying claim itself. In sum, we find that the PBA's proposal seeks review of the merits of the employee's claim and is a nonmandatory demand for de novo review.

FOOTNOTE SUMMARY

[1] Applied by the Appellate Division, 2nd Dept. in *Kaufman v Dolce*, 216 A.D.2d 298 (June 5, 1995).

[2] In its decision below, the Appellate Division, Third Dept. stated:

> Turning to the requirement that an injured officer must execute a medical confidentiality waiver, a matter which PERB found to be a subject of mandatory negotiation but which Supreme Court held is inherently authorized by the other provisions of General Municipal Law § 207-c, we begin by noting that the statute explicitly authorizes the municipality to cease paying benefits if its physician certifies that the disability is at an end, if the officer refuses treatment, or if the officer is found by the municipal physician to be capable of light duty yet refuses such duty when it is offered. Exercise of these rights would be impossible if the physician were unable to report to the municipality his opinion, and the findings giving rise to it, as to (1) whether the officer remains disabled, (2) whether he or she is capable

> of light duty, and if so what type, and (3) whether treatment or inspection has been refused.
>
> For this reason, we agree with Supreme Court that General Municipal Law § 207-c necessarily implies that the employer is entitled to a waiver, and that to allow mandatory negotiation of this item would thwart the statute's intent. We are of the view, however, that the municipality only has the right to obtain information which is absolutely necessary to implementation of the statutory provisions; *a municipal employer cannot require that an officer consent to any disclosure beyond the narrow scope previously noted, nor may it constrain the officer to authorize a transfer of information from his or her treating physicians for the purpose of aiding the municipality's physician in diagnosis or treatment; the municipalities' ability to compel this more extensive disclosure is a matter for collective bargaining.*

[3] *See* *Uniform Firefighters v City of Cohoes* (Crt. of Appeals – May 9, 2000), *infra*.

[4] Addresses the applicant's burden.

[5] Under *Uniform Firefighters v City of Cohoes*, *supra*, once triggered pursuant to the submission of a conflicting medical report, the employer's decision to terminate a benefit previously granted, does not become *final and binding* until the affected employee has been afforded his constitutionally protected right of due process.

[6] Note – the scope of this demand is limited to the Employer's initial determination to grant the benefit or not and, pursuant to its express terms, does not extend to procedures associated with stopping the benefit once granted.

[7] This is not an interest arbitration case.

[8] 31 PERB ¶ 4568.

[9] This decision was written prior to the Crt of Appeals decision in *Uniform firefighters v City of Cohoes*, *supra*, issued on May 9, 2000, which clarified the applicable constitutional due process requirement.

[10] 25 PERB ¶ 3045 (1992).

[11] Made as a separate demand. Note – it goes beyond the scope of the demand presented in *Watertown*, which was limited to a review of the employer's initial determination to grant the benefit or not.

[12] *See* *City of Syracuse v PERB*, *supra*.

[13] The Town could not recoup section 207-c benefits paid to Officer Park dating back to April 21, 2003, the date Chief Kapica directed him to return to work in a light duty capacity. Rather, the Town's recoupment of benefits could only retroactively extend to August 4,

2003, the date after the conclusion of the due process hearing when Office Park had been directed to return to work.

[14] This is not an interest arbitration case.

[15] In *Police Assn of New Rochelle*, an interest arbitration case, the demand at issue was as follows:

> There shall be a Medical Review Board *to determine* whether an individual officer has an illness or injury which is job-related. Such board shall be comprised of a physician selected by the individual officer, a physician selected by the City and in the event that these physicians cannot agree, then a physician shall be selected by the mutual agreement of the individual's physician and the City's physician *to make a determination.*

In finding the demand to be mandatory, the Board stated:

> The City contends that the demand is nonmandatory because the subject matter is covered by General Municipal Law §207-c. That statute deals with payments to policemen who suffer job-related injuries or illnesses. In pertinent part, it authorizes the employer to appoint a doctor to examine the injured or sick policeman to ascertain whether he has recovered and when he is able to work again. *This statutory provision does not preclude the establishment of a procedure for the medical determination, either initially or on review, as to whether an illness or any injury is job-related.* The General Municipal Law §207-c does not preclude the negotiation of such procedures any more than does Civil Service Law §75 in dealing with employee discipline. Section 75 does not preclude negotiations concerning designation of the hearing officer who makes determinations in disciplinary proceedings. *Board of Education of Huntington, supra.*

[16] In footnote 25 of her decision, ALJ Fitzgerald stated:

> As explained by the administrative law judge in *Highland Falls PBA, Inc.*, 40 PERB ¶ 4525 (ALJ Quinn, 2007); rev, in part, 42 PERB ¶ 3020 (July 23, 2009), the scope of review in a CPLR Article 78 proceeding, which is the statutory process of review of virtually all administrative determinations made by public employers, '"is limited to whether the employer's determination was arbitrary, capricious, affected by an error of law, or not sufficiently supported by the evidence in the record before it," as compared to the standard in arbitration, where "the issue is whether the employee is entitled to the benefits, given the law and the evidence before the arbitrator," further noting that an arbitrator's decision is reviewable pursuant to CPLR Article 75 under a different scope of review than Article 78.

In *Highland Falls PBA, Inc, supra*, ALJ Quinn held:

> In effect, under *Poughkeepsie I*, arbitration is mandatorily negotiable concerning the receipt of GML § 207-c benefits *only if it provides the same limited scope of review that would be available in an Article 78 proceeding*; a position that it unequivocally reiterated three years later in *Poughkeepsie Professional Fire Fighters Association* (hereinafter "*Poughkeepsie II*"), which was ultimately confirmed by the Court of Appeals.

On exceptions, however, the Board never addressed this issue directly, instead finding that the PBA's demand was unitary and, therefore, nonmandatory for that reason alone.

[17] Note: The demand, as written, is general in nature and does not distinguish between a review of an employer's initial eligibility determination verses a review of an employer's decision to rescind a benefit that has been previously granted.

[18] Does not address the question left open by the Board in *Highland Falls PBA, Inc., supra*.

[19] Under *Uniform Firefighters v City of Cohoes*, *supra*, the affected employee is constitutionally entitled to a due process hearing before the employer's directive becomes final & binding, but only if the affected employee submits a conflicting medical report. *See also City of Syracuse v PERB* (Appellate Div. 4th Dept – December 27, 2000), *supra*.

[20] Note – In *Watertown*, unlike here, the demand was limited to a review of the employer's initial determination regarding benefit eligibility.

[21] Consistent with *Watertown* (i.e., the proposed procedure is limited to a review of the employer's initial determination regarding eligibility and does not extend to a review of an employer's decision to rescind a benefit that has been granted previously).

[22] *Id*.

[23] *Id*. Compare to the at-issue demand in *County of Chemung, supra*, which provided that the decision of the Hearing Officer "*shall be reviewable only pursuant to the provisions of Article 78 of the Civil Practice Law and Rules*."

[24] Similar to the demand in *Poughkeepsie 1*, which was found to be nonmandatory by the Board and affirmed by the Crt. of Appeals.

[25] Compare to ALJ Fitzgerald's earlier decision in *City of Middletown, supra*, decided approximately five years earlier.

[26] Broadly stated demand, which applies to a review of both the employer's initial eligibility determination and a review of the employer's decision to rescind a benefit previously granted.

[27] Consistent with fundamental due process.

[28] Compare to *Town of East Hampton*, ALJ Blassman – 42 PERB ¶ 4534 (June 1, 2009).

Negotiating Statutory Procedures in the Public Sector – CSL §§ 71, 72, 73, 75
A Practical Approach

This presentation intends to provide practitioners with a practical approach to assessing bargaining obligations in connection with issues covered by CSL §§ 71, 72, 73, and 75.[1] The outline for this study will begin with a review of negotiability, i.e., the duty to bargain and any defenses raised as they relate to terms and conditions of employment; followed by a review of related major cases that provide guidance for determining whether or not bargaining is required; and finally a review of impasse resolution procedures.

Fundamentally, the question that always is presented in connection with bargaining obligations is whether a topic or proposal is a mandatory subject of bargaining. Determinations of whether bargaining proposals are mandatorily negotiable come before PERB through three avenues. The first is through the filing of improper practice charges alleging bad faith bargaining in violation of § 209-a.1(d) or § 209-a.2(b) of the Act. Second and third, PERB also reviews the mandatory nature of proposals in connection with collective bargaining and compulsory arbitration processes, where a party either may assert bad faith bargaining through an improper practice charge alleging violations of § 209-a.1(d) or § 209-a.2(b) of the Act or, short of an adversarial proceeding, may file a petition for a Declaratory Ruling, pursuant to PERB's Rules of Procedure, § 210, provided that the justiciable issues are limited to whether a

[1] This paper is intended to be instructive only and to provide direction for further study. It does not purport to be exhaustive research, nor is it intended to be a substitute for reading the cases in full. While the case holdings cited are intended to be faithful to the texts as reported, any unattributed observations or opinions expressed, as well as any misrepresentations, are my own and do not reflect necessarily the position of the New York's Public Employment Relations Board.

party is covered by the Act or whether a matter is a mandatory subject of bargaining. *City of New York*, 37 PERB ¶ 3034 (2004).

Whether or not a bargaining proposal is a mandatory subject of bargaining begins with the underlying tenet of the Taylor Law: the "strong and sweeping" public policy favoring bargaining of terms and conditions of employment. *Webster Cent Sch Dist,* 75 NY2d 619, 627, 23 PERB ¶ 7013, 7018 (1990). Unjustified refusals to bargain mandatory subjects may result in findings of violations of bargaining obligations - § 209-a.1(d) if committed by a public employer, and § 209-a.2(b) if committed by a labor organization, where no affirmative or justifiable defense is established.

Generally, the legitimate defenses for refusing to bargain can be categorized as three types. The first cluster of defenses purport that the subject of a proposal or topic is non-mandatory. Examples of non-mandatory subjects include those that are prohibited subjects by virtue of the subject matter itself – those subjects that are *ultra vires*, "outside the power of a government to agree to" (Public Sector Labor and Employment Law, 3rd Edition, Revised 2014, Lefkowitz, at 641), are not enforceable, and therefore cannot be negotiated (e.g., retirement pensions, teacher tenure). In addition, non-mandatory subjects include those subjects determined to violate public policy (e.g., parity clauses), subjects that do not impact terms and conditions of employment of unit employees (e.g., applicants, benefits for current retirees), and those that are preempted by law, i.e., contrary to a clear legislative intent that has removed the discretion of the employer to agree. Most of the discussion that follows falls into this category of preemption.

The second type of defense is that an impasse has been declared by a party, thus absolving the duty to continue bargaining. The third category of defenses includes those cases

when the topic or proposal is mandatory, but a refusal to bargain is permitted by contract terms or practice (e.g., duty satisfaction, waiver, management prerogative, etc.).

CSL § 71 WC Absence and Reinstatement - Disability Resulting From Occupational Injury or Disease
CSL §§ 72 and 73 - LOA and Reinstatement - Ordinary Disability

Examination of the intersection of the Taylor Law's mandate (that requires bargaining over procedures affecting employees' terms and conditions of employment) and any another statutory scheme always begins with a review of the statutory language in question. The examination herein begins with the language of CSL § 71, the statute that provides for separation from employment due to occupational injuries or diseases.[2] For our purposes, that statute provides, in relevant part:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, **he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position.** Notwithstanding the foregoing, where an employee has been separated from the service by reason of a disability resulting from an assault sustained in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission . . . (emphasis added)

The statute goes on to outline the steps to be taken that will trigger the application process for reinstatement. Nowhere does the statute speak directly regarding pre-leave

[2] The review that follows examined cases that relate solely to §§ 71, 72 and 73 and does not include review of cases that were grounded in GML § 207-a or § 207-c.

procedures for commencing a leave of absence nor, following a leave for occupational disability, for initiating or executing the termination.

The termination language in CSL § 72 is similarly opaque. CSL § 72 subsections 1-3 deal extensively with the authorities vested in each party, but not the steps and procedures, preliminary to an employer's decision, to execute any of its rights related to an involuntary leave of absence. Moreover, the only language in CSL § 72 referencing termination appears in sub-section 4:

> 4. If an employee placed on leave pursuant to this section is not reinstated within one year after the date of commencement of such leave**, his or her employment status may be terminated in accordance with the provisions of section seventy-three of this article.** (emphasis added)

However, §73 is no more instructive, in that the statute contains a single statement of fact as to termination:

> When an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, **his employment status may be terminated,** and his position may be filled by a permanent appointment. (emphasis added)

The remaining 260 words contained in § 73 deal with reinstatement rights.

The development of bargaining obligations related to procedures precedent to the execution of an employer's rights have come before PERB as bad faith challenges to bargaining. The early cases reported by PERB involving CSL §§ 71-73 were not grounded in the Taylor Law but reached the New York Court of Appeals as constitutional challenges to due process. In *Economico v Village of Pelham*, 50 NY2d 120; 13 PERB ¶ 7528 (1980), a § 73 case involving separation following ordinary disability, the court held that due process requires a post-

termination hearing when the facts underlying the statute are in dispute. A decade later, in *Prue v. City of Syracuse*, 78 NY2d 364; 24 PERB ¶ 7540 (1991), another § 73 case, the high court held that due process additionally requires pretermination notice and a minimal opportunity to be heard, citing *Cleveland BOE v. Loudermill*, 470 US 532. Two years later, the Court re-visited pretermination procedures in *Hurwitz v. NYS Dept Social Services*, 81 NY2d 182; 26 PERB ¶7512 (1993) and held, in accordance with *City of Syracuse*, that pretermination due process amounts to no more than an opportunity for an employee to present opposing views on questions of duration and fitness. None of these cases addressed Taylor Law bargaining obligations. Nevertheless, these due process cases and their holdings often were cited by employers in early PERB cases as defenses to bargaining.

An early case involved the negotiation of proposals related to employees on extended sick leave. In *Village of Old Brookville*, 16 PERB ¶ 4571 (1983), the PBA refused to negotiate the Village's proposal language modifying the duration and reinstatement language of §§ 72 and 73. When the PBA refused to negotiate, the Village alleged a violation of § 209-a.2(b). On the issue of statutory preemption, the ALJ noted that, where a state law takes a matter out of the discretionary authority of an employer and mandates alternative procedures or specific substantive provisions, there is no Taylor Law duty to negotiate, citing *City of Binghamton*, 9 PERB ¶ 3026 (1976), *affd* 9 PERB ¶ 7019 (Sup Ct Albany Co) (1976). Further, he relied on *City of Rochester*, 12 PERB ¶ 3010 (1979), noting that a demand relating to a subject treated by a statute is negotiable so long as the statute does not clearly preempt the entire subject matter. Where there is any legitimate uncertainty that a statute covers the same ground as a demand, will not be deemed non-mandatory on the ground of statutory preemption, citing *Town of*

Mamaroneck, 16 PERB ¶ 3037 (1983). Stated differently, the presumption of the mandatory nature of a bargaining proposal is a rebuttable one.

Town of Cortlandt, 30 PERB ¶ 3031 (1997), *affd* 30 PERB ¶ 7012 (Sup Ct Westchester Co) (1997) provides definitive guidance regarding the parties' bargaining obligations. In it, PERB expressly addressed the Taylor Law duty to bargain terminations in the case of work-related disabilities. There, the Town claimed that since § 71 allows termination of an employee after a cumulative absence from work for one year, its exercise of that right should not be subject to any bargaining obligation under the Act. The Board framed the issue:

> The question before us is whether the Town's exercise of the discretion bestowed under CSL § 71 must be bargained or whether CSL § 71 plainly and clearly establishes a legislative intent to exempt an employer from a duty to bargain discharges based upon the length of absence.

In finding that the Town had an obligation to bargain over the termination, the Board followed a classic preemption analysis and noted:

> There is nothing in CSL § 71 which deals explicitly with collective negotiations under the Act, nor is there anything inescapably implicit in that statute which establishes the Legislature's plain and clear intent to exempt the Town from the State's strong public policy favoring the negotiation of all terms and conditions of employment. . .

Citing *Allen v. Howe*, 84 NY2d 665 (1994), the Board went on to say:

> Although …terminations under CSL § 71 promote a governmental interest in a productive and economically efficient civil service, it also recognized the substantial interest of employees in their continued employment. The system of mandatory collective negotiations under the Act is intended to permit and promote the mutual reconciliation of precisely these types of competing interests. By requiring the negotiation of decision to terminate employees from employment based upon the length of time they are away from work due to occupational injuries or illnesses, and in the absence of plain and clear legislative intent to the contrary, we give effect to the State's declared public policy favoring collective negotiations. The Town's unilateral adoption of a policy requiring termination of employment and contractual benefits

> after one year of occupational disability is permitted but not required by CSL § 71 and constituted a change in terms and conditions of employment.

The New York Supreme Court, in affirming PERB, recognized the competing interests of the employer and employee, again citing *Allen v. Howe*, and explicitly held:

> While an employer is permitted to terminate an employee who has been disabled by an occupational injury for more than one year, there is no requirement that it do so and no express prohibition against negotiation of an employer's exercise of its prerogative.

In *Town of Wallkill,* 44 PERB ¶ 4529 (2011), a § 73 case, PERB reviewed a bad faith bargaining improper practice charge, alleging that the Town unilaterally adopted a policy and procedure for termination of employees after a one-year absence, in violation of § 209-a.1(d). There, the ALJ reviewed the bargaining obligation in light of *Town of Cortlandt's* preemption standard, noting:

> Though the Board has not directly addressed termination pursuant to CSL § 73, the analysis in *Town of Cortlandt* is equally applicable to disability terminations due to non-occupational injuries or illnesses . . . CSL § 73 has no language at all relating to collective negotiations, and legislative intent to exempt these kinds of terminations from the duty to bargain is not implicit in any language in the statute.

In *City of New Rochelle*, 47 PERB ¶ 3004 (2014), a § 72 case, where the city unilaterally ordered a police officer on sick leave to submit to an independent medical examination and to return to work, over his objection, PERB held that, unless there is merit to any of the employer's defenses, procedures for granting and terminating sick leave and returning to work are mandatorily negotiable, citing *Plainedge UFSD*, 7 PERB ¶ 3050 (1979).

More recently, in *City of Long Beach*, 50 PERB ¶ 4503 (2017), when the City provided notice to an employee of its intent to terminate him and provided him an opportunity for a hearing, it defended the action, claiming that unilateral implementation of a procedure for

terminating the employee under § 71 was proper since it had provided due process. However, the ALJ relied on *Town of Cortlandt* and on *Town of Wallkill*, considering fully the due process and bargaining paradigms. There, she held that the requirements of due process operate independently of the requirements of the Act and that the parties are obligated to meet the demands of each. She found that the City's conduct demonstrated an intent to terminate the employee as well as create a process to pursue that aim and held that the City unilaterally established a due process procedure (notice, an opportunity to be heard) without bargaining in violation of § 209-a.1(d). In *City of Long Beach*, 50 PERB ¶3036 (2017), *affd* 51 PERB ¶ 7002 (2018), the Board affirmed the ALJ's holding, explicitly reiterating that the City's statutory duties are independent of, and exceed, its constitutional obligation to provide due process. It noted that the absence of pre-termination procedures in the statute cannot be read as preempting an employer's duty to bargain. The New York Supreme Court (Nassau County), without commenting on the merits of the issue, declined to dismiss the city's petition and held that PERB's decision was not arbitrary or affected by an error of law.

Thus, at this point, it appears that the parties' obligations to engage in bargaining over procedures preliminary to an employer's execution of its rights embodied in CSL §§ 71-73 leaves little room for doubt. Going forward, refusals by parties to bargain over the procedures related to an employer's exercise of its discretion pursuant to the statutes, based on a non-mandatory argument, likely will be found to violate its bargaining obligation.

CSL § 75 Termination for Misconduct or Incompetence

A review of the statutory scheme for CSL § 75, like CSL §§ 71-73, similarly provides little guidance regarding procedures related to removal and discipline:

> 1. Removal and other disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision **shall not be removed or otherwise subjected to any disciplinary penalty** provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section. (emphasis added)

CSL § 76 expressly provides parties, subject to preemption, the right to negotiate alternative procedures to § 75's statutory provisions for discipline and removal:

> 4. Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter.

In *Antinore v State of New York*, 8 PERB ¶ 7501, 79 Misc2d 8 (1974), *revd* 8 PERB ¶7513, 49 AD3d 6 (1975), *affd* 9 PERB ¶ 7528, 40 2d 921 (1976), when a tenured civil service employee, a child care worker for the New York State Division for Youth, was charged with sodomy and sexual acts endangering morals of minors and advised to appeal his pending termination through the CBA's negotiated grievance and arbitration procedure that replaced §§ 75 and 76, the employee challenged the constitutionality of the CBA and sought a declaratory judgment, claiming an ultimate right to judicial review. The issue raised was whether an employer and union can agree to an alternate disciplinary procedure without the consent of the individual. The New York Supreme Court held they could not. It noted the inevitable collision between commendable statutory policies favoring settlement of public employment labor disputes by consensual arbitration and time-honored constitutional concepts of due process and equal protection of the laws. It concluded that the statute had permitted the establishment of a constitutionally impermissible agreement, denying the employee due process and equal

protection of the laws. It held that the agreement between the State and union as to disciplinary procedures, absent waiver by individual, cannot replace § 75. However, the Appellate Division, upon review of the statute's amended history permitting the statutory provisions to be supplemented or modified or replaced by collective bargaining, and based on the statutory representative role of the labor organization, found waiver by individual members of the bargaining unit:

> The agreement represents a reciprocal negotiation between forces with strengths on both sides, reflecting the reconciled interests of employer and employees, voluntarily entered into. CSEA, as designated bargaining agent for a group of public employees in which plaintiff was included, was agent for plaintiff, such that its assent to the agreement was plaintiff's assent. "* * * [T]he union represents all the employees as to all covered matters * * *" (Chupka v. Lorenz-Schneider Co., 12 NY2d 1, 6). The fact that this plaintiff did not himself approve the agreement negotiated by his representative and now disclaims satisfaction with one aspect of the agreement makes it no less binding upon him.

In *City of Auburn*, 10 PERB ¶ 3045 (1977), *revd* 11 PERB ¶ 7016, 91 Misc2d 909 (1977), *affd* 11 PERB ¶ 7003, 62 AD2d 12 (1978), *affd*, 12 PERB ¶ 7006, 46 NY2d 1034 (1979), the City alleged a violation of § 209-a.2(b) against the PBA for its bargaining proposals related to discipline. PERB, based on a narrow construction of the statutory language, held that §§ 75 and 76 may be supplemented, modified or replaced by agreements negotiated only by the employer New York State and its employee organizations, but that for all other public employers, §§ 75 and 76 are preemptive and the subject matter is not open to negotiation. Upon review, the New York Supreme Court (Albany County) held that PERB's construction was unreasonable. Instead, it held that § 76.4 does not *clearly* prohibit negotiations between a municipal employer and an employee organization regarding disciplinary procedures and held that discipline procedures for municipal employers other than the State of New York were not

per se prohibited subjects of bargaining. The Appellate Division (3rd Dept), citing from *Matter of Board of Educ. v Yonkers Federation of Teachers* (40 NY2d 268, 273), held that a public employer's power to bargain collectively, while broad, is not unlimited and that an employer is free to negotiate any matter, but may do so only in the absence of a "plain and clear" prohibition in a statute or controlling decision, law, or public policy. Moreover, citing *Antinore,* it held that the due process safeguards of §§ 75 and 76 can be waived by an employee without violating due process and equal protection. The Court of Appeals affirmed the Appellate Division, without comment.

Subsequently, the New York Attorney General issued an Attorney General's Opinion, 15 PERB ¶ 8003 (1981), resolving any remaining doubt as to the constitutional and due process status of alternatively-negotiated discipline procedures. There, the AG affirmed that an agreement between a local government and an employee organization under the Taylor Law may include provisions on discipline and removal that supplement, modify or replace §§ 75 and 76 of the Civil Service Law, and that an employee represented by such an employee organization would, through the employee organization's assent to the agreement, waive his rights under §§75 and 76. It stated:

> It is logical that the holding in Antinore to the effect that an employee is bound by his union's agreement, should apply. We believe that this is what the Court decided in Auburn, when it cited Antinore. . . We conclude that an agreement between a local government and an employee organization under the Taylor Law may include provisions on discipline and removal that supplement, modify or replace sections 75 and 76 of the Civil Service Law. An employee represented by such an employee organization would, through the employee organization's assent to the agreement, waive his rights under §§ 75 and 76.

Since then, most challenges to alternatively-bargained discipline and termination procedures present themselves pursuant to the preemption language stemming from the first sentence in §76.4:

> Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division.

These preemption cases are grounded in State, County and Town statutes that expressly reserve to local officials the unfettered right to discipline, usually uniformed law enforcement, personnel. Many of these latter cases come before PERB through the avenue of procedures related to compulsory arbitration.

§ 209 Resolution of Disputes in the Course of Collective Negotiations

> On request of either party or upon its own motion, as provided in subdivision two of this section, and in the event the board determines that an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of [affected employees], . . . the board shall render assistance as follows:
>
> > (c) (i) upon petition of either party, the board shall refer the dispute to a public arbitration panel as ...provided….
> >
> > (e)- (g) **[for specified law enforcement]**…shall only apply to the terms of collective bargaining agreements directly relating to compensation. .. , **and shall not apply to non-compensatory issues…including disciplinary procedures, …**

In *PBA of the City of New York (NYCPBA)(sometimes reported under Town of Orangetown)* 35 PERB ¶ 3034 (2002), *affd* 36 PERB ¶ 7014 (2003), *affd* 37 PERB ¶ 7012, 13 AD3d 879 (2004), *affd*, 39 PERB ¶ 7006, 6 NY3d 563 (2006), the PBA filed petitions for Declaratory Rulings (DR-072, -100, -101) to determine whether police officer discipline provisions contained in an expired CBA were mandatorily negotiable under § 209.4. Upon

review, PERB found that, in this case, the discipline proposals were subject to special laws that leave discipline of police to the discretion of the Police Commissioner and, pursuant to § 76.4, held that police officer discipline was a prohibited subject. The New York Supreme Court (Albany County) affirmed PERB's finding. In affirming the trial court, the Appellate Division noted that since the City charter predated CSL § 75, the charter evinced a clear legislative intent to vest the Commissioner with broad authority over police discipline. The New York Court of Appeals affirmed that police discipline could not be the subject of bargaining when legislation has expressly committed authority to local officials:

> When a special state law, that pre-existed CSL §§ 75 and 76, specifically commits the discipline of police officers to local government officials, New York's public policy favoring strong disciplinary authority over police officers outweighs New York's strong and sweeping policy supporting collective negotiations under the Act.

In *State of New York (Div of State Police)*, 37 PERB ¶ 6601 (2004), *revd* 38 PERB ¶3007 (2005), *affd* 39 PERB 7013 (2006), the PBA presented proposals seeking to modify existing administrative disciplinary rules and regulations and incorporate them into the CBA. A petition for a Declaratory Ruling (DR-112) was filed, seeking a determination whether the PBA's proposals that reflect department polices that predate § 75 were mandatorily negotiable. The ALJ ruled that they were mandatory, finding that Executive Law § 215 did preempt the bargaining obligation. The Board reversed, finding that the Police Superintendent's authority over discipline predated § 75. It held that the proposal was a prohibited submission to interest arbitration, noting that prior negotiation did not act to change the non-mandatory nature of the proposal. The New York Supreme Court (Albany County) affirmed PERB, agreeing that previous negotiations regarding discipline did not establish discipline as permissible.

In *State of New York (Div of Police)* 39 PERB ¶ 3023 (2006), *annulled* 40 PERB ¶ 7003 (2007), *pet dismissed,* 41 PERB ¶ 7503, 43 NY3d 125 (2008), *affd* 41 PERB ¶ 7511, 11 NY3d 96 (2008), the State denied a member union representation during a disciplinary interrogation that was related to critical incident reviews. The PBA claimed that the denial constituted a unilateral change in violation of § 209-a.1(d). Subsequent efforts at resolution presented the issue of whether the alleged change was a mandatory subject of bargaining. PERB, affirming the ALJ, found that the unilateral change, dealing with discipline, nonetheless was a prohibited subject based on *NYCPBA.* The New York Supreme Court (Albany County), in granting the PBA's petition to annul PERB's holding, found a distinction between the process leading up to a decision of discipline and the decision to discipline. Moreover, the court found that the New York Executive Law section in question did not address investigations, was not preemptive, and thus the proposal was a mandatory subject of bargaining. The Appellate Division (3rd Dept) dismissed the petition on other grounds (standing). The New York Court of Appeals, presuming standing, affirmed the Appellate Division and dismissed the petition. It held that the parties' narrowly negotiated CBA right to representation for administrative interrogations essentially waived representation rights during critical incident reviews.

In *City of New York,* 40 PERB ¶ 6601 (2007), *affd* 40 PERB ¶ 3017 (2007), *pet to annul dismissed* 41 PERB ¶ 7001, 24 Misc3d 1240(A) (2008), *dismissed as moot*, 41 PERB ¶ 7004, 54 AD3d 480 (2008), *lv for appeal denied*, 42 PERB ¶ 7001, 12 NY3d 701 (2009), the City petitioned for a Declaratory Ruling (DR-119) as to whether an alleged safety proposal related to staffing, and a proposal claiming premium pay as compensation for the lack of the right to negotiate discipline both were mandatory subjects. The ALJ held that the safety/staffing proposal was non-mandatory on the basis of management prerogative and that the premium pay

proposal was mandatory since the essence of the demand was compensation. PERB affirmed the ALJ on both proposals and, on the safety/staffing proposal, rejected the PBA's *Cohoes* conversion theory argument, holding that the non-mandatory proposal was not converted under *Cohoes* into a mandatory proposal. The New York Supreme Court (Albany County) affirmed the premium pay proposal as mandatory, holding that PERB's finding was not unreasonable and dismissed the petition to annul PERB's finding on premium pay. Pending appeal to the Appellate Division, an arbitration panel issued an award and the 3rd Department dismissed the petition to annul as moot.

In *Village of Tarrytown*, 40 PERB ¶ 4540 (2007), *affd* 40 PERB ¶ 3024 (2007), in connection with submission of proposals for interest arbitration, the Village filed an improper practice charge alleging the PBA violated § 209-a.2(b) by including the PBA's bill of rights seeking procedural safeguards for police interrogations leading to disciplinary. The ALJ held that the proposal was prohibited, based on *NYCPBA.* In affirming the ALJ, PERB rejected the PBA's claim that *NYCPBA* distinguished between police disciplinary proposals and those procedures related to investigation. It held that the proposal for procedures related to the investigation of police misconduct was a discipline proposal subject to § 209.4 and a prohibited proposal in connection with interest arbitration.

In *Town of Wallkill,* 42 PERB ¶ 3017 (2009), *pet dismissed* 43 PERB ¶ 7005 (2010), *revd* 44 PERB ¶ 7506, 84 AD3d 968 (2011), *affd* 45 PERB ¶ 7508, 19 NY3d 1066 (2012), where the PBA's improper practice charge alleged a violation of §209-a.1(d) when Town unilaterally implemented changes to the Town Code that changed discipline procedures from the expired CBA provisions to CSL § 75. The Town petitioned for a judgment declaring, as valid, modifications to a local law that predated §§ 75 and 76. PERB held that the unilateral action

violated § 209-a.1(d). The New York Supreme Court (Albany County), dismissed the City's petition to annul, declaring the local law invalid to the degree it was inconsistent with CBA, per *Auburn.* On appeal, based on *NYCPBA*, the Appellate Division (2nd Dept) reversed the trial court, and held that negotiation of police officer discipline was a prohibited subject. The New York Court of Appeals affirmed the Appellate Court, holding that the Town's action was a proper exercise of its authority, noting that the preexisting law vested police officer disciplinary authority with the Town Board, and held police discipline as a prohibited subject of bargaining.

In *City of Middletown*, 43 PERB ¶ 7002 (2010), the PBA submitted to interest arbitration, *inter alia*, a police bill of rights seeking protections during interrogations related to discipline, as well as a proposal on disciplinary procedures. There, PERB outlined the mandatory nature of these proposals:

> In general, the subject of police disciplinary procedures is mandatorily negotiable under the Act because it is a term and condition of employment. Furthermore, the Legislature, in a series of amendments to the Act since 1974, has demonstrated a clear and explicit public policy choice for the subject of police disciplinary procedures to be, in general, negotiable but excluded from the subjects that can be resolved in compulsory interest arbitration for specifically defined negotiations units. In *Auburn*, the Court of Appeals affirmed the reversal of a Board decision and held that a proposal to negotiate a grievance/arbitration procedure for a unit of police officers, as an alternative to CSL §§ 75 and 76, was not a prohibited subject of negotiation. Subsequently, in *NYCPBA*, the Court reaffirmed the holding in *Auburn*, but held that the New York City Charter and Administrative Code, State police disciplinary laws pre-dating CSL §§75 and 75 delegating police disciplinary authority to City officials, demonstrate a public policy that outweighs the strong and sweeping policy supporting collective negotiations under the Act. . . . Since *NYCPBA*, both the Courts and the Board have held, consistent with Auburn, that where CSL § 75 or analogous general disciplinary statutes are applicable to police officers, the subject of police discipline is not a prohibited subject of negotiations under the Act.

There, the Board, in reversing the ALJ, concluded that the PBA's proposals were not prohibited under *Auburn* and *NYCPBA* to the extent they were seeking to replace CSL § 75 for unit members who were eligible, as a matter of law, to those disciplinary procedures, i.e., honorably discharged veterans and volunteer firefighters. Therein, the Board cited its earlier case in *Town of Wallkill*, 42 PERB ¶ 3017 (2009), where it held that a negotiated procedure to replace CSL §75 for honorably discharged veterans and volunteer firefighters was not prohibited under *Auburn* and *NYCPBA*, based on judicial precedent and early 20th century legislation granting special disciplinary procedural protections for honorably discharged veterans and volunteer firefighters. However, the New York Supreme Court (Albany County) found that the Board committed an error of law by excluding honorably discharged veterans and volunteer firefighters from the general prohibition of collective bargaining and reversed the Board's decision. It noted that the City charter specifically vested local officers with discretion regarding discipline, without distinguishing honorably discharged veterans and volunteer firefighters. It held that the proposal seeking bargaining over discipline affecting police officers who were veterans and volunteer firefighters was prohibited. Finally, though it conceded deference to PERB's authority to interpret the Act, it cautioned that it would accord PERB no deference where PERB analyzes the relative weight to be given to competing policies.

In *City of Schenectady*, 46 PERB ¶ 3025 (2013), *pet to annul dismissed* 47 PERB ¶ 7004 (2014), *affd* 49 PERB ¶ 7002, 136 AD3d 1086 (2016), the PBA filed an improper practice charge alleging a violation of §209-a.1(d) when the Town unilaterally announced it would no longer apply the discipline procedures from the parties' expired CBA provisions and instead revert to § 75. PERB, affirming the ALJ, determined that preemption was not clear in the Second-Class City Law (SCCL), and found the City in violation. The New York Supreme Court (Albany

County), dismissed the City's petition, and held that the authority under the Taylor Law superseded unilateral authority in SCCL. The Appellate Division (2nd Dept) affirmed the trial court and held that there was no right to revert to SCCL that predates Taylor Law since preemption is not clear.

§ 209 Resolution of Disputes in the Course of Collective Negotiations

> 4. On request of either party or upon its own motion, as provided in subdivision two of this section, and in the event the board determines that an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of [affected employees], . . . the board shall render assistance as follows:
>
> > (c) (i) upon petition of either party, the board shall refer the dispute to a public arbitration panel as ...provided:

CSL § 209.4(c) of the Act intends to expedite the process of bargaining and closure through its interest arbitration procedures. However, a procedural tension has been recognized in case law during the period following a CBA's expiration and a PBA's declaration of impasse when, under *Triborough* and § 209-a.1(e), an employer is required to maintain the *status quo* and cannot expedite the bargaining process, without the PBA's consent, toward the conclusion of an award through interest arbitration.

In *City of Batavia*, 17 PERB 3007 (1984), PERB held that enactment of the § 209-a.1(e) of the Act, which declares it improper for a public employer to refuse to continue terms of an expired agreement until the new agreement is negotiated, does not make the filing of a petition for interest arbitration as to such terms improper. It held that a problem would arise, if at all, only when the employer actually altered the terms of an expired agreement pursuant to an arbitration award. A year later, in *City of Kingston,* 18 PERB ¶ 8002 (1985), when the City filed a petition for interest arbitration, the Director of Conciliation determined that the interest

arbitration process should go forward, despite the City's obligation to maintain the *status quo* under § 209-a.1(e). The Director held that participation in the panel selection process would not be deemed a waiver of the labor organization's right to challenge a filing of a petition in an improper practice charge. Later that year, in *City of Kingston*, 18 PERB ¶ 3036 (1985), the firefighters association filed an improper practice charge alleging the City committed an improper practice by filing the petition for interest arbitration. PERB held that the City did not commit an improper practice by the mere filing of the petition, noting that under § 209-a.1(e), the *status quo* could not be changed except by negotiated agreement. There, the Board declined to process the petition, as it deemed it futile.

In *City of Yonkers*, 46 PERB ¶ 3027 (2013), when the City filed a petition for interest arbitration, the Director of Conciliation declined to process it. Dismissing the City's exceptions, the Board declined to depart from its "decades-old holding" in *City of Kingston* that an employer lacks an independent right to initiate interest arbitration without the employee organization' s consent.

More recently, PERB has had occasion to review this tension and impediment to effecting closure to bargaining following contract expiration and impasse. In *City of Ithaca (Ithaca I) 48 PERB ¶ 4568 (2015), affd 49 PERB ¶ 3030 (2016),* the parties commenced negotiations in early 2012 for the CBA that expired at the end of 2011. The PBA declared impasse in July of 2013 and opposed the City's interest arbitration petition filed in 2014, insisting on the § 209-a.1(e) *status quo.* In late 2014, the City requested that the parties commence bargaining for a new contract beginning 2014. The PBA demanded to continue bargaining for a successor agreement effective 2012. In 2015, the City filed an improper practice charge alleging a violation of § 209-a.2(b), claiming that the PBA waived its right to

negotiate for 2012-2013 when it refused consent to interest arbitration. The ALJ found no evidence of a clear, unmistakable and unambiguous waiver by the PBA and, thus, no bad faith bargaining. The Board affirmed the ALJ's finding of no waiver, noting there was no basis to find that either party failed to bargain in good faith, but instead, that they had exhausted the conciliation procedures. It found that the City had satisfied its duty to negotiate during the period following PBA's declaration of impasse.

In *City of Ithaca (Ithaca II) 50 PERB* ¶ 3006 *(2017)***,** the Director of Conciliation declined to process the PBA's petition for interest arbitration for 2012-2013, based on the Board's decision in *Ithaca I* that the City satisfied its duty to negotiate in good faith for the duration of an award. In a case of first impression, the Board discussed the tension between questions of arbitrability (per § 205.6 of the Rules) and questions of eligibility (related to procedural and substantive issues). It held that the instant dispute is one of arbitrability, not eligibility, because objections to arbitrability are directed at whether the subject matter of the dispute sought to be submitted to compulsory arbitration fall within the scope of interest arbitration. Arbitrability, it explained, goes to the character of the dispute (what proposals may be submitted), while eligibility goes to the character of the parties (who may petition for interest arbitration). The Director's ruling was reversed, and the petition was remanded to the Director.

In *City of Ithaca (Ithaca III), 51 PERB* ¶ 4503 *(2018), affd 51 PERB* ¶ *3020 (2018),* the City filed an improper practice charge alleging the PBA violated § 209-a.2(b) when it submitted in 2016 a petition for interest arbitration covering the 2012-2013 period, despite the Board's finding of duty satisfaction by City. The ALJ found the PBA's proposals contained in the petition to violate § 209-a.2(b), based on the union's proposal to change the date of the CBA (a material terms and conditions of employment) for the 2012 and 2013 calendar years, thus finding

the proposals were outside the permissible scope of arbitration. The Board, again in a case of first impression, overruled *Kingston* and *Yonkers* to the limited extent that those decisions stand for the proposition that an employer's interest arbitration petition will not be processed once a union invokes its *Triborough* rights to maintain the *status quo* under 209-1(e). Going forward, the invocation of *Triborough* rights merely acts to limit the scope and enforceability of any award issued by the interest arbitration panel, but does not negate the statutory right of an employer to petition for interest arbitration. The Board noted that allowing the processing of the petition, even if it resulted in an award that confirmed the *status quo*, would "avoid the sort of delay that has left the parties here caught up in procedural brinkmanship more than five years after the declaration of impasse." PERB explained that "at a minimum [interest arbitration would] serve to punctuate the end of negotiations of an immediate successor agreement to the expired contract and would establish the *status quo* for the duration of the award, as determined by the interest arbitration panel within the statutory time frame, based upon the parties' bargaining history and other appropriate factors."

Workshop A:
Medical and Recreational Marijuana in the Workplace or as a Business

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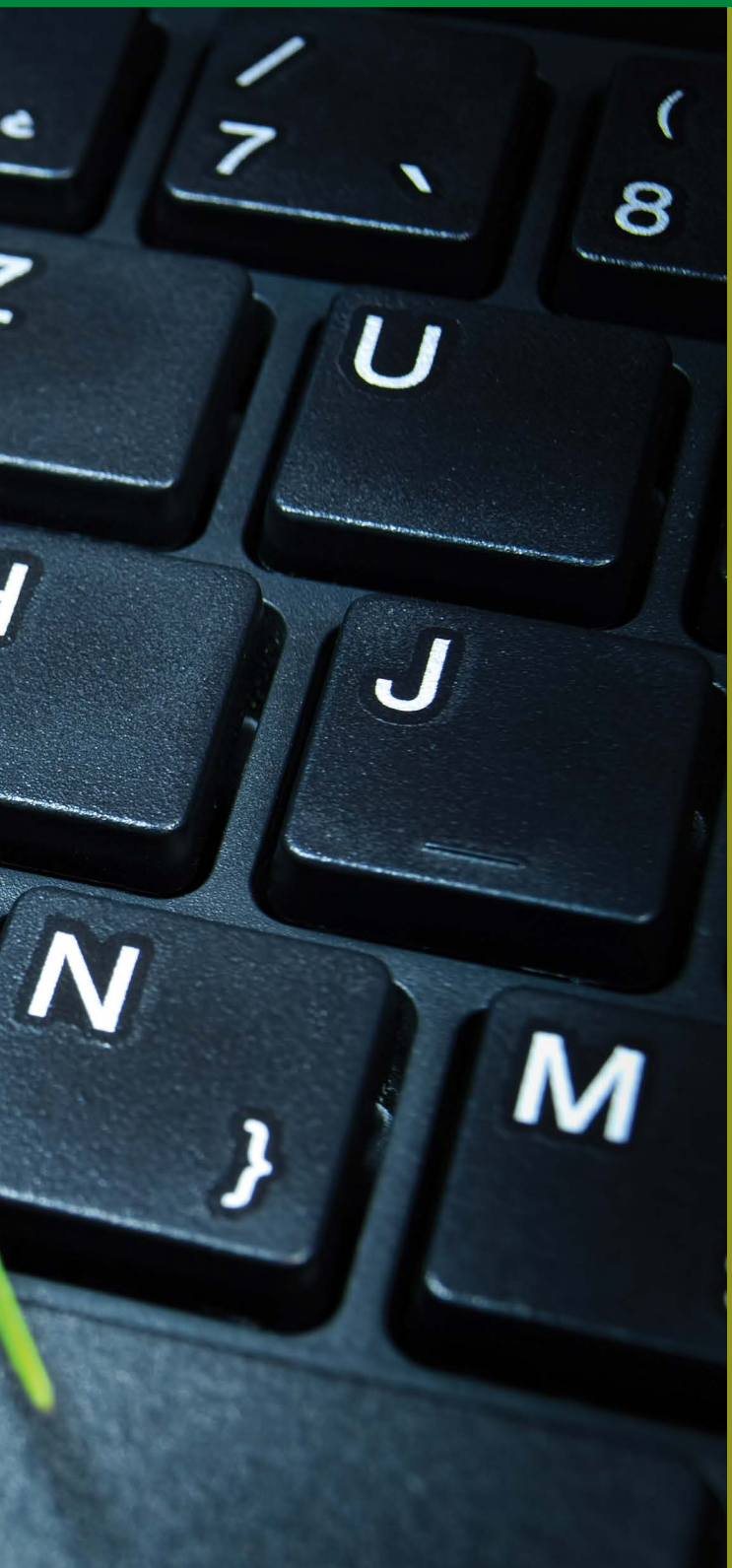
Medical Marijuana

A Current Look at Cannabis Law

By Sara E. Payne and Geoffrey A. Mort

in the Workplace:



Twenty-nine states, including New York, plus the District of Columbia, have legalized medical marijuana.[1] Because marijuana remains an illegal substance under federal law, its legal use under state law raises a number of issues. These issues are playing out with increasing frequency in courts across the country.

In New York, the Compassionate Care Act (CCA) was signed into law on July 5, 2014.[2] In brief, the CCA authorizes the manufacture, sale, and use of medical marijuana within the state, and directs the state's Department of Health to promulgate regulations implementing and governing the program. The first marijuana dispensaries permitted under the CCA opened in January 2016, at which time New Yorkers with certain enumerated medical conditions could become "certified" and legally purchase and use medical marijuana.[3]

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Though medical marijuana has been legal in some states for more than 20 years, case law in the employment context has been slow to develop. While there is no case law in New York to date, a number of cases arising under other state medical marijuana laws are illustrative for employers and employees. Existing decisions generally address the tension between federal and state law as an overarching theme, and the most common legal questions include: (1) whether the Controlled Substances Act (CSA) preempts state marijuana laws; (2) whether the Americans with Disabilities Act (ADA) protects employees who legally use marijuana under state law; (3) whether an employer has a duty to accommodate an employee's legal marijuana use; and (4) whether employees are protected against adverse employment actions because of their legal marijuana use. In this respect, a significant majority of cases decided by both state and federal courts arise in the context of employee drug testing.

Generally speaking, drug testing cases tend to involve reasonably similar fact patterns: an employee has a serious medical condition which, under the supervision of a health care professional, is treated with medical marijuana pursuant to a duly enacted state law. When such an employee is drug tested by his or her employer, the test is invariably positive for cannabis. Commonly, the employee voluntarily disclosed his or her status as a medical marijuana user prior to drug testing and mistakenly believes that compliance with the state marijuana law will protect them against adverse employment action based on a positive drug test. These cases commonly hold that state marijuana laws are preempted by the CSA, that an employee's use of marijuana is not protected under the ADA, and that an employers' zero-tolerance (or similar) drug policy is an acceptable basis upon which to terminate a medical marijuana user's employment, rescind a job offer, or refuse to hire a candidate. However, state legislation respecting employee rights is evolving, and a few recent decisions deviate from the judicial trend favoring employers. Together, these developments may represent a new trend favoring employees and emphasizing states' rights to legislate marijuana use.

FEDERAL PREEMPTION

Employers commonly rely on federal preemption as a defense in cases involving alleged wrongful termination (or rescission of an offer or refusal to hire) based on an employee's legal marijuana use. In cases where an employer relies on a preemption defense, it typically asserts that the Supremacy Clause of the U.S. Constitution requires that state statutes, such as medical marijuana laws, be interpreted consistently with federal law – usually the CSA.[4] The preemption doctrine, as applied to state medical marijuana laws, was discussed at length in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry.*[5] In *Emerald Steel,* the Oregon Supreme Court articulated that the key question under a preemption analysis is whether a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[6] Because the intent of the CSA, in the court's view, is to criminalize and prohibit all use of "Schedule I" drugs, of which marijuana is one, Oregon's medical marijuana law stands as an obstacle to the CSA, and is therefore preempted by the CSA. In other words, the court reasoned, Congress "has the authority under the Supremacy Clause to preempt state laws that affirmatively authorize the use of medical marijuana."[7]

The 2015 Colorado case *Coats v. Dish Network*[8] so vividly captures the paradoxes, emotions, and core issues involved in the intersection of legal medical marijuana use and employment law that it merits discussion. Mr. Coats was a quadriplegic who had been confined to a wheelchair since youth. He held a valid registration card under Colorado's medical marijuana statute and used marijuana at home in the evening to help him to sleep so he could work during the day at defendant's telephone customer service call center. He alleged he was never impaired at work and never used marijuana in the workplace; in fact, Mr. Coats was considered a model employee. After three years of employment with defendant, defendant performed drug tests on all of its employees. Mr. Coats tested positive for marijuana and, as a result, his employment was terminated. He then sued Dish Network, alleging that his discharge violated Colorado's Lawful Activities Statute,[9] which prohibits discrimination against an employee for engaging in a lawful activity during nonworking hours. Mr. Coats's lawyers argued that because Colorado law permits the use of medical marijuana, Mr. Coats's use of the drug was a lawful activity. Both the trial court and the Colorado Court of Appeals found in favor of defendant, and Mr. Coats appealed to the Colorado Supreme Court. At issue was whether the use of medical marijuana was a lawful activity or not. Colorado's high court held that it was not because, notwithstanding state law, marijuana use is prohibited by the CSA.

The *Coats* case attracted national attention and is perhaps the most widely known case involving medical marijuana, drug testing, and employment law. Mr. Coats's lawyers described the case as involving a perfect storm of facts, upon which if Mr. Coats could not prevail, it would leave serious doubt as to who could.[10] The facts of the case were indeed wrenching, and the outcome was particularly noteworthy because Colorado's medical marijuana law is widely considered to be one of the strongest in the country, as it is codified as an amendment to the State Constitution. The law does not, however, contain an express prohibition against employment discrimination.

In the wake of *Coats*, a federal district court in the Second Circuit addressed a similar issue under Connecticut's

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medical marijuana law which may have far-reaching implications. In *Noffsinger v. SSC Niantic Operating Co. LLC,*[11] the court directly addressed whether "federal law precludes the enforcement of a Connecticut law [prohibiting] employers from firing or refusing to hire someone who uses marijuana for medical purposes."[12]

The plaintiff in *Noffsinger* used a synthetic FDA-approved form of cannabis at night to treat post-traumatic stress disorder. After she was offered a job by defendant, her pre-employment drug test was positive for cannabis, and her job offer was rescinded. Ms. Noffsinger thereafter commenced an action alleging, *inter alia*, a violation of the anti-discrimination provision contained in Connecticut's medical marijuana law. Specifically, plaintiff argued that defendant's refusal to hire her violated Connecticut's Palliative Use of Marijuana Act, or PUMA, which prohibits employment discrimination against those who legally used marijuana. Defendant argued that PUMA was preempted by three federal laws and, primarily, the CSA. The court concluded that the CSA is not in direct conflict with PUMA and ruled in favor of plaintiff.[13] Grounding its analysis in obstacle preemption, the court reasoned:

> The mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power. Rather, obstacle preemption precludes only those state laws that create an actual conflict with an overriding federal purpose and objective (internal citations omitted). [The CSA] does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner. It also contains a provision that explicitly indicates that Congress did not intend for [the CSA] to preempt state law unless there is a positive conflict between [it] and [ ] state law so that the two cannot consistently stand together.[14]

In its analysis, the court observed that there were no prior decisions interpreting PUMA and pointedly distinguished prior decisions addressing federal preemption of state medical marijuana laws, including *Emerald Steel Fabricators* and *Coats.* In noting that the above-referenced decisions and others "h[ad] come out in favor of employers, [the foregoing cases did] not concern[ ] statutes with specific anti-discrimination provisions,"[15] and "a statute that clearly and explicitly provide[s] employment protections for medical marijuana could lead to a different result"[16] from cases upholding adverse employment actions.

The court thus distinguished between plaintiff's underlying disability and the treatment for that disability (i.e., medical marijuana), finding that discrimination based on one's choice of treatment is entirely lawful.

DISABILITY DISCRIMINATION AND STATUTORY PROTECTIONS

State anti-discrimination statutes prohibit, as a rule, employment discrimination against disabled persons. Because most individuals enrolled in medical marijuana programs satisfy the definition of "disabled" under state law and the ADA, medical marijuana users who have been discharged as a result of a failed drug test often argue that their termination constitutes disability discrimination and/or that a waiver from a zero-tolerance drug policy permitting the employee to continue using medical marijuana would have been a reasonable accommodation that the employer failed to provide. As a matter of course, courts historically rejected these arguments.

For example, in *Shepherd v. Kohl's Dep't Stores,*[17] the court pointed out that "there is no evidence . . . plaintiff was fired because of his [disability] and not because of the manner in which he chose to treat that condition." The court thus distinguished between plaintiff's underlying disability and the treatment for that disability (i.e., medical marijuana), finding that discrimination based on one's choice of treatment is entirely lawful.

In *Ross v. RagingWire Telecommunications, Inc.,*[18] the California Supreme Court used similar reasoning. There, plaintiff, like the plaintiff in *Shepherd* and other cases, asserted he was disabled and that because he used medical marijuana to treat the symptoms of his underlying condition, his discharge constituted disability discrimination. The *Ross* court noted that marijuana use under any circumstances brought the plaintiff "into conflict with defendant's employment policies,"[19] which the court observed were in accord with federal law. Thus, the court held that California's medical marijuana law "does not require employers to accommodate the use of illegal drugs."[20] The court's reliance on the preemptive nature of the CSA in *Shepherd* and *Ross* is common across cases alleging discrimination under the ADA. However, discrimination claims brought under state law have been more successful.

In *Barbuto v. Advantage Sales and Marketing, LLC,*[21] plaintiff was offered a position with defendant and, after accepting the offer, submitted to defendant's mandatory drug testing. Prior to the drug test, plaintiff advised defendant that she would test positive for marijuana, explaining that she suffered from Crohn's Disease which she managed with medical marijuana as a legal participant in the Massachusetts medical marijuana program.

Nevertheless, plaintiff's employment was terminated based on a positive drug test. Here, the court focused on a provision in the Massachusetts medical marijuana law that provides "[a]ny person meeting the requirements under this law shall not be penalized in any manner, or denied any right or privilege" because of their medical marijuana use.[22] Plaintiff subsequently commenced an action for, *inter alia*, handicap discrimination under Massachusetts law.

Here, the court held that even if the employer "had a drug policy prohibiting the use of [marijuana], even where lawfully prescribed by a physician, the employer would have a duty to engage in an interactive process with the employee to determine whether there were equally effective medical alternatives [to marijuana] whose use would not be in violation of its policy."[23] Thus, concluded the *Barbuto* court, failing a drug test is not a valid basis for terminating a legal medical marijuana user unless the employer unsuccessfully sought to obtain agreement with the employee on an accommodation other than marijuana. The court further found that, even though use and possession of marijuana violates federal law, that fact alone does not make legal medical use under state law a per se unreasonable accommodation. This decision is particularly noteworthy in two respects.

First, the court declined to infer a private cause of action under the medical marijuana law because it did not contain express employment protections. However, the court used language from the medical marijuana law together with the handicap discrimination law to find that plaintiff adequately stated a claim for handicap discrimination.

Second, the court's analysis with respect to defendant's refusal to permit plaintiff's use of medical marijuana as a reasonable accommodation is worthy of comment. Defendant argued that plaintiff was terminated not because of her handicap, but because of her marijuana use. The court found the foregoing argument unpersuasive, stating:

> By the defendant's logic, a company that barred the use of insulin by its employees in accordance with a company policy would not be discriminating against diabetics because of their handicap, but would simply be implementing a company policy prohibiting the use of a medication. Where, as here, the company's policy prohibiting any use of marijuana is applied against a handicapped employee who is being treated with marijuana by a licensed physician for her medical condition, the termination of the employee for violating that policy effectively denies a handicapped employee the opportunity of a reasonable accommodation, and therefore is appropriately recognized as handicap discrimination.[24]

Based on this reasoning, the *Barbuto* court found that plaintiff's use of medical marijuana was not facially unreasonable as an accommodation. Defendant was thus obligated to engage in the interactive process, but thereafter could present evidence demonstrating the requested accommodation would cause it to suffer an undue hardship.

As is relevant in New York, the CCA includes anti-discrimination language very similar to the Massachusetts language. Particularly, the CCA provides that certified patients "shall not be [ ] denied any right or privilege" based on their legal marijuana use. Further, "being a certified patient shall be deemed [as] having a disability" under the human rights law, civil rights law, penal law and criminal procedure law,[25] and anti-discrimination laws prohibit employers from discriminating against disabled persons. Consequently, a New York court may accept the *Barbuto* analysis and permit a plaintiff's handicap discrimination claim arising from a medical marijuana user's failed drug test to proceed to trial. A different outcome would likely result absent the CCA's anti-discrimination language. To that end, courts across the country routinely uphold adverse employment actions against medical marijuana users where the state law does not set forth analogous anti-discrimination protection.

For example, the court in *Roe v. TeleTech Customer Care Mgmt. LLC*[26] held that Washington's Medical Use of Marijuana Act (MUMA) did provide a private right of action for an employee discharged as a result of legal medical marijuana use. There, Washington's high court rejected the argument that a public policy forbidding adverse employment actions based on legal marijuana use should be inferred from MUMA in the absence of express employment protection. The Sixth Circuit's reasoning and holding in *Casius v. Walmart Stores, Inc.*[27] was similar. There, the court held that the Michigan statute's language did not "impose restrictions on private employers"[28] that would prevent them from discharging medical marijuana users, so plaintiff's discharge was not unlawful.

WRONGFUL TERMINATION AND PUBLIC POLICY

In states with wrongful termination statutes, medical marijuana users against whom adverse employment has been taken commonly argue their dismissal was wrongful because their conduct was permitted by state law. The court in *Ross, supra,* observed that California's wrongful termination law set forth an exception to the employment at will doctrine by providing "an employer may not discharge an employee for a reason that violates a fundamental public policy of the state."[29] However, plaintiff's reliance on public policy proved fatal, as the court concluded that California's Compassionate Use Act "simply does not speak to employment law,"[30] and therefore no public policy rendered plaintiff's dismissal wrongful.

The plaintiff in *Roe, supra,* ran afoul of the same reasoning. The *Roe* court held that because no clear public policy existed disallowing the termination of marijuana card holders who fail drug tests, the employee had no cause of action for wrongful discharge. In this respect, few medical marijuana statutes contain sufficiently strong language to support a claim that public policy protects legal medical marijuana users from adverse employment action, and as a result, challenges for wrongful discharge on public policy grounds have largely failed.

UNEMPLOYMENT BENEFITS

Another issue that sometimes arises with respect to medical marijuana is whether registered employees fired after failing workplace drug tests are eligible for unemployment benefits. A Michigan appellate court discussed this question at length in *Braska v. Challenge Mfg. Co.*[31] Although Michigan's unemployment insurance law disqualifies an individual who tests positive for drugs from receiving benefits, Michigan's medical marijuana law provides that a person possessing a medical marijuana registry identification card "shall not be subject to . . . penalty in any manner . . . for the medical use of marijuana."[32]

Courts across the country routinely uphold adverse employment actions against medical marijuana users where the state law does not set forth analogous anti-discrimination protection.

Here, the court found that denial of unemployment benefits did constitute a "penalty" and rejected the state's argument that denial of benefits was the result of failing a drug test, not using medical marijuana. The plaintiffs' use of medical marijuana, reasoned the court, "and their subsequent positive drug tests are inexplicably intertwined."[33] Of course, employees in states that permit medical marijuana, but do not have a statute with the protections of Michigan's law, might well face not only dismissal, but a loss of unemployment benefits. New York's medical marijuana statute, however, does contain language similar to Michigan's.

NEW YORK PRECEDENT

While New York courts have not weighed in on these issues yet, one administrative decision is on point. In *Taxi & Limousine Comm'n v. W.R.*,[34] a fitness proceeding alleging respondent's unfitness was commenced against a taxi licensee who "failed" an annual drug test. Under the relevant regulations, a failed drug test is one that is the "result of illegal drug use." Here, respondent held a valid New York medical marijuana certification card. Typically, when a taxi licensee tests positive for a controlled substance, the result is reversed if the licensee presents a

valid prescription and the results of the positive drug test are consistent with use of the substance as prescribed.

The Taxi & Limousine Commission argued that marijuana should be treated differently from other controlled substances because the service it uses to review positive drug tests and prescriptions only recognizes medical marijuana prescriptions in Arizona. The administrative law judge (ALJ) disagreed with this reasoning and found that respondent's drug test was not "failed" because the positive result did not arise from "illegal drug use" since respondent held a medical marijuana certification. In concluding a finding of unfitness was improper, the ALJ cited the legislature's intent that medical marijuana patients be deemed to have a disability and may not be penalized in "any" manner or denied any right or privilege solely because of their certified use of marijuana.

Taxi & Limousine Comm'n, *Barbuto* and *Noffsinger* suggest that New York courts are likely to find that legal medical marijuana users have some employment protections as disabled persons, that employers are obligated to engage in the interactive process with them, and that continued medical marijuana use may be a reasonable accommodation.

As the medical marijuana program established by the CCA grows and becomes more established, New York will undoubtedly encounter the same legal issues that other states with such programs have. When it does, New York courts – in grappling with preemption and other issues raised by legalized marijuana – will at least have the advantage of several decades of case law from California, Colorado, and elsewhere to provide them with guidance as they seek to balance our state's medical marijuana statute against the CSA and employer fears regarding employee drug use.

1. For the purposes of this article, we are only addressing employment law issues relating to *medical* marijuana. This article does not address employment law issues arising from the recreational use of marijuana, which is now legal in nine states.
2. N.Y. Pub. Health Law § 3360, *et seq.*
3. 10 N.Y.C.R.R. §§ 1004.2; 1004.3.
4. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (holding pre-emptive intent may be inferred if there is an actual conflict between state and federal law).
5. 230 P.3d 518 (Ore. 2010).
6. *Id.* at 528.
7. *Id.* at 530.
8. 350 P.3d 849 (Colo. 2015).
9. Many states have such laws; in New York, the statute is referred to as the "Legal Activities Law."
10. Press Release, The Evans Law Firm, *Brandon Coats v. Dish Network LLC* (June 19, 2015), http://the evans law firm.com/about us/our-cases-in-the-news/Coats-v-DISH-Colorado.aspx.
11. 273 F. Supp. 3d 326 (D. Conn. 2017).
12. *Id.* at 330.
13. *Id.* at 334.
14. *Id.*
15. *Id.* at 335.
16. *Id.* at 335.
17. 2016 U.S. Dist. LEXIS 101279, *19 (E.D. Cal. 2016).
18. 174 P.3d 200 (Cal. 2008).
19. *Id.* at 204.
20. *Id.*
21. 78 N.E.3d 37 (Mass. 2017).
22. ALM GL ch. 94I.
23. *Id.* at 44.
24. Barbuto at 467–68; similar reasoning was used in *EEOC v. Pines of Clarkston*, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. 2015) and *Coles v. Harris Teeter*, LLC, 217 F. Supp. 3d 185 (D.D.C. 2016), which both involved plaintiffs' legal medical marijuana use under state law and terminations after failed workplace drug tests. Both employee-plaintiffs alleged that they were discriminated against because of their disabilities (epilepsy and glaucoma, respectively), not because of positive drug test, and each defeated motions to dismiss and for summary judgment by producing evidence that their dismissal were motivated by their disability. For example, the plaintiff in *Coles* alleged that his employer had not fired another employee who tested positive on several workplace drug tests.
25. N.Y. Pub. Health Law § 3369(2).
26. 257 P. 3d 586 (Wn. 2011).
27. 695 F.3d 428 (6th Cir. 2012).
28. *Id.* at 435.
29. *Id.* at 208.
30. *Id.*
31. 861 N.W.2d 289 (Mich. Court of Appeals 2014).
32. *Id.* at 299.
33. *Id.* at 300.
34. OATH Index No. 2503/17 (July 2017).

GUEST COLUMN

Border Patrol

Risks of the U.S. Commercial Cannabis Industry for Non–U.S. Citizens

Patricia L. Gannon and Marcela Bermudez

Editor's Note: CBP issued an updated statement (https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-canadas-legalization-marijuana-and-crossing-border) on Oct. 9 announcing that Canadian cannabis workers will be allowed to cross the U.S. border as long as the reason of their trip is not cannabis-related. Anyone who admits to consuming cannabis in Canada, or who is looking to participate in the U.S. cannabis industry while not a U.S. citizen, can still be turned away and/or banned from entering the country.

With the growing trend toward legalization, cannabis presents a new and fresh business avenue. Although the blossoming industry seems enticing for potential investors and employees, non-U.S. citizens may want to resist the temptation to join the U.S. industry, even while residing in states which have legalized the drug, as participation could postpone entry to the country—possibly forever (http://www.cannabisbusinesstimes.com/article/canada-us-border-cannabis-employees-business-executives-lifetime-ban/).

The legal environment surrounding cannabis in the U.S. proves confusing for both citizens and non-citizens. That's because three different primary sources of law play into this situation: the Controlled Substances Act (CSA) in federal criminal cases, the Immigration and Nationality Act (INA) for federal civil cases, and state legalization statutes and regulations.

Scheduling Error

The majority of states allow for limited use of medical marijuana under certain circumstances. The CSA, meanwhile, counterintuitively categorizes marijuana as a Schedule I drug, placing it alongside heroin, LSD, ecstasy and peyote in a category of drugs with no accepted medical uses.

For immigration, the consequences of this classification are severe. The Schedule I designation makes it a federal offense to possess, gift, sell, cultivate, import or export cannabis. This includes any activity, commercial or otherwise, involving any part or derivative of the plant. One does not need to be on federal property or travel between states

to be guilty of a federal drug crime. The U.S. Supreme Court has held that even growing or using marijuana at home for medical purposes, in accordance with state law, is regulated by the CSA.

While the INA provides a petty offense exception for possession of 30 grams or less, any other cannabis offense could result in up to 10 years in prison and possible deportation. Memos and appropriation riders (Cole Memo, Rohrabacher-Blumenauer Amendment) have prevented more domestic law enforcement activity by the U.S. Department of Justice (DOJ) toward conduct lawful under recreational and medical state marijuana laws. Since 2014, Congress has passed appropriations riders that bar the DOJ from using federal funds to bring criminal prosecutions based on conduct that is permitted by state medical marijuana laws. This funding prohibition effectively bars federal prosecution in medical marijuana cases. However, Attorney General Jeff Sessions would like this rider to end.

In 2013, the DOJ issued memoranda that requested that U.S. Attorneys refrain from prosecuting conduct that was lawful under state recreational laws as well. Sessions has since rescinded these memos. The U.S. Attorney General has granted each U.S. Attorney the freedom to prosecute marijuana use, even where permitted under state laws.

Visa Not Accepted

In addition to the CSA, the INA also restricts non-U.S. citizens' ability to use and possess marijuana while in the U.S. The Department of Homeland Security (DHS) oversees immigration in the U.S. This includes the U.S. Customs and Border Protection (CBP), which operates the borders; U.S. Citizenship and Immigration Services (USCIS), which manages immigration benefits such as immigrant and non-immigrant petition and naturalization applications; and U.S. Immigration and Customs Enforcement (ICE), which enforces immigration law within the U.S., including deportation actions, raids and other investigations.

Numerous U.S. visas allow foreigners to come to the country for business and tourism, including:

- the E treaty trader or investor visas for certain non-U.S. citizens who want to trade or invest in a business,
- the EB-5, which provides a means for eligible immigrant investors to become “green card holders” after investing $1 million dollars,
- the L intracompany transfer,
- the H-1B specialty occupation,
- an extraordinary ability visa in science or business (O-1).
- For non-agricultural temporary workers, the H-2B visa is also a possibility.

All these visa options are off the table for non-U.S. citizens who are entering the U.S. to engage in cannabis-related activity, regardless of the legality of cannabis in the state they are visiting because of cannabis’s CSA classification.

CBP is a foreigner’s first encounter with DHS when seeking entry to the U.S. CBP has broad authority to seize and search electronic devices of anyone seeking entry to the U.S. It reported searching 30,200 devices at the U.S. border in 2017 alone (a 60-percent increase compared to 2016). Twenty percent of those searches were on devices owned by non-U.S. citizens. As a result of these electronic searches, non-U.S. citizens could be deemed inadmissible simply by communicating (via

email, Facebook, texts, etc.) a desire to consume cannabis or otherwise participate in the cannabis industry while in the U.S. The Constitution may not prove a viable argument at the border. Although the Constitution protects all people, the plenary power doctrine of the federal government has broad powers to adopt what would appear to be unconstitutional policies, whether that be the right to free speech or the right to unreasonable search and seizures. But due in large part to the plenary power doctrine, the executive branch of the U.S. can determine many polices and protective measures regarding control at U.S. borders and national security. The federal courts may interpret this differently in the future, but as of now, non-U.S. citizens should be prepared at the border.

CBP's broad authority to search phones and other electronic devices at the border can cause serious immigration issues. For example, a Chilean woman recently flew to the U.S. to visit her long-time boyfriend, a trip she has made numerous times in the past. At Los Angeles International Airport (LAX), CBP officers stopped and searched her, including her phone, where they discovered photos of a Colorado dispensary. Officers asked if she tried cannabis while on her previous visit to Colorado, and she replied, "Yes, it's legal there." With that moment of honesty, the woman was sent on a plane back to Chile and received a lifetime ban from entry to the U.S.

IN A Lot of Trouble

The INA lays out a complex system of laws regarding inadmissibility and deportability. INA set forth grounds for deportation and possible waivers or defenses to charges of deportation. Certain charges depend on an individual's status in the U.S. (i.e., immigrant or non-immigrant, legal or illegal). The INA refuses to admit anyone with a conviction for a violation (or a conspiracy or attempted violation) of any law or regulation related to a controlled substance, as defined in the CSA. Additionally, the INA broadly defines "conviction" as formal judgment of guilt of an alien entered by a court or, if adjudication has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* (Latin for "no contest") or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered that some form of punishment, penalty or restraint on the alien's liberty be imposed.

Even if a conviction is pardoned or expunged, it can still be used for inadmissibility findings and deportation if officers discover the arrest through interviews, questionnaires or other means. Federal law defines what may be expunged in an immigration context, often allowing immigration officers to see otherwise "sealed" records.

In addition, lawful permanent residents are deportable if convicted of an aggravated felony at any time after entry. Aggravated felonies include specific classes of convictions in the INA, which may or may not be felonies under other state or federal laws. Illicit trafficking in a controlled substance is per se an aggravated felony, and any non-citizen working in a dispensary or cultivation business would fall under that definition.

Additionally, a non-U.S. citizen may be barred from U.S. entry merely if the government has reason to believe (based on reasonable, substantial and probative evidence) that the individual is connected to illicit trafficking in any controlled substance. Recently, at the 2018 AILA

Annual Conference on Immigration Law in San Francisco, a foreign national relayed what happened to him at the border. He works in security protection and advises many clients, including cannabis companies, on security issues. Due to some of the materials on his social media, the CBP officer was concerned that he was here to counsel and advise cannabis companies in the U.S. on how to strategically and efficiently guard their merchandise. Ultimately, he was allowed in for five days because he had tickets and hotel reservations to Disney and was with his family. Nevertheless, one must be very careful as aiding and abetting an illegal activity is taken seriously. Even services that are not directly related to cannabis production and appear to be peripheral may be subject to scrutiny.

Canada's legalization of recreational cannabis threatens to create even more headaches for those wishing to enter the U.S., either as tourists or on a more permanent basis. Given that CBP officers need only a "reason to believe" that an individual will violate U.S. law to deny entry (potentially with a lifetime ban), admitting to using cannabis, even legally in Canada, could be enough to lead border patrol officers to "reasonably believe" that the individual seeking entry will violate the law by using cannabis while in the U.S. This applies even more so to individuals involved in cannabis businesses, as CBP officers may assume that the potential entrant plans to further their business endeavor in the U.S.

Finally, immigration law requires "good moral character" to obtain many immigration benefits including becoming a naturalized citizen. A conviction or an admission of facts, which constitute the essential elements of a crime involving moral turpitude (which includes crimes involving intent to steal or defraud, sex offenses and trafficking of a controlled substance), legally prevents an individual from showing "good moral character." Furthermore, a conviction of a crime involving moral turpitude within five years automatically subjects a person to deportation and a ban from entering the U.S. for at least 10 years.

So long as there is a commercial element, participating in the cannabis industry remains a serious crime in immigration law—even if the sale occurred in a context in which the non-U.S. citizen reasonably believed his or her actions to be lawful (i.e., a successful Colorado dispensary owned and operated by a non-U.S. citizen).

Shimon Abta provides a final cautionary tale. Abta legally resided in the U.S. with his new wife on a B-1 visa (temporary business visitor). When he applied to become a permanent resident (with a green card), the USCIS discovered Abta had a medical marijuana card from Nevada and worked in the cannabis industry in Israel as an agronomist. Applying federal law, the USCIS threatened Abta with felony trafficking charges and forced him to leave the country, despite Abta's clearly lawful intent. To this day, Abta has been unable to return to the U.S.

Editor's note: The authors gratefully acknowledge the contributions to this article made by Brendan Krimsky, Columbia Law School, J.D. expected 2020.

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Top photo courtesy of Adobe Stock

Workshop B: Current Developments in Wage and Hour Law

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Opinion Letter FLSA 2018-8 – Administrative Exemption (Copy included in Appendix)

I. FACTS

- The employer sells a wide range of insurance products, from personal and business insurance to professional liability insurance
- Client service managers (CSMs) are licensed insurance agents who serve as "insurance advisers and consultants" to the employer's clients
- CSMs "help the client recognize the need for insurance coverage to guard against unforeseen risk and loss," although the letter notes that the employer separate employs individuals who sell insurance products
- CSMs assist clients in developing insurance programs that will meet the client's needs and gather and pass information about the client to the underwriters
- The employer asserts that CSMs use their own discretion and independent judgment when advising clients and are not required to seek prior approval for the advice and counsel they provide

II. ADMINISTRATIVE EXEMPTION

- Salary basis test
- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
- Notes the example of certain exempt financial services employees set forth in the regulations

III. CSMs PERFORM EXEMPT WORK

- Assume that CSMs meet salary basis test
- They perform office or non-manual work directly related to the management or general business operations of the employer's customers
- Opinion focuses on discretion and independent judgment
- Finds that CSMs use discretion and independent judgment because they advise customers on which insurance products best suits customers' needs

Recent Opinion Letters Issued by the U.S. Department of Labor
Presented by: Mike Lingle and Joseph Carello

Opinion Letter FLSA 2018-27 – Tip Credits/Dual Jobs (Copy included in Appendix)

I. TIP CREDIT REGULATION GENERALLY

- Tip credit provision allows employers to pay tipped employees minimum of $2.13 per hour and take a "tip credit" equal to the difference between the cash wage and federal minimum wage, currently $7.25 per hour
- Tip credit cannot exceed tips received
- Tipped employees are those engaged in an occupation in which they customarily and regularly receive not less than $30 per month in tips
- Employers must inform employees of the tip credit

II. DUAL JOBS

- When employees perform more than one occupation, some of which qualify for the tip credit and some of which that do not, the employer may only take a tip credit for those hours worked in the tipped job
- The Field Operations Handbook (FOH) notes that tipped employees may spend time performing work that is not tip producing, so long as such time does not exceed 20% of their work time
- Cases have come out differently on the issue. *Compare Fast v. Applebee's Int'l, Inc.*, 502 F.Supp.2d 996 (W.D. Mo. 2007) *with Pellon v. Business Representation Int'l, Inc.*, 528 F.Supp.2d 1306, *aff'd* 291 Fed. Appx. 310 (11th Cir. 2008)

III. OPINION LETTER INTERPRETATION

- "We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met."

- Refers to O*NET and the regulations for duties that are considered directly related to tip-producing duties
- No tip credit is allowed for tasks not contained in the O*NET task list
- FOH subsequently updated as well

IV. NEW YORK LAW DIFFERS

- Requirements are more strict

Opinion Letter FLSA 2019-2 – Optional Volunteer Program (Copy included in Appendix)

I. FACTS

- The employer provides an optional community service program for employees.
- Employees engage in certain volunteer activities that either employer sponsors or the employees themselves select.
- The employer compensates employees for the time they spend on volunteer activities during working hours or while they are required to be on premises but does not compensate for hours spent on volunteer activities outside normal working hours.
- The group of employees with the greatest community impact are given with a monetary award, and the winning group's supervisor decides how to distribute the award among the employees. In making this decision, the supervisor may consider how many hours each employee volunteered.
- The employer is considering using a mobile device application to track each participating employee's volunteer hours.

II. COMPENSABILITY OF VOLUNTEER WORK

- A person is ordinarily not an employee under the FLSA if the individual volunteers without contemplation or receipt of compensation. The volunteer must offer his or her services “freely without coercion or undue pressure,” direct or implied, from an employer.
- An employer may use an employee's time spent volunteering as a factor in calculating whether to pay the employee a bonus, without incurring an obligation to treat that time as hours worked, so long as: (1) volunteering is optional, (2) not volunteering will have no

adverse effect on the employee's working conditions or employment prospects, and (3) the employee is not guaranteed a bonus for volunteering.

III. THE VOLUNTEER WORK IS NOT COMPENSABLE

- The employer's program was charitable and voluntary.
- The employer did not direct or control the volunteer work and employees faced no adverse consequences or undue pressure for declining to participate.
- Bonus was not guaranteed for participating in volunteer work.
- Proposed use of mobile app to track hours was acceptable so long as it was not used "to direct or control the employee's activities by, for example, giving specific instructions about what volunteer work he or she should do, or how he or she should do it."

Opinion Letter FLSA 2018-19 – Compensability of Fifteen-Minute Rest Breaks (Copy Included in Appendix)

I. FACTS

- Employer's nonexempt employees have provided FMLA certifications from their health care providers "stating that the employees require 15-minute breaks every hour due to their own continuing serious health conditions."
- Taking such breaks means that, "in an [8-hour] shift, these employees will perform only 6 hours of work."
- Assume the employees are eligible for protected leave under the FMLA, that they have a serious health condition, and that their recurring 15-minute breaks constitute protected leave under the FMLA.

II. COMPENSABILITY OF BREAK TIME

- The FLSA defines "employ" as including "to suffer or permit to work," 29 U.S.C. 203(g), but does not explicitly define what constitutes compensable work.
- The compensability of an employee's time depends on "[w]hether [it] is spent predominantly for the employer's benefit or for the employee's."
- Rest breaks up to 20 minutes in length are generally compensable because the breaks predominantly benefit the employer.
- In limited circumstances, short rest breaks primarily benefit the employee and therefore are not compensable.

III. THE FMLA BREAKS ARE NOT COMPENSABLE

- Because the FMLA-protected breaks were given to accommodate the employee's serious health condition, the breaks predominantly benefit the employee and are not compensable.
- The text of the FMLA confirms that FMLA-protected leave may be unpaid.

Appendix to Recent Opinion Letters Issued by the U.S. Department of Labor

Presented by: Mike Lingle and Joseph Carello

U.S. Department of Labor Wage and Hour Division
Washington, D.C. 20210

FLSA2018-8

January 5, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division ("WHD") reissue Opinion Letter FLSA2009-26. On January 16, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter "for further consideration" and stated that it would "provide a further response in the near future."

We have further analyzed Opinion Letter FLSA2009-26. From today forward, this letter, which is designated FLSA2018-8 and reproduces below the verbatim text of Opinion Letter FLSA2009-26, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.

I thank you for your inquiry.

Bryan L. Jarrett
Acting Administrator

Dear **Name***:

This is in response to your request for an opinion regarding whether client service managers (CSMs) at an insurance company qualify for the administrative exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).* It is our opinion that the CSMs are exempt administrative employees.

Your agency sells a wide range of insurance products, from personal and business insurance to professional liability insurance, and employs CSMs who are professional, licensed insurance agents. The CSMs' primary duty is generally to serve as insurance advisers and consultants to

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

management or general business operations of the employer's customers. 29 C.F.R. §§ 541.201(b); 541.201(c). Therefore, we will focus on whether their primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

To qualify for the administrative exemption, an employee's primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance. *See* 29 C.F.R. § 541.200(a)(3). This "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). Some factors to consider when making this determination are:

> whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives.

29 C.F.R. § 541.202(b). Federal courts generally find that employees who meet at least two or three of these factors mentioned above are exercising discretion and independent judgment, although a case-by-case analysis is required. *See* 69 Fed. Reg. 21,122, 22,143 (Apr. 23, 2004).

Based on the information provided, it appears the CSM's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. Serving as an insurance adviser and consultant to your agency's clients and helping each client select the proper insurance package involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered. *See* 29 C.F.R. § 541.202(a). When doing this task, the CSM analyzes the client's insurance needs and compares these needs to the insurance packages available, taking into account the level of risk and the price of the coverage. This service is a significant matter to the agency's clients. Furthermore, since the CSMs have the authority to execute insurance and finance contracts and legally bind the agency and its clients, the CSMs have the authority to commit their employer in matters that have significant financial impact and to negotiate and bind the company on significant matters. 29 C.F.R. § 541.202(b). Finally, CSMs use their own discretion and independent judgment and are free from immediate supervision when advising clients. Thus, it appears the CSMs primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Additionally, 29 C.F.R. § 541.203 includes specific examples of occupations that would generally meet the administrative duties test, including in paragraph (b) "[e]mployees in the financial services industry," who perform duties similar to the CSMs' duties. Such employees are ordinarily considered to meet the duties requirements for the administrative exemption if their duties include:

> work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2018-27

November 8, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division ("WHD") reissue Opinion Letter FLSA2009-23. On January 16, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter "for further consideration" and stated that it would "provide a further response in the near future."

We have further analyzed Opinion Letter FLSA2009-23. From today forward, this letter, which is designated FLSA2018-27 and reproduces below the verbatim text of Opinion Letter FLSA2009-23, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. Please note, however, that since the letter was originally issued in 2009, (1) the applicable federal minimum wage has increased to $7.25 per hour, (2) the website cited in the letter is now available at https://www.onetonline.org/link/summary/35-3031.00, and (3) then-section 30d00(e) of the Field Operations Handbook is now section 30d00(f), and the language therein was modified.

I thank you for your inquiry.

Bryan L. Jarrett
Acting Administrator

Dear **Name***:

This is in response to your request that we clarify our Field Operations Handbook (FOH) section 30d00(e),[1] which explains the Wage and Hour regulation at 29 C.F.R. § 531.56(e) interpreting the definition of a "tipped employee" in section 3(t) of the Fair Labor Standards Act, 29 U.S.C.

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at ww.wagehour.dol.gov.

> Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting table, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

Section 30d00(e) attempts to ensure that employers do not evade the minimum wage requirements of the Act simply by having tipped employees perform a myriad of nontipped work that would otherwise be done by non-tipped employees. Admittedly, however, it has created some confusion. For instance, in *Fast v. Applebee's Int'l, Inc.*, 502 F.Supp.2d 996 (W.D. Mo. 2007), the court construed § 30d00(e) to not only prohibit the taking of a tip credit for duties unrelated to the tip producing occupation, but also to prohibit the taking of a tip credit for duties related to the tip producing occupation if they exceed 20 percent of the employee's working time. Moreover, the court determined that what constitutes a related and non-related duty is a jury determination.

In contrast, in *Pellon v. Business Representation Int'l, Inc.*, 528 F.Supp.2d 1306 (S.D. Fla. 2007), *aff'd*, 291 Fed. Appx. 310 (11th Cir. 2008), the court rejected the *Fast* court's reading of FOH § 30d00(e), holding, in part, that the 20 percent limitation does not apply to related duties. The court further held that under the *Fast* ruling, "nearly every person employed in a tipped occupation could claim a cause of action against his employer if the employer did not keep perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts." *Pellon*, at 1314. Such a situation benefits neither employees nor employers.

We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met. We also believe that guidance is necessary for an employer to determine on the front end which duties are related and unrelated to a tip-producing occupation so that it can take necessary steps to comply with the Act. Accordingly, we believe that the determination that a particular duty is part of a tipped occupation should be made based on the following principles:

- Duties listed as core or supplemental for the appropriate tip-producing occupation in the in the Tasks section of the Details report in the Occupational Information Network (O*NET) http://online.onetcenter.org or 29 C.F.R. § 531.56(e) shall be considered directly related to the tip-producing duties of that occupation.[3] No limitation shall be

[3] WHD recognizes that there will be certain unique or newly emerging occupations that qualify as tipped occupations under the Act, but for which there is no O*NET description. *See e.g.*, Wage and Hour Opinion Letter FLSA2008-18 (Dec. 19, 2009) (itamae-sushi chefs and teppanyaki chefs). For such tipped occupations for which

U.S. Department of Labor Wage and Hour Division
Washington, DC 20210

FLSA2019-2

March 14, 2019

Dear **Name***:

This letter responds to your request for an opinion concerning whether an employee's time spent participating in an employer's optional volunteer program, which awards a bonus to certain participating employees, is hours worked under the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You represent that your client provides an optional community service program for its employees. Under this program, employees engage in certain volunteer activities that either your client sponsors or the employees themselves select. Your client compensates employees for the time they spend on volunteer activities during working hours or while they are required to be on your client's premises; however, many of the hours that these employees spend on volunteer activities are outside normal working hours. At the end of the year, your client rewards the group of employees with the greatest community impact with a monetary award, and the winning group's supervisor decides how to distribute the award among the employees. In making this decision, the supervisor may consider how many hours each employee volunteered. Your client does not require employees to participate in the program or direct or control their participation. Finally, your client is considering using a mobile device application to track each participating employee's volunteer hours.

GENERAL LEGAL PRINCIPLES

Congress did not intend for the FLSA "to discourage or impede volunteer activities," but rather to "prevent manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to 'volunteer' their services." 29 C.F.R. § 553.101. Indeed, the FLSA recognizes the generosity and public benefits of volunteering and allows people to freely volunteer time for religious, charitable, civic, humanitarian, or similar public services. WHD Opinion Letter FLSA2006-4, 2006 WL 561849, at *1–2 (Jan. 27, 2006). A person is ordinarily not an employee under the FLSA if the individual volunteers without contemplation or receipt of compensation. WHD Opinion Letter FLSA2018-22, 2018 WL 4562932, at *1 (Aug. 28, 2018). Of course, the volunteer must offer his or her services "freely without coercion or undue pressure," direct or implied, from an employer. *Id.* (citing WHD Opinion Letter FLSA2006-18, 2006 WL 1836646, at *1 (June 1, 2006); *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 767 (6th Cir. 2018)); *see* WHD Opinion Letter FLSA2006-4, 2006 WL 561849, at *2 (citing 29 C.F.R. § 785.44).

Sincerely,

Keith E. Sonderling
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

U.S. Department of Labor Wage and Hour Division
Washington, DC 20210

FLSA2018-19

April 12, 2018

Dear **Name***:

This letter responds to your request for an opinion regarding "[w]hether a non-exempt employee's 15-minute rest breaks, which are certified by a health care provider as required every hour due to the employee's serious health condition and are thus covered under the FMLA [Family and Medical Leave Act], are compensable or non-compensable time under the FLSA [Fair Labor Standards Act]." The opinion below is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

BACKGROUND

In your letter, you represent that your clients are employers covered under both the FLSA and FMLA. Your letter explains that several of your clients' nonexempt employees have provided FMLA certifications from their health care providers "stating that the employees require 15-minute breaks every hour due to their own continuing serious health conditions." Taking such breaks means that, "in an [8-hour] shift, these employees will perform only 6 hours of work." For the purposes of this response, we assume the employees are eligible for protected leave under the FMLA, that they have a serious health condition, and that their recurring 15-minute breaks constitute protected leave under the FMLA. *See* 29 C.F.R. §§ 825.110, 825.113-.115, 825.200, 825.202.

GENERAL LEGAL PRINCIPLES

The FLSA, as a general matter, requires employers to compensate employees for their work. The FLSA defines "employ" as including "to suffer or permit to work," 29 U.S.C. 203(g), but does not explicitly define what constitutes compensable work. The U.S. Supreme Court has noted that the compensability of an employee's time depends on "[w]hether [it] is spent predominantly for the employer's benefit or for the employee's." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *see also, e.g.*, *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 64 (2d Cir. 1997) (same).

Short rest breaks up to 20 minutes in length "primarily benefit[] the employer." *Sec'y of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 430 (3d Cir. 2017); *see also* 29 C.F.R. § 785.18 (short breaks "promote the efficiency of the employee"); *Naylor v. Securiguard, Inc.*, 801 F.3d 501, 505 (5th Cir. 2015) (short breaks are "deemed to predominantly benefit the employer by giving the company a reenergized employee"). Thus, consistent with the Supreme Court's decision in *Armour*, rest breaks up to 20 minutes in length are ordinarily compensable. 29 C.F.R. § 785.18.

It is important to note, however, that employees who take FMLA-protected breaks must receive as many compensable rest breaks as their coworkers receive. *See* 29 C.F.R. § 825.220(c). For example, if an employer generally allows all of its employees to take two paid 15-minute rest breaks during an 8-hour shift, an employee needing 15-minute rest breaks every hour due to a serious health condition should likewise receive compensation for two 15-minute rest breaks during his or her 8-hour shift. *See id.*; *see also* WHD Opinion Letter FLSA-1358, 1995 WL 1032460 (Jan. 25, 1995) (when rest breaks are afforded to all employees, "it is immaterial with respect to compensability of such breaks whether the employee drinks coffee, smokes, goes to the restroom, etc.").

We trust that this letter is responsive to your inquiry.

Sincerely,

Bryan Jarrett
Acting Administrator

***Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**

Employment Rights of Undocumented Workers

By: Laura Rodríguez, Esq.*

The Pew Research Center estimates that, as of 2017, the workforce in the United States includes 7.6 million unauthorized immigrants. These workers are protected by state and federal employment laws, regardless of their immigration status.

I. Knowingly Hiring Undocumented Workers Is Illegal

The Immigration Reform and Control Act of 1986 ("IRCA") made it illegal for employers to knowingly employ undocumented workers. *See* 8 USC § 1324(a). IRCA established an employment verification system that employers must follow to verify the identity of potential employees and confirm that they are authorized to work in the United States. 8 USC § 1324(b). If an employer hires someone that is known to be undocumented, or allows an employee to continue working after learning the person is undocumented, the employer is in violation of IRCA.

In reality, many employers do not follow IRCA and continue to employ workers that they know are undocumented. This practice has persisted, in part, because employers are rarely prosecuted for employing undocumented immigrants. According to data collected and maintained by Syracuse University, over thirty employers were prosecuted under IRCA per year in 2005 and 2009. *Few Prosecuted for Illegal Employment of Immigrants*, TRAC Reports, Inc. (Sept. 6, 2019), https://trac.syr.edu/immigration/reports/559/. However, every other year of IRCA's history, less than twenty employers have been prosecuted per year. Currently available data indicates that there were eleven prosecutions during the last twelve months. *Id*. To date, no action has been taken against the employers at the Mississippi factories raided by U.S.

*Laura Rodríguez is an associate attorney at Pechman Law Group PLLC. She is also an Adjunct Professor at Fordham Law School where she teaches a seminar about wage and hour law.

Immigration and Customs Enforcement ("ICE") on August 7, 2019 where an estimated 680 workers were taken into custody due to their suspected undocumented status. Chrisine Hausner and Mihir Zaveri, *Mississippi Plants Knowingly Hired Undocumented Workers, ICE Says*, N.Y. TIMES, (Aug. 15, 2019), https://www.nytimes.com/2019/08/15/us/ ice-raids-mississippi-plants.html.

II. Undocumented Workers Are Entitled to Minimum and Overtime Wages

Although undocumented workers do not have legal work authorization, once they perform work for an employer, they are legally entitled to payment for that work. Immigration status does not impact the applicability of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). "When courts read New York Labor Law and the IRCA together, they do not find any inconsistencies that prevent an undocumented worker from bringing a claim under New York Labor Law." *Pineda v. Kel-Tech Const., Inc*., 15 Misc.3d 176, 185 (N.Y. Sup. Ct. 2007). The same is true of the FLSA. *Rosas v. Alice's Tea Cup, LLC*, 127 F. Supp. 3d 4, 9 (S.D.N.Y. 2015) ("[F]ederal courts have made 'clear that the protections of the FLSA are available to citizens and undocumented workers alike'"); *Colon v. Major Perry St. Corp.*, 987 F. Supp. 2d 451, 459 (S.D.N.Y. 2013) ("FLSA's mandatory language leaves no discretion for courts to alter the statute's remedial scheme based on an employee's immigration status"). As has been explained by the Second Circuit,

> [A]n order requiring an employer to pay his undocumented workers the minimum wages . . . for labor actually and already performed . . . does not itself condone that [immigration] violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it in accordance with minimum FLSA standards.

Madeira v. Affordable Hous. Found., 469 F.3d 219, 243 (2d Cir. 2006).

All workers are entitled to payment at or above the minimum wage, which, in

New York, currently varies between $11.10 and $15.00 per hour. Non-exempt workers, regardless of immigration status, are also entitled to overtime payment for hours worked over forty in one week. An employer cannot "assert a defense under the FLSA on the grounds of the employee's immigration status" to deny "a claim for backpay on behalf of undocumented workers who earned, but were not paid, overtime wages," because such claims "vindicate[] not only the policy underlying the FLSA but also federal immigration policy." *Solis v. Cindy's Total Care, Inc.*, No. 10 Civ. 7242, 2011 WL 6013844, at *3 (S.D.N.Y. Dec. 2, 2011). The FLSA applies to all as a way to protect against the exploitation of workers without papers, but also to protect the jobs of those who do have work authorization. Furthermore, it is meant to encourage all employers to follow the law.

> Failing to enforce FLSA because the employer raises the immigration status of his employee as a defense to compensation allows the employer to "effectively be immunized from its duty under the statute to pay earned wages, and would thereby be able to undercut law-abiding employers who hired lawful workers, as those workers would not be disabled from vindicating their FLSA rights.

Angamarca v. Da Ciro, Inc., 303 F.R.D. 445, 447 (S.D.N.Y. 2012) (quoting *Solis*, 2011 WL 6013844, at *3).

III. Immigration Status Is Not Generally Discoverable

During the litigation of wage claims, the Courts have repeatedly barred inquiries into the immigration status of a wage and hour plaintiff holding that disclosure of this information would have a chilling effect and "effectively eliminate the FLSA as a means for protecting undocumented workers from exploitation and retaliation." *Rodriguez v. Pie of Port Jefferson Corp.*, 48 F. Supp. 3d 424, 428 (E.D.N.Y. 2014) (quoting *Flores v. Amigon,* 233 F. Supp. 2d 462, 465 (E.D.N.Y.2002)); *see also Liu v. Donna Karan International, Inc.*, 207 F.Supp.2d 191, 192 (S.D.N.Y.2002) ("[C]ourts addressing the issue

of whether defendants should be allowed to discover plaintiff-workers' immigration status in cases seeking unpaid wages brought under the FLSA have found such information to be undiscoverable.").

Defendants often seek information regarding whether a plaintiff has filed taxes or has lawful immigration status. This is typically done to undermine the plaintiff's credibility and, in some cases, to discourage the plaintiff from continuing to pursue any claims. Courts view tax returns as private and of a sensitive nature, so calls for their production in wage-and-hour cases are usually barred, as are deposition questions regarding tax filings, unless the defendant shows that: (1) the returns are relevant to the subject matter of the action; and (2) there is a "compelling need for the returns because the information contained therein is not otherwise readily obtainable." *See Rosas v. Alice's Tea Cup, LLC*, 127 F. Supp. 3d 4, 12 (S.D.N.Y. 2015); *cf. Raba v. Suozzi*, No. 06 Civ. 1109, 2007 U.S. Dist. LEXIS 1567 (E.D.N.Y. Jan. 9, 2007) (finding no compelling need for production of tax returns where defendants sought tax returns to establish additional sources of income because defendants could question plaintiffs about that issue at deposition). Other tax forms, such as W-2 forms, are considered less intrusive and their production is more likely to be compelled. *See Agerbrink v. Model Serv. LLC*, No. 14 Civ. 7841, 2017 U.S. Dist. LEXIS 33249, at *20 (S.D.N.Y. Mar. 8, 2017) (finding no compelling need for discovery of tax returns where information about classification on the tax returns "may easily be obtained by interrogatory or deposition").

IV. It Is Unlawful to Retaliate Against an Undocumented Worker

Undocumented workers may assert their right to be paid in accordance with the law and employers may not retaliate or take negative action against workers for asserting these rights. Workers are protected by the anti-retaliation provisions of both the FLSA and NYLL which provide broad relief for anti-retaliation claims. *See* 29 U.S.C.

§ 216(b) ("Any employer . . . shall be liable for such legal or equitable relief as may be appropriate . . ."); N.Y. Lab. L. § 215(2)(a) ("An employee may bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this section. The court shall have jurisdiction…to order all appropriate relief").

Some examples of unlawful retaliation against a worker are: decreasing a worker's hours, terminating his employment, or reporting him to ICE in response to a complaint that was raised. *Valle v. Beauryne Builders LLC*, No. 17 Civ. 0274, 2018 WL 1463692, at *4 (M.D. La., 2018). Requiring a worker to complete an I-9 form in direct response to a complaint made by the worker may also constitute retaliation, as was held in *E.E.O.C. v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006). An employer's counsel may also be held liable for retaliatory activity if the counsel takes action against the worker on behalf of the employer, such as by contacting ICE about an employee while an FLSA action is pending against the employer. In *Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017) the Court explained,

> The wage and hours provisions focus on de facto employers, but the anti-retaliation provision refers to 'any person' who retaliates. See 29 U.S.C. § 215(a)(3). In turn, section 203(d) extends this concept to "any person acting directly or indirectly in the interest of an employer in relation to an employee." See Id. § 203(d). Thus, Congress clearly means to extend section 215(a)(3)'s reach beyond actual employers.

Arias, 860 F.3d at 1191-1192. *But see Diaz v. Longcore*, 751 Fed. Appx. 755 (6th Cir. 2018) (holding that an employer's outside counsel in a FLSA action is not an "employer" who may be sued for violating the anti-retaliation provision).

a) Arrests by ICE

Undocumented immigrants may hesitate to make a claim against an employer for fear of retaliation, including being reported to ICE. There have been instances in

which ICE has arrested workers while they participated in the prosecution of their employment claims. *E.g.*, Beth Fertig, *Undocumented Restaurant Worker Is Arrested by ICE During Deposition Against His Employer*, WNYC NEWS (Aug. 16, 2019), https://www.wnyc.org/story/undocumented-restaurant-worker-arrested-ice-during-deposition-against-his-employer/. However, such situations are rare. ICE has a Memorandum of Understanding with the U.S. Department of Labor to not to detain workers that are in the process of suing an employer over workplace violations. Furthermore, ICE has limited enforcement authority in courthouses. U.S. Immigration and Customs Enforcement, FAQ on Sensitive Locations and Courthouse Arrests, https://www.ice .gov/ero/ enforcement/sensitive-loc (last visited Sept. 6, 2019). In New York State, a directive was issued April 17, 2019 specifically limiting the ability of federal immigration officials to arrest immigrants in New York State courts. "Arrests by agents of U.S. Immigration and Customs Enforcement may be executed inside a New York State courthouse only pursuant to a judicial warrant or judicial order authorizing the arrest." State of New York Unified Court System, Office of the Chief Administrative Judge, Directive Number: 1-2019 (April 17, 2019).

b) NYLL Extends Protections for Undocumented Population

Senate Bill 5791 was signed into law by Governor Cuomo on July 27, 2019 and goes into effect October 25, 2019. It extends protections for undocumented workers under the NYLL. The law currently states, in relevant part,

> No employer or his or her agent . . . shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee . . . because such employee has made a complaint to his or her employer . . . caused to be instituted or is about to institute a proceeding . . . testified . . . or otherwise exercised rights.

N.Y. Lab. L. § 215(1)(a).

As of October 25, 2019, the law is amended to add the following specifications:

> . . . to threaten, penalize, or in any other manner discriminate or retaliate against any employee includes threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member . . . to a federal, state or local agency.

Id.

V. Settlement Payments to Undocumented Workers

Undocumented workers may recover damages for unpaid wages regardless of their immigration status and despite not having a valid social security number. *Saavedra v. Mrs. Bloom's Direct, Inc*., 17 Civ. 2180, 2018 WL 2357264, at *3 (S.D.N.Y., 2018) (explaining that only an Individual Tax Identification Number need be provided for settlement purposes).

Courts are protective of plaintiffs' right to collect damages in wage cases, under both the FLSA and the NYLL.

> When plaintiffs work 'in an industry that often pays minimal amounts . . . and often employs undocumented foreigners,' refusal to pay a settlement on the basis of a plaintiff's immigration status poses a 'real danger of undercutting the protective goals of the remedial statutes under which plaintiffs have sued' and settled.

Kim v. Kum Gang, Inc., No. 12 Civ. 6344, 2014 WL 2510576, at *2 (S.D.N.Y. June 2, 2014). Furthermore,

> Defendants chose to hire Plaintiff without a USCIS I-9 form or failed to verify the underlying documentation supporting her I-9 form, they are likely estopped from using Plaintiff's purported immigration status as a shield from performing under the settlement, particularly where Defendants already "avail[ed] [themselves] of the benefit of [Plaintiff's] past labor without paying for it."

Saavedra, 2018 WL 2357264, at *3.

Appendix to Materials Submitted by Erin S. Torcello, Esq.

Senate Bill S2844B
2019-2020 Legislative Session

Relates to securing payment of wages for work already performed; creates an employee lien

DOWNLOAD BILL TEXT PDF (HTTPS://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2019/S2844B)

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SPONSORED BY

Jessica Ramos (/Senators/Jessica-Ramos)
(D, WF) 13TH SENATE DISTRICT

CURRENT BILL STATUS - PASSED SENATE & ASSEMBLY

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BETA ⓘ (/citizen-guide/bill-alerts)

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VOTES

VIEW VOTES

BILL AMENDMENTS

B (ACTIVE)

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S2844B (ACTIVE) - DETAILS

See Assembly Version of this Bill:

A486 (/Legislation/Bills/2019/A486/Amendment/B)

Law Section:

Lien Law

Laws Affected:

Amd Lien L, generally; amd §§199-a & 663, Lab L; amd §§6201, 6210 & 6211, R6212, CPLR; amd §§624 & 630, BC L; amd §§609 & 1102, Lim Lil L

Versions Introduced in Other Legislative Sessions:
2013-2014: S6658 (/Legislation/Bills/2013/S6658)
2015-2016: S2232 (/Legislation/Bills/2015/S2232)
2017-2018: S579 (/Legislation/Bills/2017/S579), A628 (/Legislation/Bills/2017/A628)

S2844B (ACTIVE) - SUMMARY

Relates to securing payment of wages for work already performed; creates a lien remedy for all employees; provides grounds for attachment; relates to procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft... (view more)

S2844B (ACTIVE) - SPONSOR MEMO

```
BILL NUMBER: S2844B

SPONSOR: RAMOS

TITLE OF BILL:  An act to amend the lien law, in relation to employee
liens; to amend the labor law, in relation to employee complaints; to
amend the civil practice law and rules, in relation to grounds for
attachment; to amend the business corporation law, in relation to
streamlining procedures where employees may hold shareholders of non-
publicly traded corporations personally liable for wage theft; and to
amend the limited liability company law, in relation to creating a right
for victims of wage theft to hold the ten members with the largest
ownership interests in a company personally liable for wage theft


PURPOSE:

This bill amends five sections of the law (Lien Law; Labor Law; Attach-
ment under the Civil Practice Law and Rules; the Business Corporations
Law; and the Limited Liability Company Law) to strengthen current laws
to increase the likelihood that victims of "wage theft" will be able to
secure payment of unpaid wages for work already performed from their
employers.
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VIEW MORE (51 LINES)

S2844B (ACTIVE) - BILL TEXT

DOWNLOAD PDF (HTTPS://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2019/S2844B)

STATE OF NEW YORK

2844--B

Cal. No. 492

2019-2020 Regular Sessions

IN SENATE

January 29, 2019

Introduced by Sens. RAMOS, BAILEY, BIAGGI, GIANARIS, GOUNARDES, JACKSON, KRUEGER, RIVERA, SALAZAR, SANDERS, STAVISKY -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the lien law, in relation to employee liens; to amend the labor law, in relation to employee complaints; to amend the civil practice law and rules, in relation to grounds for attachment; to amend the business corporation law, in relation to streamlining procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft; and to amend the limited liability company law, in relation to creating a right for victims of wage theft to hold the ten members with the largest ownership interests in a company personally liable for wage theft

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 2 of the lien law is amended by adding three new subdivisions 21, 22 and 23 to read as follows:

21. EMPLOYEE. THE TERM "EMPLOYEE", WHEN USED IN THIS CHAPTER, SHALL HAVE THE SAME MEANING AS "EMPLOYEE" PURSUANT TO ARTICLES ONE, SIX, NINETEEN AND NINETEEN-A OF THE LABOR LAW, AS APPLICABLE, OR THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201 ET. SEQ., AS APPLICABLE.

22. EMPLOYER. THE TERM "EMPLOYER", WHEN USED IN THIS CHAPTER, SHALL HAVE THE SAME MEANING AS "EMPLOYER" PURSUANT TO ARTICLES ONE, SIX, NINETEEN AND NINETEEN-A OF THE LABOR LAW, AS APPLICABLE, OR THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201 ET. SEQ., AS APPLICABLE, EXCEPT THAT THE TERM "EMPLOYER" SHALL NOT INCLUDE A GOVERNMENTAL AGENCY.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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Mary__Lister • 3 months ago

This is a much-needed bill to ensure fair and just treatment for the workers of New York State.

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ALSO ON THE NEW YORK STATE SENATE

A7934

1 comment • 2 months ago

Michael__Otten_1 — While I admire the actions taken in January 2019, there is still much to be done to raise New York's stature as a truly democratic state, where the 3 million unaffiliated or non-members of the dominant two

A7997

2 comments • 3 months ago

Clinton_Eller — I strongly oppose A7997 because citizens who legally petition their government for a referendum on incorporation shouldn't have to worry about politicians changing laws because they don't like the potential

S6532

5 comments • 3 months ago

mary14889 — My BOE just informed that the bill is sitting on Cuomo's desk and that he has no intention of signing it. We need a petition to the governor. I'm going to work something up for the Chemung County Dem Committtee

S6279

2 comments • 3 months ago

Daniela_Elefteriadis — Many of the vaccines listed aren't communicable through air or common contact.
Why would they need a tetnus shot?

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Assembly Bill A486B

2019-2020 Legislative Session

Relates to securing payment of wages for work already performed; creates an employee lien

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CURRENT BILL STATUS VIA S2844 - PASSED SENATE & ASSEMBLY

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B (ACTIVE)

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A486B (ACTIVE) - DETAILS

See Senate Version of this Bill:

S2844 (/Legislation/Bills/2019/S2844/Amendment/B)

Law Section:

Lien Law

Laws Affected:

Amd Lien L, generally; amd §§199-a & 663, Lab L; amd §§6201, 6210 & 6211, R6212, CPLR; amd §§624 & 630, BC L; amd §§609 & 1102, Lim Lil L

Versions Introduced in Other Legislative Sessions:
2013-2014: S6658 (/Legislation/Bills/2013/S6658)
2015-2016: S2232 (/Legislation/Bills/2015/S2232)
2017-2018: A628 (/Legislation/Bills/2017/A628), S579 (/Legislation/Bills/2017/S579)

A486B (ACTIVE) - SUMMARY

Relates to securing payment of wages for work already performed; creates a lien remedy for all employees; provides grounds for attachment; relates to procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft... (view more)

A486B (ACTIVE) - BILL TEXT

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S T A T E O F N E W Y O R K

486--B

Cal. No. 372

2019-2020 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 9, 2019

Introduced by M. of A. L. ROSENTHAL, MOSLEY, GOTTFRIED, OTIS, WEPRIN, ORTIZ, PERRY, DAVILA, DINOWITZ, SIMON, M. G. MILLER, LIFTON, BARRON, SEAWRIGHT, RICHARDSON, BENEDETTO, STECK, BRONSON, CRESPO, HUNTER, ROZIC, COLTON, TAYLOR, PICHARDO, EPSTEIN, REYES, DeSTEFANO, ZEBROWSKI, STIRPE, CARROLL, McMAHON, RAMOS, JAFFEE, CRUZ -- Multi-Sponsored by -- M. of A. COOK, DE LA ROSA, HEVESI, KIM, LENTOL, RIVERA -- read once and referred to the Committee on Judiciary -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported from committee, advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the lien law, in relation to employee liens; to amend the labor law, in relation to employee complaints; to amend the civil practice law and rules, in relation to grounds for attachment; to amend the business corporation law, in relation to streamlining procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft; and to amend the limited liability company law, in relation to creating a right for victims of wage theft to hold the ten members with the largest ownership interests in a company personally liable for wage theft

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 2 of the lien law is amended by adding three new subdivisions 21, 22 and 23 to read as follows:

21. EMPLOYEE. THE TERM "EMPLOYEE", WHEN USED IN THIS CHAPTER, SHALL HAVE THE SAME MEANING AS "EMPLOYEE" PURSUANT TO ARTICLES ONE, SIX, NINETEEN AND NINETEEN-A OF THE LABOR LAW, AS APPLICABLE, OR THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201 ET. SEQ., AS APPLICABLE.

22. EMPLOYER. THE TERM "EMPLOYER", WHEN USED IN THIS CHAPTER, SHALL HAVE THE SAME MEANING AS "EMPLOYER" PURSUANT TO ARTICLES ONE, SIX, NINE-

VIEW MORE (1,070 LINES)

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ALSO ON THE NEW YORK STATE SENATE

S6599

7 comments • 3 months ago

Gary Popkin — In 1990 Al Gore told us we'd be under water in five years. In 1995 he told us we'd be under water in five years. In 2000 he told us ... well ... you get the point.

A7990

1 comment • 3 months ago

Patricia_Tarkington — Thank you for introducing this bill which will provide an important protection to NY Affordable Housing tenants.

S6532

5 comments • 3 months ago

mary14889 — My BOE just informed that the bill is sitting on Cuomo's desk and that he has no intention of signing it. We need a petition to the governor. I'm going to work something up for the Chemung County Dem Committtee

S6458

14 comments • 3 months ago

Nicholas Kotsonis — You have killed all private investment in housing. You have also lessened the work for the working class. The plumbers, electricians, carpenters, handymen, who work on apartment buildings.

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STATE OF NEW YORK

2844--B

Cal. No. 492

2019-2020 Regular Sessions

IN SENATE

January 29, 2019

Introduced by Sens. RAMOS, BAILEY, BIAGGI, GIANARIS, GOUNARDES, JACKSON, KRUEGER, RIVERA, SALAZAR, SANDERS, STAVISKY -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the lien law, in relation to employee liens; to amend the labor law, in relation to employee complaints; to amend the civil practice law and rules, in relation to grounds for attachment; to amend the business corporation law, in relation to streamlining procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft; and to amend the limited liability company law, in relation to creating a right for victims of wage theft to hold the ten members with the largest ownership interests in a company personally liable for wage theft

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 2 of the lien law is amended by adding three new subdivisions 21, 22 and 23 to read as follows:

21. Employee. The term "employee", when used in this chapter, shall have the same meaning as "employee" pursuant to articles one, six, nineteen and nineteen-A of the labor law, as applicable, or the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq., as applicable.

22. Employer. The term "employer", when used in this chapter, shall have the same meaning as "employer" pursuant to articles one, six, nineteen and nineteen-A of the labor law, as applicable, or the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq., as applicable, except that the term "employer" shall not include a governmental agency.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD00946-05-9

23. Wage claim. The term "wage claim", when used in this chapter, means a claim that an employee has suffered a violation of sections one hundred seventy, one hundred ninety-three, one hundred ninety-six-d, six hundred fifty-two or six hundred seventy-three of the labor law or the related regulations and wage orders promulgated by the commissioner, a claim for wages due to an employee pursuant to an employment contract that were unpaid in violation of that contract, or a claim that an employee has suffered a violation of 29 U.S.C. § 206 or 207.

§ 2. Section 3 of the lien law, as amended by chapter 137 of the laws of 1985, is amended to read as follows:

§ 3. Mechanic's lien and employee's lien on [~~real~~] property. 1. Mechanic's lien. A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such laborers, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. Where the contract for an improvement is made with a husband or wife and the property belongs to the other or both, the husband or wife contracting shall also be presumed to be the agent of the other, unless such other having knowledge of the improvement shall, within ten days after learning of the contract give the contractor written notice of his or her refusal to consent to the improvement. Within the meaning of the provisions of this chapter, materials actually manufactured for but not delivered to the real property, shall also be deemed to be materials furnished.

2. Employee's lien. An employee who has a wage claim as that term is defined in subdivision twenty-three of section two of this chapter shall have a lien on his or her employer's interest in property for the value of that employee's wage claim arising out of the employment, including liquidated damages pursuant to subdivision one-a of section one hundred ninety-eight, section six hundred sixty-three or section six hundred eighty-one of the labor law, or 29 U.S.C. § 216 (b), from the time of filing a notice of such lien as prescribed in this chapter. An employee's lien based on a wage claim may be had against the employer's interest in real property and against the employer's interest in personal property that can be sufficiently described within the meaning of section 9-108 of the uniform commercial code, except that an employee's lien shall not extend to deposit accounts or goods as those terms are defined in section 9-102 of the uniform commercial code. The department of labor and the attorney general may obtain an employee's lien for the value of wage claims of the employees who are the subject of their investigations, court actions or administrative agency actions.

3. As used in this article and unless otherwise specified, a lien shall mean an employee's lien or a mechanic's lien.

§ 3. Subdivisions 1 and 2 of section 4 of the lien law, subdivision 1 as amended by chapter 515 of the laws of 1929 and subdivision 2 as added by chapter 704 of the laws of 1985, are amended to read as follows:

(1) [~~Such~~] A mechanic's or employee's lien and employee's lien against real property shall extend to the owner's right, title or interest in

the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired, except as hereinafter in this article provided. If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the **mechanic's** lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all **mechanic's** liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided.

(2) [~~Such~~] **A mechanic's or employee's** lien shall not extend to the owner's right, title or interest in real property and improvements, existing at the time of filing the notice of lien if such lien arises from the failure of a lessee of the right to explore, develop or produce natural gas or oil, to pay for, compensate or render value for improvements made with the consent or at the request of such lessee by a contractor, subcontractor, materialman, equipment operator or owner, landscaper, nurseryman, or person or corporation who performs labor or furnishes materials for the exploration, development, or production of oil or natural gas or otherwise improves such leased property. Such **mechanic's or employee's** lien shall extend to the improvements made for the exploration, development and production of oil and natural gas, and the working interest held by a lessee of the right to explore, develop or produce oil and natural gas.

§ 4. The opening paragraph of section 4-a of the lien law, as amended by chapter 696 of the laws of 1959, is amended to read as follows:

The proceeds of any insurance which by the terms of the policy are payable to the owner of real property improved, and actually received or to be received by him because of the destruction or removal by fire or other casualty of an improvement on which lienors have performed labor or services or for which they have furnished materials, **or upon which an employee has established an employee's lien,** shall after the owner has been reimbursed therefrom for premiums paid by him, if any, for such insurance, be subject to liens provided by this act to the same extent and in the same order of priority as the real property would have been had such improvement not been so destroyed or removed.

§ 5. Subdivisions 1, 2 and 5 of section 9 of the lien law, as amended by chapter 515 of the laws of 1929, are amended to read as follows:

1. The name **of the lienor,** and **either the** residence of the lienor **or the name and business address of the lienor's attorney, if any**; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

2. The name of the owner of the [~~real~~] property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

5. The amount unpaid to the lienor for such labor or materials**, or the amount of the wage claim if a wage claim is the basis for establishment of the lien, the items of the wage claim and the value thereof which make up the amount for which the lienor claims a lien**.

§ 6. Subdivision 1 of section 10 of the lien law, as amended by chapter 367 of the laws of 2011, is amended to read as follows:

1. **(a)** Notice of **mechanic's** lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; provided, however, that where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of **mechanic's** lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; and provided further where the notice of **mechanic's** lien is for retainage, the notice of **mechanic's** lien may be filed within ninety days after the date the retainage was due to be released; except that in the case of a **mechanic's** lien by a real estate broker, the notice of **mechanic's** lien may be filed only after the performance of the brokerage services and execution of lease by both lessor and lessee and only if a copy of the alleged written agreement of employment or compensation is annexed to the notice of lien, provided that where the payment pursuant to the written agreement of employment or compensation is to be made in installments, then a notice of lien may be filed within eight months after the final payment is due, but in no event later than a date five years after the first payment was made. For purposes of this section, the term "single family dwelling" shall not include a dwelling unit which is a part of a subdivision that has been filed with a municipality in which the subdivision is located when at the time the lien is filed, such property in the subdivision is owned by the developer for purposes other than his personal residence. For purposes of this section, "developer" shall mean and include any private individual, partnership, trust or corporation which improves two or more parcels of real property with single family dwellings pursuant to a common scheme or plan. [~~The~~]

(b) Notice of employee's lien may be filed at any time not later than three years following the end of the employment giving rise to the wage claim.

(c) A notice of lien**, other than for a lien on personal property,** must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of each of such counties. The county clerk of each county shall provide and keep a book to be called the "lien docket," which shall be suitably ruled in columns headed "owners," "lienors," "lienor's attorney," "property," "amount," "time of filing," "proceedings had," in each of which he shall enter the particulars of the notice, properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. Except where the county clerk maintains a block index, the names of the owners shall be arranged in such book in alphabetical order. The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed. **A notice of employee's lien on personal property must be**

filed, together with a financing statement, in the filing office as set forth in section 9-501 of the uniform commercial code.

§ 7. Section 11 of the lien law, as amended by chapter 147 of the laws of 1996, is amended to read as follows:

§ 11. Service of copy of notice of lien. 1. Within five days before or thirty days after filing the notice of a mechanic's lien, the lienor shall serve a copy of such notice upon the owner, if a natural person, (a) by delivering the same to him personally, or if the owner cannot be found, to his agent or attorney, or (b) by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or (c) by registered or certified mail addressed to his last known place of residence, or (d) if such owner has no such residence in such city or town, or cannot be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon; if the owner be a corporation, said service shall be made (i) by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or (ii) if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or (iii) by registered or certified mail addressed to its last known place of business. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien.

2. Within five days before or thirty days after filing the notice of an employee's lien, the lienor shall serve a copy of such notice upon the employer, if a natural person, (a) by delivering the same to him personally, or if the employer cannot be found, to his agent or attorney, or (b) by leaving it as his last known place of residence or business, with a person of suitable age and discretion, or (c) by registered or certified mail addressed to his last known place of residence or business, or (d) if such employer owns real property, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon. The lienor also shall, within thirty days after filing the notice of employee's lien, affix a copy thereof conspicuously on the real property identified in the notice of employee's lien, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon. If the employer be a corporation, said service shall be made (i) by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or (ii) if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or (iii) by registered or certified mail addressed to its last known place of business, or (iv) by delivery to the secretary of the department of state in the same manner as required by subparagraph one of paragraph (b) of section three hundred six of the business corporation law. Failure to file proof of such a service with the county clerk within thirty-five days after the notice

of lien is filed shall terminate the notice as a lien. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any other person claiming a lien.

§ 8. Section 11-b of the lien law, as amended by chapter 147 of the laws of 1996, is amended to read as follows:

§ 11-b. Copy of notice of mechanic's lien to a contractor or subcontractor. Within five days before or thirty days after filing a notice of mechanic's lien in accordance with section ten of this chapter or the filing of an amendment of notice of mechanic's lien in accordance with section twelve-a of this [~~chapter~~] article the lienor shall serve a copy of such notice or amendment by certified mail on the contractor, subcontractor, assignee or legal representative for whom he was employed or to whom he furnished materials or if the lienor is a contractor or subcontractor to the person, firm or corporation with whom the contract was made. A lienor having a direct contractual relationship with a subcontractor or a sub-subcontractor but not with a contractor shall also serve a copy of such notice or amendment by certified mail to the contractor. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien. Any lienor, or a person acting on behalf of a lienor, who fails to serve a copy of the notice of mechanic's lien as required by this section shall be liable for reasonable attorney's fees, costs and expenses, as determined by the court, incurred in obtaining such copy.

§ 9. Subdivision 1 of section 12-a of the lien law, as amended by chapter 1048 of the laws of 1971, is amended to read as follows:

1. Within sixty days after the original filing, a lienor may amend his lien upon twenty days notice to existing lienors, mortgagees and the owner, provided that no action or proceeding to enforce or cancel the mechanics' lien or employee's lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of wilful exaggeration shall survive such amendment.

§ 10. Subdivision 1 of section 13 of the lien law, as amended by chapter 878 of the laws of 1947, is amended to read as follows:

(1) [~~A~~] An employee's lien, or a lien for materials furnished or labor performed in the improvement of real property, shall have priority over a conveyance, mortgage, judgment or other claim against such property not recorded, docketed or filed at the time of the filing of the notice of such lien, except as hereinafter in this chapter provided; over advances made upon any mortgage or other encumbrance thereon after such filing, except as hereinafter in this article provided; and over the claim of a creditor who has not furnished materials or performed labor upon such property, if such property has been assigned by the owner by a general assignment for the benefit of creditors, within thirty days before the filing of either of such notices; and also over an attachment hereafter issued or a money judgment hereafter recovered upon a claim, which, in whole or in part, was not for materials furnished, labor performed or moneys advanced for the improvement of such real property; and over any claim or lien acquired in any proceedings upon such judgment. Such liens shall also have priority over advances made upon a contract by an owner for an improvement of real property which contains an option to the contractor, his successor or assigns to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien. If several buildings are demolished, erected, altered or repaired,

or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular part of the real property or upon the particular building or premises where his labor is performed or his materials are used. Persons shall have no priority on account of the time of filing their respective notices of liens, but all liens shall be on a parity except as hereinafter in section fifty-six of this chapter provided; and except that in all cases laborers for daily or weekly wages **with a mechanic's lien, and employees with an employee's lien,** shall have preference over all other claimants under this article.

§ 11. Section 17 of the lien law, as amended by chapter 324 of the laws of 2000, is amended to read as follows:

§ 17. Duration of lien. **1. (a)** No **mechanic's** lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an extension to such lien, except for a lien on real property improved or to be improved with a single family dwelling, is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension. Such extension shall contain the names of the lienor and the owner of the real property against whose interest therein such lien is claimed, a brief description of the real property affected by such lien, the amount of such lien, and the date of filing the notice of lien. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to foreclose the lien within such extended period, such lien shall be extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. A lien on real property improved or to be improved with a single family dwelling may only be extended by an order of a court of record, or a judge or justice thereof. No lien shall be continued by court order for more than one year from the granting thereof, but a new order and entry may be made in each of two successive years. If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person. The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. Where a lien is discharged by deposit or by order, a notice of pendency of action shall not be filed.

(b) A lien, the duration of which has been extended by the filing of a notice of the pendency of an action as above provided, shall nevertheless terminate as a lien after such notice has been canceled as provided

in section sixty-five hundred fourteen of the civil practice law and rules or has ceased to be effective as constructive notice as provided in section sixty-five hundred thirteen of the civil practice law and rules.

2. (a) No employee's lien on real property shall be a lien for a longer period than one year after the notice of lien has been filed, unless an extension to such lien is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension. Such extension shall contain the names of the lienor and the owner of the real property against whose interest therein such lien is claimed, a brief description of the property affected by such lien, the amount of such lien, and the date of filing the notice of lien. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to obtain judgment on the wage claim or to foreclose the lien within such extended period, such lien shall be automatically extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order.

(b) No employee's lien on personal property shall be a lien for a longer period than one year after the financing statement has been recorded, unless an extension to such lien, is filed with the filing office in which the financing statement is required to be filed pursuant to section 9-501 of the uniform commercial code within one year from the filing of the original financing statement, continuing such lien. Such extension shall contain the names of the lienor and the owner of the property against whose interest therein such lien is claimed, a brief description of the prior financing statement to be extended, and the date of filing the prior financing statement. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to obtain judgment on the wage claim or to foreclose the lien within such extended period, such lien shall be automatically extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be refiled as of the date of granting such order and a statement made that such lien is continued by virtue of such order.

(c) If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person. The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. Where a lien is discharged by deposit or by order, a notice of pendency of action shall not be filed.

(d) Notwithstanding the foregoing, if a lienor commences a foreclosure action or an action to obtain a judgment on the wage claim within one year from the filing of the notice of lien on real property or the recording of the financing statement creating lien on personal property, the lien shall be extended during the pendency of the action and for one hundred twenty days following the entry of final judgment in such

action, unless the action results in a final judgment or administrative order in the lienor's favor on the wage claims and the lienor commences a foreclosure action, in which instance the lien shall be valid during the pendency of the foreclosure action, provided, that the lien will be automatically extinguished if, after a dismissal with prejudice of the wage claims on which it is based, the lienor fails to file a notice of appeal within the prescribed period to file a notice of appeal. If a lien is extended due to the pendency of a foreclosure action or an action to obtain a judgment on the wage claim, the lienor shall file a notice of such pendency and extension with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the property affected thereby, and the time of filing the notice of lien, or in the case of a lien on personal property shall file such notice with the office authorized to accept financing statements pursuant to section 9-501 of the uniform commercial code. For purposes of this section, an action to obtain judgment on a wage claim includes an action brought in any court of competent jurisdiction, the submission of a complaint to the department of labor or the submission of a claim to arbitration pursuant to an arbitration agreement. An action also includes an investigation of wage claims by the commissioner of labor or the attorney general of the state of New York, regardless of whether such investigation was initiated by a complaint.

(e) A lien, the duration of which has been extended by the filing of a notice of the pendency of an action as above provided, shall nevertheless terminate as a lien after such notice has been canceled as provided in section sixty-five hundred fourteen of the civil practice law and rules or has ceased to be effective as constructive notice as provided in section sixty-five hundred thirteen of the civil practice law and rules.

§ 12. Subdivisions 2 and 4 of section 19 of the lien law, subdivision 2 as amended by chapter 310 of the laws of 1962, subdivision 4 as added by chapter 582 of the laws of 2002 and paragraph a of subdivision 4 as further amended by section 104 of part A of chapter 62 of the laws of 2011, are amended to read as follows:

(2) By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien, unless (i) an action be begun within the same period to foreclose a mortgage or another mechanic's lien upon the same property or any part thereof and a notice of pendency of such action is filed according to law, or (ii) an action is commenced to obtain a judgment on a wage claim pursuant to subdivision two of section seventeen of this article, but a lien, the duration of which has been extended by the filing of a notice of the pendency of an action as herein provided, shall nevertheless terminate as a lien after such notice has been cancelled or has ceased to be effective as constructive notice.

(4) Either before or after the beginning of an action by the employer, owner or contractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgment which may be rendered against the property or employer for the enforcement of the lien:

a. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be sufficient; and where a certificate of qualification has been issued by the superintendent of financial services under the provisions of section one thousand one hundred eleven of the insurance

law, and has not been revoked, no justification or notice thereof shall be necessary. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. Any such bond or undertaking shall be filed with the clerk of the county in which the notice of lien is filed, and a copy shall be served upon the adverse party. The undertaking is effective when so served and filed. If a certificate of qualification issued pursuant to subsections (b), (c) and (d) of section one thousand one hundred eleven of the insurance law is not filed with the undertaking, a party may except, to the sufficiency of a surety and by a written notice of exception served upon the adverse party within ten days after receipt, a copy of the undertaking. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs. Where no exception to sureties is taken within ten days or where exceptions taken are set aside, the undertaking shall be allowed.

b. In the case of bonds or undertakings not executed pursuant to paragraph a of this subdivision, the **employer,** owner or contractor shall execute an undertaking with two or more sufficient sureties, who shall be free holders, to the clerk of the county where the premises are situated. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made by such court, judge or justice discharging such lien.

c. If the lienor cannot be found, or does not appear by attorney, service under this subsection may be made by leaving a copy of such undertaking and notice at the lienor's place of residence, or if a corporation at its principal place of business within the state as stated in the notice of lien, with a person of suitable age and discretion therein, or if the house of his abode or its place of business is not stated in said notice of lien and is not known, then in such manner as the court may direct. The premises, if any, described in the notice of lien as the lienor's residence or place of business shall be deemed to be his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person servicing the papers or directing the service had knowledge to the contrary. Notwithstanding the other provisions of this subdivision relating to service of notice, in any case where the mailing address of the lienor is outside the state such service may be made by registered or certified mail, return receipt requested, to such lienor at the mailing address contained in the notice of lien.

d. Except as otherwise provided in this subdivision, the provisions of article twenty-five of the civil practice law and rules regulating undertakings is applicable to a bond or undertaking given for the discharge of a lien on account of private improvements **or of an employee's lien**.

§ 13. Section 24 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 24. Enforcement of [~~mechanic's~~] lien. **(1) Real property.** The [~~mechanics'~~] liens **on real property** specified in this article may be enforced against the property specified in the notice of lien and which

is subject thereto and against any person liable for the debt upon which the lien is founded, as prescribed in article three of this chapter.

(2) Personal property. An employee's lien on personal property specified in this article may immediately be enforced against the property through a foreclosure as prescribed in article nine of the uniform commercial code, or upon judgment obtained by the employee, commissioner of labor or attorney general of the state of New York, may be enforced in any manner available to the judgment creditor pursuant to article nine of the uniform commercial code or other applicable laws.

§ 14. Section 26 of the lien law, as amended by chapter 373 of the laws of 1977, is amended to read as follows:

§ 26. Subordination of liens after agreement with owner. In case an owner of real property shall execute to one or more persons, or a corporation, as trustee or trustees, a bond and mortgage or a note and mortgage affecting such property in whole or in part, or an assignment of the moneys due or to become due under a contract for a building loan in relation to such property, and in case such mortgage, if any, shall be recorded in the office of the register of the county where such real property is situated, or if such county has no register then in the office of the clerk of such county, and in case such assignment, if any, shall be filed in the office of the clerk of the county where such real property is situated; and in case lienors having [~~mechanics'~~] liens against said real property, notices of which have been filed up to and not later than fifteen days after the recording of such mortgage or the filing of such assignment, and which liens have not been discharged as in this article provided, shall, to the extent of at least fifty-five per centum of the aggregate amount for which such notices of liens have been so filed, approve such bond and mortgage or such note and mortgage, if any, and such assignment, if any, by an instrument or instruments in writing, duly acknowledged and filed in the office of such county clerk, then all mechanics' liens for labor performed or material furnished prior to the recording of such mortgage or filing of such assignment, whether notices thereof have been theretofore or are thereafter filed and which have not been discharged as in this article provided, shall be subordinate to the lien of such trust bond and mortgage or such trust note and mortgage to the extent of the aggregate amount of all certificates of interest therein issued by such trustee or trustees, or their successors, for moneys loaned, materials furnished, labor performed and any other indebtedness incurred after said trust mortgage shall have been recorded, and for expenses in connection with said trust mortgage, and shall also be subordinate to the lien of the bond and mortgage or note and mortgage, given to secure the amount agreed to be advanced under such contract for a building loan to the extent of the amount which shall be advanced by the holder of such bond and mortgage or such note and mortgage to the trustee or trustees, or their successors, under such assignment. The provisions of this section shall apply to all bonds and mortgages and notes and mortgages and all assignments of moneys due, or to become due under building loan contracts executed by such owner, in like manner, and recorded or filed, from time to time as hereinbefore provided. In case of an assignment to trustees under the provisions of this section, the trustees and their successors shall be the agents of the assignor to receive and receipt for any and all sums advanced by the holder of the building loan bond and mortgage or the building loan note and mortgage under the building loan contract and such assignment. No lienor shall have any priority over the bond and mortgage or note and mortgage given to secure the money agreed to be advanced under a build-

ing loan contract or over the advances made thereunder, by reason of any act preceding the making and approval of such assignment.

§ 15. Section 38 of the lien law, as amended by chapter 859 of the laws of 1930, is amended to read as follows:

§ 38. Itemized statement may be required of lienor. A lienor who has filed a notice of **mechanic's** lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished. The statement shall be verified by the lienor or his agent in the form required for the verification of notices in section nine of this [~~chapter~~] **article**. If the lienor shall fail to comply with such a demand within five days after the same shall have been made by the owner or contractor, or if the lienor delivers an insufficient statement, the person aggrieved may petition the supreme court of this state or any justice thereof, or the county court of the county where the premises are situated, or the county judge of such county for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section. Two days' notice in writing of such application shall be served upon the lienor. Such service shall be made in the manner provided by law for the personal service of a summons. The court or a justice or judge thereof shall hear the parties and upon being satisfied that the lienor has failed, neglected or refused to comply with the requirements of this section shall have an appropriate order directing such compliance. In case the lienor fails to comply with the order so made within the time specified, then upon five days' notice to the lienor, served in the manner provided by law for the personal service of a summons, the court or a justice or judge thereof may make an order cancelling the lien.

§ 16. Section 39 of the lien law, as added by chapter 859 of the laws of 1930, is amended to read as follows:

§ 39. Lien wilfully exaggerated is void. In any action or proceeding to enforce a mechanic's lien upon a private or public improvement **or an employee's lien,** or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice.

§ 17. Section 39-a of the lien law, as added by chapter 859 of the laws of 1930, is amended to read as follows:

§ 39-a. Liability of lienor where lien has been declared void on account of wilful exaggeration. Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement **or an employee's lien** the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and**, in an action or proceeding to enforce a mechanic's lien,** an amount equal to the difference by which the amount

claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

§ 18. Section 40 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 40. Construction of article. This article is to be construed in connection with article two of this chapter, and provides proceedings for the enforcement of **employee's liens on real property, as well as** liens for labor performed and materials furnished in the improvement of real property, created by virtue of such article.

§ 19. Section 41 of the lien law, as amended by chapter 807 of the laws of 1952, is amended to read as follows:

§ 41. Enforcement of mechanic's **or employee's** lien on real property. A mechanic's lien **or employee's lien** on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded, by an action, by the lienor, his assignee or legal representative, in the supreme court or in a county court otherwise having jurisdiction, regardless of the amount of such debt, or in a court which has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of such debt.

§ 20. Section 43 of the lien law, as amended by chapter 310 of the laws of 1962, is amended to read as follows:

§ 43. Action in a court of record; consolidation of actions. The provisions of the real property actions and proceedings law relating to actions for the foreclosure of a mortgage upon real property, and the sale and the distribution of the proceeds thereof apply to actions in a court of record, to enforce mechanics' liens **and employees' liens** on real property, except as otherwise provided in this article. If actions are brought by different lienors in a court of record, the court in which the first action was brought, may, upon its own motion, or upon the application of any party in any of such actions, consolidate all of such actions.

§ 21. Section 46 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 46. Action in a court not of record. If an action to enforce a mechanic's lien **or employee's lien** against real property is brought in a court not of record, it shall be commenced by the personal service upon the owner of a summons and complaint verified in the same manner as a complaint in an action in a court of record. The complaint must set forth substantially the facts contained in the notice of lien, and the substance of the agreement under which the labor was performed or the materials were furnished**, or if the lien is based upon a wage claim as defined in section two of this chapter, the basis for such wage claim**. The form and contents of the summons shall be the same as provided by law for the commencement of an action upon a contract in such court. The summons must be returnable not less than twelve nor more than twenty days after the date of the summons, or if service is made by publication, after the day of the last publication of the summons. Service must be made at least eight days before the return day.

§ 22. Section 50 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 50. Execution. Execution may be issued upon a judgment obtained in an action to enforce a mechanic's lien **or an employee's lien** against real property in a court not of record, which shall direct the officer to sell the title and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of filing the notice of lien.

§ 23. Section 53 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 53. Costs and disbursements. If an action is brought to enforce a mechanic's lien **or an employee's lien** against real property in a court of record, the costs and disbursements shall rest in the discretion of the court, and may be awarded to the prevailing party. The judgment rendered in such an action shall include the amount of such costs and specify to whom and by whom the costs are to be paid. If such action is brought in a court not of record, they shall be the same as allowed in civil actions in such court. The expenses incurred in serving the summons by publication may be added to the amount of costs now allowed in such court.

§ 24. Section 59 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 59. Vacating of a [~~mechanic's~~] lien; cancellation of bond; return of deposit, by order of court. **1.** A mechanic's lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty **of this chapter** may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it as his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order.

2. An employee's lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty of this chapter may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it at his last known place of residence or attorney's place of business, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, or to commence an action to obtain judgment on the wage claim upon which the lien was established, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien or an action to obtain judgment on the wage claim upon which the lien was established, as directed in the notice, shall be made by affidavit, at the time of applying for such order.

§ 25. Section 62 of the lien law, as amended by chapter 697 of the laws of 1934, is amended to read as follows:

§ 62. Bringing in new parties. A lienor who has filed a notice of lien after the commencement of an action in a court of record to foreclose or

enforce **an employee's lien or** a mechanic's lien against real property or a public improvement, may at any time up to and including the day preceding the day on which the trial of such action is commenced, make application upon notice to the plaintiff or his attorney in such action, to be made a party therein. Upon good cause shown, the court must order such lienor to be brought in by amendment. If the application is made by any other party in said action to make such lienor or other person a party, the court may in its discretion direct such lienor or other person to be brought in by like amendment. The order to be entered on such application shall provide the time for and manner of serving the pleading of such additional lienor or other person and shall direct that the pleadings, papers and proceedings of the other several parties in such action, shall be deemed amended, so as not to require the making or serving of papers other than said order to effectuate such amendment, and shall further provide that the allegations in the answer of such additional lienor or other person shall, for the purposes of the action, be deemed denied by the other parties therein. The action shall be so conducted by the court as not to cause substantially any delay in the trial thereof. The bringing in of such additional lienor or other person shall be without prejudice to the proceedings had, and if the action be on the calendar of the court, same shall retain its place on such calendar without the necessity of serving a new note of issue and new notices of trial.

§ 26. Subdivision 3 of section 199-a of the labor law, as amended by chapter 564 of the laws of 2010, is amended to read as follows:

3. Each employee and his or her authorized representative shall be notified in writing**, of the termination of the commissioner's investigation of the employee's complaint and the result of such investigation,** of any award and collection of back wages and civil penalties, and of any intent to seek criminal penalties. In the event that criminal penalties are sought the employee and his or her authorized representative shall be notified of the outcome of prosecution.

§ 27. Subdivision 2 of section 663 of the labor law, as amended by chapter 564 of the laws of 2010, is amended to read as follows:

2. By commissioner. On behalf of any employee paid less than the wage to which the employee is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and the employer shall be required to pay the full amount of the underpayment, plus costs, and unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law, an additional amount as liquidated damages. Liquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total amount of underpayments found to be due the employee. In any action brought by the commissioner in a court of competent jurisdiction, liquidated damages shall be calculated as an amount equal to one hundred percent of underpayments found to be due the employee. **Each employee or his or her authorized representative shall be notified in writing of the outcome of any legal action brought on the employee's behalf pursuant to this section.**

§ 28. Subdivision 5 of section 6201 of the civil practice law and rules, as amended by chapter 860 of the laws of 1977 and as renumbered by chapter 618 of the laws of 1992, is amended and a new subdivision 6 is added to read as follows:

5. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to

full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53[.] **of this chapter; or**

6. the cause of action is based on wage claims. "Wage claims," when used in this chapter, shall include any claims of violations of articles five, six, and nineteen of the labor law, section two hundred fifteen of the labor law, and the related regulations or wage orders promulgated by the commissioner of labor, including but not limited to any claims of unpaid, minimum, overtime, and spread-of-hours pay, unlawfully retained gratuities, unlawful deductions from wages, unpaid commissions, unpaid benefits and wage supplements, and retaliation, and any claims pursuant to 18 U.S.C. § 1595, 29 U.S.C. § 201 et seq., and/or employment contract as well as the concomitant liquidated damages and penalties authorized pursuant to the labor law, the Fair Labor Standards Act, or any employment contract.

§ 29. Section 6210 of the civil practice law and rules, as added by chapter 860 of the laws of 1977, is amended to read as follows:

§ 6210. Order of attachment on notice; temporary restraining order; contents. Upon a motion on notice for an order of attachment, the court may, without notice to the defendant, grant a temporary restraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of section 6214. **When attachment is sought pursuant to subdivision six of section 6201, and if the employer contests the motion, the court shall hold a hearing within ten days of when the employer's response to plaintiffs' motion for attachment is due.** The contents of the order of attachment granted pursuant to this section shall be as provided in subdivision (a) of section 6211.

§ 30. Subdivision (b) of section 6211 of the civil practice law and rules, as amended by chapter 566 of the laws of 1985, is amended to read as follows:

(b) Confirmation of order. Except where an order of attachment is granted on the ground specified in subdivision one **or six** of section 6201, an order of attachment granted without notice shall provide that within a period not to exceed five days after levy, the plaintiff shall move, on such notice as the court shall direct to the defendant, the garnishee, if any, and the sheriff, for an order confirming the order of attachment. Where an order of attachment without notice is granted on the ground specified in subdivision one **or six** of section 6201, the court shall direct that the statement required by section 6219 be served within five days, that a copy thereof be served upon the plaintiff, and the plaintiff shall move within ten days after levy for an order confirming the order of attachment. If the plaintiff upon such motion shall show that the statement has not been served and that the plaintiff will be unable to satisfy the requirement of subdivision (b) of section 6223 until the statement has been served, the court may grant one extension of the time to move for confirmation for a period not to exceed ten days. If plaintiff fails to make such motion within the required period, the order of attachment and any levy thereunder shall have no further effect and shall be vacated upon motion. Upon the motion to confirm, the provisions of subdivision (b) of section 6223 shall apply. An order of attachment granted without notice may provide that the sheriff refrain from taking any property levied upon into his actual custody, pending further order of the court.

§ 31. Subdivisions (b) and (e) of rule 6212 of the civil practice law and rules, subdivision (b) as separately amended by chapters 15 and 860

of the laws of 1977 and subdivision (e) as added by chapter 860 of the laws of 1977, are amended to read as follows:

(b) Undertaking. [~~On~~] **1. Except where an order of attachment is sought on the ground specified in subdivision six of section 6201, on** a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than five hundred dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees.

2. On a motion for an attachment pursuant to subdivision six of section 6201, the court shall order that the plaintiff give an accessible undertaking of no more than five hundred dollars, or in the alternative, may waive the undertaking altogether. The attorney for the plaintiff shall not be liable to the sheriff for such fees. The surety on the undertaking shall not be discharged except upon notice to the sheriff.

(e) Damages. [~~The~~] **Except where an order of attachment is sought on the ground specified in subdivision six of section 6201, the** plaintiff shall be liable to the defendant for all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property. Plaintiff's liability shall not be limited by the amount of the undertaking.

§ 32. Paragraph (b) of section 624 of the business corporation law, as amended by chapter 449 of the laws of 1997, is amended to read as follows:

(b) Any person who shall have been a shareholder of record of a corporation**, or who is or shall have been a laborer, servant or employee,** upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder**, laborer, servant or employee, provided the purpose reasonably related to a person's interest as a laborer, servant or employee shall be to obtain the names, addresses, and value of shareholders' interests in the corporation**. Holders of voting trust certificates representing shares of the corporation shall be regarded as shareholders for the purpose of this section. Any such agent or attorney shall be authorized in a writing that satisfies the requirements of a writing under paragraph (b) of section 609 (Proxies). A corporation requested to provide information pursuant to this paragraph shall make available such information in written form and in any other format in which such information is maintained by the corporation and shall not be required to provide such information in any other format. If a request made pursuant to this paragraph includes a request to furnish information regarding beneficial owners, the corporation shall make available such information in its possession regarding beneficial owners as is provided to the corporation by a registered broker or dealer or a bank, association or other entity that exercises fiduciary powers in connection with the forwarding of information to such owners. The corporation shall not be required to obtain information about beneficial owners not in its possession.

§ 33. Section 630 of the business corporation law, paragraph (a) as amended by chapter 5 of the laws of 2016, paragraph (c) as amended by chapter 746 of the laws of 1963, is amended to read as follows:

§ 630. Liability of shareholders for wages due to laborers, servants or employees.

(a) The ten largest shareholders, as determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed, of every domestic corporation or of any foreign corporation, when the unpaid services were performed in the state, no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. [~~Before such laborer, servant or employee shall charge such shareholder for such services, he shall give notice in writing to such shareholder that he intends to hold him liable under this section. Such notice shall be given within one hundred and eighty days after termination of such services, except that if, within such period, the laborer, servant or employee demands an examination of the record of shareholders under paragraph (b) of section 624 (Books and records, right of inspection, prima facie evidence) of this article, such notice may be given within sixty days after he has been given the opportunity to examine the record of shareholders. An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services.~~] The provisions of this paragraph shall not apply to an investment company registered as such under an act of congress entitled "Investment Company Act of 1940."

(b) For the purposes of this section, wages or salaries shall mean all compensation and benefits payable by an employer to or for the account of the employee for personal services rendered by such employee **including any concomitant liquidated damages, penalties, interest, attorney's fees or costs**. These shall specifically include but not be limited to salaries, overtime, vacation, holiday and severance pay; employer contributions to or payments of insurance or welfare benefits; employer contributions to pension or annuity funds; and any other moneys properly due or payable for services rendered by such employee.

(c) A shareholder who has paid more than his pro rata share under this section shall be entitled to contribution pro rata from the other shareholders liable under this section with respect to the excess so paid, over and above his pro rata share, and may sue them jointly or severally or any number of them to recover the amount due from them. Such recovery may be had in a separate action. As used in this paragraph, "pro rata" means in proportion to beneficial share interest. Before a shareholder may claim contribution from other shareholders under this paragraph, he shall[~~, unless they have been given notice by a laborer, servant or employee under paragraph (a),~~] give them notice in writing that he intends to hold them so liable to him. Such notice shall be given by him within twenty days after the date that [~~notice was given to him by~~] **he became aware that** a laborer, servant or employee **may seek to hold him liable** under paragraph (a).

§ 34. Subdivision (c) of section 609 of the limited liability company law, as added by chapter 537 of the laws of 2014, is amended to read as follows:

(c) Notwithstanding the provisions of subdivisions (a) and (b) of this section, the ten members with the largest percentage ownership interest, as determined as of the beginning of the period during which the unpaid services referred to in this section are performed, of every limited liability company, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees, for services performed by them for such limited liability company. [~~Before such laborer, servant or employee shall charge such member for such services, he or she shall give notice in writing to such member that he or she intends to hold such member liable under this section. Such notice shall be given within one hundred eighty days after termination of such services. An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the limited liability company upon a judgment recovered against it for such services.~~] A member who has paid more than his or her pro rata share under this section shall be entitled to contribution pro rata from the other members liable under this section with respect to the excess so paid, over and above his or her pro rata share, and may sue them jointly or severally or any number of them to recover the amount due from them. Such recovery may be had in a separate action. As used in this subdivision, "pro rata" means in proportion to percentage ownership interest. Before a member may claim contribution from other members under this section, he or she shall give them notice in writing that he or she intends to hold them so liable to him or her.

§ 35. Section 1102 of the limited liability company law is amended by adding a new subdivision (e) to read as follows:

(e) Any person who is or shall have been a laborer, servant or employee of a limited liability company, upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, records described in paragraph two of subdivision (a) of this section throughout the period of time during which such laborer, servant or employee provided services to such company. A company requested to provide information pursuant to this paragraph shall make available such records in written form and in any other format in which such information is maintained by the company and shall not be required to provide such information in any other format. Upon refusal by the company or by an officer or agent of the company to permit an inspection of the records described in this paragraph, the person making the demand for inspection may apply to the supreme court in the judicial district where the office of the company is located, upon such notice as the court may direct, for an order directing the company, its members or managers to show cause why an order should not be granted permitting such inspection by the applicant. Upon the return day of the order to show cause, the court shall hear the parties summarily, by affidavit or otherwise, and if it appears that the applicant is qualified and entitled to such inspection, the court shall grant an order compelling such inspection and awarding such further relief as to the court may seem just and proper. If the applicant is found to be qualified and entitled to such inspection, the company shall pay all reasonable attorney's fees and costs of said applicant related to the demand for inspection of the records.

§ 36. This act shall take effect on the thirtieth day after it shall have become a law. The procedures and rights created in this act may be used by employees, laborers or servants in connection with claims for liabilities that arose prior to the effective date.

Workshop C:
Changes to Employee Benefits and Executive Compensation under the Tax Cuts and Jobs Act of 2017

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Changes to Employee Benefits and Executive Compensation Made By the Tax Cuts and Jobs Act of 2017

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Modification of the Limitation on Excessive Employee Compensation

Background

Under tax law prior to the changes made by the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 (2017) (the "Act"), the general rule, under Internal Revenue Code ("Code") section 162(a)(1), is that a reasonable allowance for compensation paid or incurred by an employer for personal services actually rendered by an employee may be deducted by the employer as an ordinary and necessary expense in running a trade or business. Code section 162(m)(1) expressly limits this deduction for compensation paid in the case of a publicly held corporation. Under that Code section, in the case of a publicly held corporation, no deduction is allowed for applicable employee remuneration, paid or incurred with respect to a covered employee, to the extent that the amount of such remuneration for the taxable year exceeds $1,000,000.

A "publicly held corporation" is a corporation which issues any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934 ("Exchange Act"). Code section 162(m)(2).

The "covered employees" are:(1) the corporation's chief executive officer (or an individual acting in such capacity) as of the close of the taxable year; and (2) the employees whose compensation is required to be reported to shareholders under the Exchange Act because

they are the four most highly compensated officers for the taxable year (other than the chief executive officer or individual treated as such). Code section 162(m)(3).

Under Code section 162(m)(4), the "applicable employee remuneration" is, with respect to any covered employee for any taxable year, the aggregate amount allowable as a deduction under Chapter 1 (NORMAL TAXES AND SURTAXES) of the Code for such taxable year (determined without regard to $1 million deduction cap) for remuneration for services performed by such employee (whether or not during the taxable year). Applicable employee remuneration includes all remuneration for services, whether paid in cash or in kind, and, so long as the individual is a covered employee during the tax year, whether the individual was a covered employee at the time the remuneration was earned. The $1 million deduction cap is reduced by excess parachute payments that are not deductible by the corporation under Code section 280G.

Certain types of compensation are not subject to, and are not taken into account, when applying, the $1 million deduction cap. Under Code section 162(m)(1) and (4), the excepted compensation includes:

(a) amounts that are paid only if one or more performance goals are met, and if certain outside director and shareholder approval requirements are satisfied, ("performance-based compensation");

(b) amounts that are paid on a commission basis;

(c) payments made to a tax-favored retirement plan (including salary reduction contributions);

(d) payments of deferred compensation, made upon or after termination of employment and in a taxable year after the individual has ceased to be a covered employee;

(e) amounts not included in taxable income (such as health benefits and certain other fringe benefits); and

(f) any remuneration payable under a written binding contract which was in effect on February 17, 1993, unless the contract is materially modified after that date.

The Changes Made By The Act

The Act made several changes to the rules of Code section 162(m) and the $1 million deduction cap. The changes are effective for taxable years beginning after December 31, 2017. On August 21, 2018, the Internal Revenue Service (the "IRS") issued Notice 2018-68 (the "Notice") to provide initial guidance on the Act. The changes to the Code made by the Act, and, when applicable, the application of the changes pursuant to the Notice, are discussed below.

Repeal of the Performance-Based and Commission Exception from Compensation. The Act terminates the exceptions for amounts included in compensation for "performance-based compensation" and "commissions". That is, for taxable years beginning after 2017, for purposes of applying the $1 million deduction cap, compensation includes any cash or noncash payment for services rendered made in the form of performance-based compensation or a commission.

Change to the Definition of "Covered Employee". Under the Act, a "covered employees" is an employee of the corporation who: (1) is the principal executive officer (the "PEO") (or an individual acting in such capacity) at any time during the taxable year; (2) is the principal

financial officer (the "PFO") (or an individual acting in such capacity) at any time during the taxable year; (3) is among the three highest compensated officers for the tax year (other than the PEO or the PFO) whose total compensation for the tax year must be reported to shareholders under the Exchange Act; or (4) was a covered employee of the taxpayer (or any predecessor) for any preceding taxable year beginning after December 31, 2016. See Code section 162(m)(3).

According to the Notice, an employee who serves as the PEO, the PFO or one of the three most highly paid officers will be a covered employee under the changed definition, whether or not serving in that capacity or employed at year end. The Notice also indicates that executive officers of a publicly held corporation can be covered employees, even if disclosure of their compensation is not required under US Securities and Exchange Commission ("SEC") rules, including officers of a company that does not file a proxy statement. Accordingly, unlike under the pre-Act version of Code section 162(m), a company's proxy statement will no longer serve as a definitive guide to who is a covered employee.

Further, the Notice points out the Act's expansion of the definition of "covered employees" to cover any individual who was a covered employee after December 31, 2016. On this point, the Notice clarifies that covered employee determinations for years beginning prior to January 1, 2018 (including for calendar year 2017), should be made pursuant to Code section 162(m) as in effect prior to the Act.

According to the Notice, the Treasury Department and IRS are requesting comments on the application of the SEC executive compensation disclosure rules to determine the three most highly compensated executive officers for a taxable year that does not end on the same date as the last completed fiscal year. The Notice says that, until additional guidance is issued, to

determine the three most highly compensated employees for these purposes, taxpayers should base their determination upon a reasonable good faith interpretation of the statute, taking into account the guidance provided under the Notice.

Note: It appears that the Act expanded the definition of covered employees, further broadening the reach of the deduction limitation.

Change to the Definition of Publicly Held Corporation. The Act expanded its definition of a publicly held corporation beyond corporations issuing common equity securities required to be registered under section 12 of the Exchange Act to corporations issuing other types of securities. Specifically under the Act, a "publicly held corporation" means any corporation which is an issuer (as defined in section 3 of the Exchange Act): (A) the securities of which are required to be registered under section 12 of the Exchange Act, or (B) that is required to file reports under section 15(d) of the Exchange Act. See Code section 162(m)(2).

Addition to the Definition of Applicable Employee Remuneration. The Act added a rule under which remuneration does not fail to be included in a covered employee's applicable employee remuneration, merely because it is includible in the income of, or paid to, a person other than the covered employee, including after the death of the covered employee. See Code section 162(m)(4)(F).

Effect on Pre-Act Written Agreements

According to the Notice, the changes made by the Act to Code section 162(m) do **not** apply to any compensation paid under a "written binding contract" that is in effect on November 2, 2017 and is not "materially modified" after that date. The Notice states that remuneration is

payable under a written binding contract that was in effect on November 2, 2017, only to the extent that the corporation is obligated under applicable law (for example, state contract law) to pay the remuneration under such contract if the employee performs services or satisfies the applicable vesting conditions. Any amount that exceeds what must be paid under applicable law will be subject to the new Code section 162(m) rules.

Obligation to Pay Under Applicable Law. It is unclear whether compensation would be treated as subject to an obligation to pay under applicable law, and thus be covered by the grandfather provision and not be subject to the changes made by the Act, when the contract, while in effect on November 2, 2017, is intended to comply with the performance-based compensation exemption under pre-Act law and permits (but does not require) the exercise of "negative discretion" (*i.e.*, discretion by a compensation committee to reduce payments otherwise payable due to meeting a performance goal). An example in the Notice suggests that this compensation would be subject to such an obligation to pay (and thus not be subject to the changes made by the Act) to the extent that a minimum payment is required to be made in any event.

The Binding Requirement. The Notice states that the Act's amendments to Code section 162(m) also apply to a written binding contract that is renewed after November 2, 2017. A written binding contract that is terminable or cancelable by the corporation without the employee's consent after November 2, 2017, is treated as renewed as of the date that any such termination or cancellation, if made, would be effective. Thus, for example, if the terms of a contract provide that it will be automatically renewed or extended as of a certain date unless either the corporation or the employee provides notice of termination of the contract at least 30

days before that date, the contract is treated as renewed as of the date that termination would be effective if that notice were given. Similarly, for example, if the terms of a contract provide that the contract will be terminated or canceled as of a certain date unless either the corporation or the employee elects to renew within 30 days of that date, the contract is treated as renewed by the corporation as of that date (unless the contract is renewed before that date, in which case, it is treated as renewed on that earlier date).

Alternatively, if the corporation will remain legally obligated by the terms of a contract beyond a certain date at the sole discretion of the employee, the contract will not be treated as renewed as of that date if the employee exercises the discretion to keep the corporation bound to the contract. A contract is not treated as terminable or cancelable if it can be terminated or canceled only by terminating the employment relationship of the employee. A contract is not treated as renewed if upon termination or cancelation of the contract the employment relationship continues but would no longer be covered by the contract. However, if the employment continues after such termination or cancellation, payments with respect to such employment are not made pursuant to the contract (and, therefore, are not grandfathered).

If a compensation plan or arrangement is binding, the amount that is required to be paid as of November 2, 2017, to an employee pursuant to the plan or arrangement will not be subject to the Act's amendments to Code section 162(m) even though the employee was not eligible to participate in the plan or arrangement as of November 2, 2017. However, the Act's amendments to Code section 162(m) will apply to such compensation plan or arrangement unless the employee was employed on November 2, 2017, by the corporation that maintained the plan or

arrangement, or the employee had the right to participate in the plan or arrangement under a written binding contract as of that date.

Under an example in the Notice, it appears that amounts payable under stock options or SARs are subject to a written binding requirement if: (1) all approvals needed for the grant of the stock options and SARs were provided by November 2, 2017, and (2) no material changes are made to the stock options or SARs after that date. However, if the stock option or SAR is subject to obtaining approval by the board of directors or other persons at a date later than November 2, 2017, there is no written binding contract for these purposes.

Based on the Notice, it also appears that an amount that is earned under a written agreement during a taxable year ending before November 2, 2017, that will be paid at a later date, and that cannot be reduced retroactively by the employer, should be considered an amount payable under a written binding contract. However, if the amount is earned after 2017 under a written agreement in effect on November 2, 2017, is payable at a later date, but could be reduced by a unilateral employer amendment to the agreement, the amount should NOT be considered as an amount payable under a written binding contract.

Similarly, amounts paid under an employment agreement, which is in effect as of November 2, 2017, will generally be treated as payable under a written binding contact. However, if the employment agreement is renewed after November 2, 2017, due to action or the failure to act by the employer, amounts paid under the employment agreement will NOT be treated as payable under a written binding contact.

Material Modifications. The Notice says that the Act's amendments to Code section 162(m) will apply to any written binding contract that is materially modified after November 2, 2017. A material modification occurs when the contract is amended to increase the amount of compensation payable to the employee. If a written binding contract is materially modified, it is treated as a new contract entered into as of the date of the material modification. Thus, amounts received by an employee under the contract before a material modification are not affected, but amounts received subsequent to the material modification are treated as paid pursuant to a new contract, rather than as paid pursuant to a written binding contract in effect on November 2, 2017.

A modification of the contract that accelerates the payment of compensation is a material modification unless the amount of compensation paid is discounted to reasonably reflect the time value of money. If the contract is modified to defer the payment of compensation, any compensation paid or to be paid that is in excess of the amount that was originally payable to the employee under the contract will not be treated as resulting in a material modification if the additional amount is based on either a reasonable rate of interest or a predetermined actual investment (whether or not assets associated with the amount originally owed are actually invested therein) such that the amount payable by the employer at the later date will be based on the actual rate of return on the predetermined actual investment (including any decrease, as well as any increase, in the value of the investment).

The adoption of a supplemental contract or agreement that provides for increased compensation, or the payment of additional compensation, is a material modification of a written binding contract if the facts and circumstances demonstrate that the additional compensation is

paid on the basis of substantially the same elements or conditions as the compensation that is otherwise paid pursuant to the written binding contract. However, a material modification of a written binding contract does not include a supplemental payment that is equal to or less than a reasonable cost-of-living increase over the payment made in the preceding year under that written binding contract. In addition, the failure, in whole or in part, to exercise negative discretion under a contract does not result in the material modification of that contract.

Note: The interpretation of the grandfather provision is the most troubling aspect of the Notice. This interpretation is very narrow and appears to restrict eligibility for grandfathering of compensation arrangements entered into prior to the Act.

Effective Date

The Notice says that the Act's amendments to Code section 162(m) apply to taxable years beginning on or after January 1, 2018. The Treasury Department and the IRS anticipate that the guidance provided by the Notice will be incorporated in future regulations that, with respect to the issues addressed in the Notice, will apply to any taxable year ending on or after September 10, 2018. Any future guidance, including regulations, addressing the issues covered by the Notice in a manner that would broaden the definition of "covered employee", or restrict the application of the definition of "written binding contract, will apply prospectively only.

Excise Tax on Excess Executive Compensation Paid By Tax-Exempt Organizations

Background

Prior to the changes made by the Tax Cuts and Jobs Act of 2017 (again, the "Act"), the tax law did not impose any type of tax, or impose any statutory limitation, on the compensation paid to officers or other executives of tax-exempt organizations. The $1 million limit on deductions for compensation paid by publicly held companies under Code section 162(m) (discussed above) and the taxes imposed on golden parachute payments under Code section 280G do not usually apply to tax-exempt organizations.

The Act makes several changes to provisions covering tax-exempt entities, including imposing an excise tax on executive compensation that exceeds $1 million. Code section 4960 and Act § 13602(a). This new excise tax is discussed below. The new Code section is effective for taxable years beginning after December 31, 2017. Act § 13602(c). On December 31, 2018, the IRS issued Notice 2019-09 to provide guidance on the new excise tax.

The Provisions of New Code Section 4960

Imposition of the Excise Tax. New Code section 4960 imposes an excise tax, at the current rate of 21%, on the sum of: (1) the remuneration paid, excluding any excess parachute payment, by an applicable tax-exempt organization for the taxable year with respect to employment of any covered employee in excess of $1,000,000, plus (2) any excess parachute payment paid by the organization to the covered employee for the taxable year. See Code section 4960(a).

The employer is liable for the payment of the excise tax. For purposes of calculating the excise tax, remuneration is treated as having been paid when there is no substantial risk of forfeiture (within the meaning of Code section 457(f)(3)(B)) of the rights to such remuneration. See Code section 4960(a) and (b).

Definitions.

Under Code section 4960(c)(1), an "applicable tax-exempt organization" or an "ATEO" is any organization which, for the taxable year:

(1) is exempt from taxation under Code section 501(a) -this would include-

--an organization exempt from tax under Code section 501(c)(3), such as a public university with an IRS determination letter affirming its tax-exempt status,

--a religious or apostolic organization exempt from tax under Code section 501(d),

--a trust forming part of a stock bonus, pension or profit-sharing plan under Code section 401(a), or

--a federal instrumentality exempt from tax under Code section 501(c)(1));

(2) is a farmers' cooperative organization described in Code section 521(b)(1);

(3) has income excluded from taxation under Code section 115(1); or

(4) is a political organization described in Code section 527(e)(1).

Under Code section 4960 (c)(2), a "covered employee" is any employee (including any former employee) of an applicable ATEO, if the employee: (a) is one of the 5 highest compensated employees of the ATEO for the taxable year, or (b) was a covered employee of the ATEO (or any predecessor) for any preceding taxable year beginning after December 31,

2016. As such, an individual who becomes a covered employee in any taxable year will retain that status for subsequent taxable years. There is no minimum dollar amount that must be reached for an employee to be classified as a covered employee.

Under Code section 4960(c)(3) and (6), the term "remuneration" means wages (as defined in Code section 3401(a)), including amounts required to be included in gross income under Code section 457(f). The term remuneration does not include:

(i) any designated Roth contribution (as defined in Code section 402A(c));

(ii) the portion of any remuneration paid to a licensed medical professional (including a veterinarian) for the performance of medical or veterinary services by the professional; or

(iii) any remuneration which is not deductible by reason of Code section 162(m) (the $1 million dollar limit on deductions for compensation discussed above).

The following definitions apply under Code section 4960(c)(5). The term "excess parachute payment" means an amount equal to the excess of any parachute payment over the portion of the base amount allocated to the payment. The term "parachute payment" means any payment in the nature of compensation to (or for the benefit of) a covered employee if: (1) the payment is contingent on the employee's separation from employment with the employer, and (2) the aggregate present value of the payments in the nature of compensation to (or for the benefit of) such individual, which are contingent on such separation, equals or exceeds an amount equal to 3 times the base amount. The following are not parachute payments:

--payments from qualified plans, annuity contracts described in Code section 403(b) or plans described in Code section 457(f);

-- payments to a licensed medical professional (including a veterinarian) to the extent that such payments are for the performance of medical or veterinary services by such professional, or

-- payments to an individual who is not a highly compensated employee as defined in Code section 414(q).

Rules similar to the rules of Code section 280G(b)(3) will apply for purposes of determining the "base amount".

Remuneration from Related Organizations. For purposes of applying the excise tax, the remuneration of a covered employee from an ATEO includes any remuneration paid with respect to employment of such employee by any related person or governmental entity. Code section 4960(c)(4)(A).

A person or governmental entity will be treated as a "related organization" of an ATEO, if such person or governmental entity:

(1) controls, or is controlled by, the ATEO;

(2) is controlled by one or more persons which control the ATEO;

(3) is a supported organization (as defined in Code section 509(f)(3)) during the taxable year with respect to the ATEO;

(4) is a supporting organization (described in Code section 509(a)(3)) during the taxable year with respect to the ATEO; or

(5) in the case of an organization which is a voluntary employees' beneficiary association described in Code section 501(c)(9) (a "VEBA"), the person that establishes, maintains, or makes contributions to the VEBA.

Code section 4960(c)(4)(B).

If remuneration from more than one employer is taken into account in determining the excise tax, each of the employers becomes liable for a proportional share of the excise tax, based on the amount of remuneration the particular employer paid to the employee at issue. Code section 4960(c)(4)(C).

Guidance in Notice 2019-09 on New Code Section 4960

Notice 2019-09 (for purposes of this topic, the "Notice") provides the following guidance on Code section 4960.

Remuneration Generally. The Notice provides that, for purposes of computing the excise tax, any excess remuneration and excess parachute payment is determined based on the remuneration paid and excess parachute payment made in the calendar year ending with or within the employer's taxable year. This means that an ATEO will use the covered employees' calendar year taxable wages. This aligns with the Form W-2 reporting method currently used to report remuneration on Form 990, Return of Organization Exempt From Income Tax. However, because Code section 4960 modifies the definition of wages set forth in Code section 3401(a) and treats remuneration as paid only when there is no substantial risk of forfeiture, remuneration for the purposes of computing the excise tax may not be the same as the amount reported in Box 1 of the covered employees' Form W-2.

Additionally, any vested remuneration, including vested but unpaid earnings on deferred amounts, that is treated as paid before Code section 4960 is applicable (January 1, 2018, in the case of a calendar year employer) is not subject to the excise tax imposed under Code section 4960, although earnings after the effective date on those amounts are treated as remuneration paid for purposes of imposing the excise tax. According to the Notice, net earnings on previously paid remuneration is treated as paid at the close of the calendar year in which they accrue.

Related Organization. The Notice makes it clear that a taxable entity, nonstock organization or governmental entity can be a related organization. Also, a related organization can be an ATEO.

Liability for Excise Tax. The Notice says that the common-law employer, as generally determined for federal tax purposes, is liable for the excise tax imposed under Code section 4960. Such employer cannot avoid liability by using a third-party payor arrangement. A payment to the employer's employee from a third- party payor (including a payroll agent, common paymaster, statutory employer under Code section 3401(d)(1), or certified professional employer organization) or from an unrelated management company, is considered a payment to the employee from the common-law employer. Similarly, a payment to the employee from a related organization, including a related organization that is an ATEO, for services rendered to the common-law employer, is considered a payment to the employee from the common-law employer for purposes of calculating remuneration and determining liability for the excise tax.

According to the Notice, only an ATEO has covered employees, but a covered employee may also be an employee of a related organization. An ATEO calculates liability for the excise tax under Code section 4960 with respect to its covered employees by including remuneration paid by the ATEO and any related organization to the covered employees, and then allocating that excise tax liability among each of the employers. For purposes of the allocation, remuneration paid by a related organization to an ATEO's covered employees is treated as paid by the related organization, and forms the basis for allocating the excise tax liability to such related organization, if the payment is made for services rendered to the related organization. The ATEO remains liable for the portion of the excise tax attributable to amounts it pays, or is paid by the related organization, for services rendered to the ATEO. The Notice provides rules for allocating liability for the excise tax among the employers, with each employer being liable for its proportionate share of the excise tax.

Further, remuneration paid to a covered employee by another organization, which is not a related organization, with respect to the covered employee's employment by an ATEO is treated as remuneration paid by that ATEO for purposes of determining the amount of the excise tax under section 4960.

Under these rules the ATEO may also be liable for the excise tax under Code section 4960 as a related organization with respect to another ATEO that calculates the excise tax for its own covered employees. If an employer is liable for the excise tax under Code section 4960 as an ATEO and as a related organization for the same remuneration paid to a covered employee, the employer is not liable for the excise tax in both capacities; rather it is liable for the greater of the excise tax it would owe as an ATEO or the excise tax it would owe as a related organization with respect to that covered employee.

Determining the Five Highest-Compensated Employees. The Notice says that the determination of whether an employee is one of the five highest-compensated employees of an ATEO, for purposes of determining the ATEOs covered employees, is made on the basis of his or her remuneration for services performed as an employee of the ATEO, any remuneration paid by a related organization and any remuneration for services performed for the ATEO as an employee of a related or unrelated organization. The remuneration used for purposes of identifying the five highest-compensated employees is the remuneration paid to an employee during the calendar year ending with or within the ATEO's or related organization's taxable year. Remuneration paid for medical services (or veterinary services) is not taken into account for these purposes.

The Notice contains the following exception. It provides that an employee is not one of an ATEO's five highest-compensated employees for a taxable year if, during the calendar year ending with or within the taxable year, the ATEO paid less than 10 percent of the employee's total remuneration for services performed as an employee of the ATEO and all related organizations. However, if an employee would not be treated as one of the five highest-compensated employees of any ATEO in an ATEO's group of related organizations because no ATEO in the group paid at least 10 percent of the total remuneration paid by the group during the calendar year, then this exception does not apply to the ATEO that paid the employee the most remuneration during that year.

Whether an employee is one of the five highest-compensated employees is determined separately for each ATEO, and not for the entire group of related organizations; thus, each

ATEO has its five highest-compensated employees. As a result, in many cases, a group of related organizations will have more than five covered employees.

Medical and Veterinary Services. The statute excludes from remuneration the portion of any compensation that is paid for the performance of medical or veterinary services by a licensed medical professional. The Notice defines "licensed medical professional" as an individual who is licensed under state or local law to perform medical or veterinary services. Further, the Notice says that, in addition to those professionals listed, this definition generally includes dentists and nurse practitioners and may include other medical professionals depending on state or local law.

When a covered employee is compensated for both medical or veterinary services and other services, the employer must allocate remuneration paid to such employee between medical services and such other services. The Notice permits taxpayers to use any reasonable, good faith method to allocate remuneration between medical services and other services. For this purpose, the employer may rely on a reasonable allocation set forth in an employment agreement that explicitly allocates a portion of the remuneration as for medical or veterinary services or other services.

Excess Remuneration. The Notice indicates that, for each covered employee, excess remuneration is the excess for a taxable year of the remuneration that is paid to the employee (other than any excess parachute payment) by an ATEO, including remuneration paid by a related organization, over $1 million for the taxable year. The $1 million threshold is not adjusted for inflation.

The Notice says that "remuneration" is generally defined as wages under Code section 3401(a) (wages subject to federal income tax withholding), but excluding designated Roth contributions under Code section 402A(c) and including amounts required to be included in gross income under Code section 457(f). Also, any amounts excepted from section 3401(a) wages in that Section itself (Code section 3401(a)(1) to (23)) are not included in remuneration for these purposes. The Notice clarifies that remuneration includes a parachute payment that is not an excess parachute payment, but remuneration does not include certain retirement benefits (see Code section 3401(a)(12)) or certain directors' fees (see Rev. Rul. 57-246, 1957-1 C.B. 338). Remuneration does not include the portion of any remuneration paid to a licensed medical professional that is directly related to the performance of medical or veterinary services.

According to the Notice, remuneration includes amounts paid to a covered employee by any related organization with respect to the employee's employment by that related organization. As discussed above, the Notice contains rules for allocating the liability for the excise tax when remuneration from more than one employer is taken into account in determining the liability for the excise tax under Code section 4960. In contrast, remuneration paid by another organization, whether or not a related organization, with respect to an employee's employment by an ATEO, is treated as remuneration paid by that ATEO for purposes of Code section 4960.

The Notice states that remuneration is treated as paid for purposes of Code section 4960 when there is no substantial risk of forfeiture of the rights to the remuneration, as defined by Code section 457(f)(3)(b). Therefore, an amount of compensation is subject to a substantial risk of forfeiture only if entitlement to the amount is conditioned on the future performance of substantial services, or upon the occurrence of a condition that is related to a purpose of the compensation if the possibility of forfeiture is substantial. The amount of remuneration treated as

paid at vesting-that is, when the substantial risk of forfeiture lapses- is the "present value" of the remuneration in which the employee vests, determined using reasonable actuarial assumptions regarding the time and likelihood of actual or constructive payment.

Excess Parachute Payments. The Notice points out that the statute imposes an excise tax on "any excess parachute payment." The term "parachute payment" is defined to be any payment in the nature of compensation to (or for the benefit of) a covered employee if: (1) such payment is contingent on such employee's separation from employment with the employer, and (2) the aggregate present value of the payments in the nature of compensation to (or for the benefit of) such individual which are contingent on such separation equals or exceeds an amount equal to three times the base amount.

Generally, the term "base amount" means an individual's annualized includible compensation for a base period. In turn, the "base period" is the covered employee's five most recent taxable years ending before the date on which the separation from employment occurs (or the portion of the five-year period during which the covered employee performed services for the ATEO and/or related organization). Any transfer of property is treated as a payment and taken into account at its fair market value. Present value is determined using a discount rate equal to 120 percent of the applicable Federal rate determined under Code section 1274(d), compounded semiannually.

The term "excess parachute payment" is defined to be an amount of any parachute payment made by an ATEO (or related organization) over the portion of the covered employee's base amount that is allocated to the payment. The portion of the base amount so allocated is determined by multiplying the base amount by a fraction, the numerator of which is the present

value of the parachute payment and the denominator of which is the aggregate present value of all parachute payments made or to be made to (or for the benefit of) the same covered employee.

The Notice provides that a payment is considered contingent on a separation from employment if the facts and circumstances indicate that the employer would not make the payment in the absence of an involuntary separation from employment. The Notice limits its treatment to payments contingent on an involuntary separation from employment because payments that vest upon a separation from employment typically vest only upon an involuntary separation from employment.

If an employee may voluntarily separate from service and still be entitled to a payment, then the payment either is not subject to a substantial risk of forfeiture or the forfeiture condition is not related to the separation from employment. If, however, there are other types of separation from employment conditions that may result in the lapse of a substantial risk of forfeiture applicable to a payment, the standard in the Notice may be expanded in future guidance to ensure that those payments are also treated as contingent on a separation from employment.

The Notice points out that, for these purposes, separation from employment generally has the same meaning as separation from service as defined in Treas. Reg. § 1.409A-1(h), without regard to Treas. Reg. § 1.409A-1(h)(2) and (5) (application to independent contractors), since generally only an employee may have a separation from employment and a change from employee status to bona fide independent contractor status would also be a separation from employment. In addition, the definition of termination of employment in Treas. Reg. § 1.409A-1(h)(1)(ii) is modified such that an employer may not set the level of the anticipated reduction in future services that will give rise to a separation from employment and that the defaults set forth in the regulations apply.

Payment in the Nature of Compensation. The Notice clarifies that any payment—in whatever form—is a payment in the nature of compensation if the payment arises out of an employment relationship, including holding oneself out as available to perform services and refraining from performing services. A payment in the nature of compensation includes (but is not limited to) wages and salary, bonuses, severance pay, fringe benefits, life insurance, pension benefits, and other deferred compensation (including any amount characterized by the parties as interest or earnings thereon). A payment in the nature of compensation also includes cash when paid, the value of the right to receive cash, including the value of accelerated vesting, or a transfer of property. However, a payment in the nature of compensation does not include attorney's fees or court costs paid or incurred in connection with the payment of any parachute payment or a reasonable rate of interest accrued on any amount during the period the parties contest whether a payment will be made.

Reporting and Paying the Excise Tax. According to the Notice, the Code section 4960 excise tax must be paid and reported by filing Form 4720 by the 15th day of the 5th month after the end of the employer's taxable year. In any case in which remuneration from a related organization is included to determine the excise tax imposed by Code section 4960, each ATEO and related organization (including a related taxable organization) must file a separate Form 4720 to report its share of liability. ATEOs and related organizations that are not liable for excise tax under Code section 4960 for the taxable year need not a file Form 4720 for the taxable year unless filing is required under other provisions of the Code or regulations.

An employer may file Form 8868, Application for Automatic Extension of Time to File an Exempt Organization Return, to request an automatic extension of time to file Form 4720.

The automatic extension will be granted if Form 8868 is properly completed, and timely filed. Form 8868 does not extend the time to pay tax. To avoid interest and penalties, an employer must pay the tax due by the original due date of Form 4720.

Effective Date. The Notice says that Code section 4960 is effective for the first taxable year beginning after December 31, 2017. It provides that amounts paid before the beginning of that taxable year are not subject to the excise tax under Code section 4960. Remuneration that was vested before the effective date is not subject to excise tax under this Section because it is treated as having been paid at vesting. For example, amounts includible in gross income under Code section 457(f)(1)(A) and any vested earnings that accrued before the effective date of Code section 4960 are not subject to the excise tax Code section 4960. However, earnings accrued on those amounts in taxable years beginning after December 31, 2017, may be subject to excise tax under the Section.

Future Guidance. The Notice indicates that the IRS and the Treasury Department intend to issue proposed regulations for Code section 4960 that will incorporate the guidance in the Notice. It notes that any further guidance under the proposed regulations will be prospective and not apply to taxable years beginning before the guidance is issued. In the meantime, the Notice states that taxpayers may base their positions on good faith, reasonable interpretations of Code section 4960, including its legislative history. Relying on the Notice is considered to be a good faith, reasonable interpretation of the statute.

Treatment of Qualified Equity Grants

Background

Under the existing tax law set forth in Code section 83, specific rules apply to property transferred by an employer to an employee in connection with the performance of services. For convenience, we assume below that any property so transferred is employer stock. Section 83 determines the amount and timing of income inclusion by the employee, and the amount and timing of the employer's compensation deduction, with respect to any such transfer.

Under Code section 83, if in connection with the performance of services, stock in the employer is transferred from the employer to the employee, the employee will recognize taxable income in the first taxable year in which the employee's rights in the stock are transferable or are not subject to a substantial risk of forfeiture, whichever of the two events occurs first (the occurrence of such earlier event is treated as becoming "substantially vested"). The amount of the taxable income is equal to the fair market value of the stock as of the date the employee becomes substantially vested (less any amount paid for the stock). Thus, in the case of stock transferred as compensation for the performance of services, tax arises in the employee's tax year of substantial vesting.

However, another rule may apply. If the employee's rights in the stock is not substantially vested at the time the stock is transferred to employee, under Code section 83(b),

the employee may elect to recognize taxable income in the employee's taxable year of the transfer. This election is called a "Section 83(b) election", and must be made within 30 days of transfer. The amount of taxable income recognized due to the election will be the amount equal to the fair market value of the stock as of the date of transfer (less any amount paid for the stock). Why make a Section 83(b) election? The value of the stock could be low or zero at the time of transfer, so that the employee will recognize little or no taxable income with respect to the transfer of the stock.

In general, under Code section 83, the employer is entitled to take a tax deduction at the same time and in the same amount as the taxable income recognized by the employee with respect to the transfer of stock.

The New Qualified Equity Grants-the Statutory Provision

The Tax Cuts and Jobs Act of 2017 (again, the "Act") introduced Section 83(i) to the Code. Under that Section, a qualified employee may elect to defer, for income tax inclusion, the amount of income attributable to qualified stock transferred to the employee by the employer upon the exercise of a stock option or the settlement of a restricted stock unit (an "RSU"). The qualified stock so transferred is called a "Qualified Equity Grant". An election to defer income inclusion (a "Section 83(i) election") with respect to qualified stock must be made no later than 30 days after the first time the employee's right to the stock is substantially vested. The rules of Code section 83(i) are described below.

Election to Defer Taxation of Qualified Equity Grants. If qualified stock is transferred to a qualified employee who makes an election with respect to such stock under Code section 83(i),

the employee will include in taxable income the amount attributable to the qualified stock as follows, instead of when the stock becomes substantially vested. The taxable income is included in the employee's taxable year in which occurs the earliest of:

(1) the first date the qualified stock becomes transferable (including, solely for these purposes, becoming transferable to the employer),

(2) the date the employee first becomes an excluded employee,

(3) the first date on which any stock of the corporation which issued the qualified stock becomes readily tradable on an established securities market (as recognized by the IRS),

(4) the date that is 5 years after the first date the rights of the employee in the qualified stock are substantially vested, or

(5) the date on which the employee revokes (at such time and in such manner as the IRS provides) Section 83(i) election with respect to the qualified stock.

Code section 83(i)(1)(A) and (B).

The Section 83(i) election creates a corresponding deferral of the employer's tax deduction for providing the qualified stock. However, FICA tax obligations resulting from the transfer of the qualified stock are NOT deferred, and the employer must remit these FICA taxes when they are normally due.

The amount of the taxable income, when the deferral period ends, is based on the value of the stock at the time at which the rights of the employee in such stock first become substantially vested, even if the stock later declines in value.

Qualified Stock. The term "qualified stock" means, with respect to any qualified employee, any stock in a corporation which is the employer of such employee, if: (1) such stock is received in connection with the exercise of a stock option, or in settlement of an RSU, and (2) such stock option or RSU was granted by the corporation in connection with the performance of services as an employee, and during a calendar year in which such corporation was an eligible corporation. Code section 83(i)(2)(A).

However, the term "qualified stock" does not include any stock if the employee may sell such stock to, or otherwise receive cash in lieu of stock from, the corporation at the time that the rights of the employee in such stock first become substantially vested. Code section 83(i)(2)(B).

Eligible Corporation. For these purposes, an "eligible corporation" is, with respect to any calendar year, any corporation if: (a) no stock of such corporation (or any predecessor of such corporation) is readily tradable on an established securities market during any preceding calendar year, and (b) such corporation has a written plan under which, in such calendar year, not less than 80 percent of all employees who provide services to such corporation in the United States (or any possession of the United States) are granted stock options, or are granted RSUs, with the same rights and privileges to receive qualified stock. The rule in (b) above does not apply in the case of any calendar year before 2018. Code section 83(i)(2)(C)(i) and (iv).

The determination of the rights and privileges with respect to stock is to be made in a similar manner as under Code section 423(b)(5). However, the following rules apply:

--employees will not fail to be treated as having the same rights and privileges to receive qualified stock solely because the number of shares available to each of the employees is not equal in amount, so long as the number of shares available to each employee is more than a di minimis amount, and

--rights and privileges with respect to the exercise of a stock option will not be treated as the same as rights and privileges with respect to the settlement of an RSU.

Code section 83(i)(2)(C)(ii).

Qualified Employee. A "qualified employee" means any individual who: (1) is not an excluded employee (or a part-time employee), and (2) agrees in the Section 83(i) election to meet such requirements as are determined by the IRS to be necessary to ensure that the tax withholding requirements of the corporation under chapter 24 with respect to the qualified stock are met. Section 83(i)(2)(C)(iii) and (3)(A).

An "excluded employee", means, with respect to any corporation, any individual:

(a) who is a 1-percent owner (within the meaning of Code section 416(i)(1)(B)(ii)) at any time during the calendar year or who was such a 1 percent owner at any time during the 10 preceding calendar years,

(b) who is or has been at any prior time the chief executive officer (the "CEO") or chief financial officer ("CFO") of such corporation, or an individual acting in such a capacity, or a spouse, child, grandchild, or parent of the CEO or CFO (or individual acting in that capacity), or

(c) who is one of the 4 highest compensated officers of such corporation for the taxable year, or was one of the 4 highest compensated officers of such corporation for any of the

10 preceding taxable years, determined with respect to each such taxable year on the basis of the shareholder disclosure rules for compensation under the Securities Exchange Act of 1934 (as if such rules applied to such corporation).

Section 83(i)(3)(B).

Making The Election. An election with respect to qualified stock must be made no later than 30 days after the first date the rights of the employee in such stock are substantially vested. The election must be made in a manner similar to the manner in which an election is made under Code section 83(b). However, the election may NOT be made with respect to any qualified stock if:

(1) the qualified employee has made an election under Code section 83(b) with respect to such qualified stock,

(2) any stock of the corporation which issued the qualified stock is readily tradable on an established securities market at any time before the election is made, or

(3) such corporation purchased any of its outstanding stock in the calendar year preceding the calendar year which includes the first date the that the rights of the employee in the qualified stock were substantially vested, unless—

--not less than 25 percent of the total dollar amount of the stock so purchased is deferral stock, and

--the determination of the individuals from whom deferral stock is purchased is made on a reasonable basis.

Code section 83(i)(4)(A) and (B).

For these purposes, "deferral stock" means stock with respect to which a Section 83(i) election is in effect. However, stock purchased by a corporation from any individual is not

treated as deferral stock for purposes of applying the 25% threshold, if such individual (immediately after such purchase) holds any deferral stock with respect to which a Section 83(i) election has been in effect for a longer period than the election with respect to the stock so purchased. Code section 83(i)(4)(C)(i) and (ii).

The 25% threshold and requirement of a reasonable basis for purchasing the stock is treated as met if the stock so purchased includes all of the corporation's outstanding deferral stock. Code section 83(i)(4)(C)(iii).

Tax Reporting. Any corporation which has outstanding deferral stock as of the beginning of any calendar year, and which purchases any of its outstanding stock during such calendar year, is required to include on its return of tax for the taxable year in which, or with which, such calendar year ends the total dollar amount of its outstanding stock so purchased during such calendar year and such other information as the IRS may require. Code section 83(i)(4)(C)(iv).

Controlled Groups. All persons treated as a single employer under Code section 414(b) shall be treated as 1 corporation for purposes of Code section 83(i). Section 83(i)(5).

Notice Requirement. Any corporation, which transfers qualified stock to a qualified employee upon the exercise of a stock option or RSU, is required, at the time that (or a reasonable period before) an amount attributable to such stock would (but for a Section 83(i) election) first be includible in the gross income of such employee, to:—

(1) certify to such employee that such stock is qualified stock, and
(2) notify such employee that the employee may be eligible to elect to defer income on such stock under Codes section 83(i), and that, if the employee makes such an election—

--first, that the amount of taxable income recognized at the end of the deferral period will be based on the value of the stock at the time at which the rights of the employee in such stock first become substantially vested, notwithstanding whether the value of the stock has declined during the deferral period,

--second, that the amount of such taxable income recognized at the end of the deferral period will be subject to withholding of tax under Code section 3401(i) (special tax withholding on wages for qualified stock) at the rate determined under Code section 3402(t), and

--third, of the responsibilities of the employee (as determined by the IRS) with respect to the tax withholding.

Code section 83(i)(6).

Restricted Stock Units. Code section 83(i) does not permit any tax deferral election to be made with respect to RSUs. Code section 83(i)(7).

IRS Guidance

On December 7, 2018, the IRS issued Notice 2018-97 to provide guidance on new Section 83(i) (for purposes of the discussion below, the "Notice"). The Notice indicates the following.

The Requirement that Grants be Made to not less than 80% of all Service Providing Employees. According to the Notice, Code section 83(i) defines an "eligible corporation," in relevant part, as, with respect to any calendar year, any corporation that has a written plan under which, in such calendar year, not less than 80% of all employees who provide services to the corporation in the United States (or any possession of the United States) are granted stock options, or are granted RSUs, with the same rights and privileges to receive qualified stock. A

question has arisen as to whether this 80% requirement with respect to a calendar year is applied on a cumulative basis that takes into account stock options or RSUs granted in prior calendar years. The Notice concludes that the requirement is applied on the basis of the stock options and RSUs granted in the current, and not in any prior, calendar years.

The Notice points out that, in calculating whether the 80% requirement is satisfied, the corporation must take into account the total number of individuals employed at any time during the year in question as well as the total number of employees receiving grants during the year (in each case, without regard to excluded employees or part-time employees described in Code section 4980E(d)(4)), regardless of whether the employees were employed by the corporation at the beginning of the calendar year or the end of the calendar year.

The Application of Federal Income Tax Withholding to the Deferred Income. The Notice states that deferral stock constitutes wages under Code section 3401(i) and is treated as received on the earliest date described in Code section 83(i)(1)(B) (that is, the date the income tax deferral ends), in an amount equal to the amount included in taxable income under Code section 83 for the taxable year that includes such earliest date. When the wages are treated as paid under Code section 3401(i), and thus become subject to income tax withholding, the employer must make a reasonable estimate of the value of the stock and make deposits of the amount of income tax withholding liability based on that estimate. The wages included under Code section 3401(i) are subject to withholding at the maximum rate of tax in effect under Code section 1, and withholding is determined without regard to the employee's Form W-4. By January 31 of the following year, the employer must determine the actual value of the deferral stock on the date it is includible in the employee's taxable income and report that amount and the withholding on Form W-2 and Form 941. With respect to income tax withholding for the deferral stock that the

employer pays from its own funds, the employer may recover that income tax withholding from the employee until April 1 of the year following the calendar year in which the wages were paid.

The Notice indicates that Code section 83(i) provides the IRS with authority to impose any requirements as it determines to be necessary to ensure that the tax withholding requirements of the corporation under chapter 24 with respect to the qualified stock are met. In order to be a qualified employee, an employee making an election under Code section 83(i) must agree in the election to adhere to these requirements. The Notice provides guidance on these requirements.

The Notice states that future guidance on Code section 83(i) may establish alternative or substitute mechanisms to ensure a corporation's income tax withholding requirements are satisfied.

The Ability of an Employer to Not Allow the Deferral Election. The Notice says that Code section 83(i) imposes a number of requirements and limitations that must be met for a Code section 83(i) election to be allowed. Although the election, if allowed, may be made by an employee, the corporation is responsible for creating the conditions that would allow an employee to make the election. However, a corporation can preclude its employees from making Code section 83(i) elections by declining to establish an escrow arrangement for income tax withholding described in and required by the Notice, or by otherwise not creating the conditions that would allow an employee to make the Code section 83(i) election. If the corporation intends to act in this manner, the terms of a stock option or RSU may provide that no deferral election under Code section 83(i) will be available This designation would inform employees that no Code section 83(i) election may be made with respect to stock received upon exercise of the stock option or settlement of the RSU even if the stock is qualified stock, and the election would not be permitted.

Effective Date. The Notice states that Code section 83(i) applies to stock attributable to stock options exercised, or RSUs settled, after December 31, 2017. The Treasury Department and the IRS anticipate that the guidance in the Notice will be incorporated into future regulations that, with respect to issues addressed in the Notice, will apply to any taxable year ending on or after December 7, 2018. Any future guidance, including regulations, addressing the issues covered by the Notice, such as the establishment of more restrictive mechanisms to ensure that a corporation's income tax withholding requirements are satisfied, will apply prospectively only.

Other Changes Made By The Act To The Tax Law

Increase in Excise Tax Rate for Stock Compensation of Insiders in Expatriated Corporations

Prior to the Act, an excise tax, at the rate of 15 percent, was imposed on the value of certain compensation paid in stock of certain insiders (that is, certain officers, directors and 10% owners) of expatriated corporations. Code sections 1(h)(1)(D) and 4985(a).

The Act increases the rate of the excise tax to 20%. The increase is effective for corporations first becoming expatriated corporations after the date of the enactment of the Act. (Dec. 22, 2017).

Repeal of Rule Allowing Certain IRA Contributions To Be Recharacterized

Prior to the Act, if, on or before the due date for an IRA contribution for any taxable year, a taxpayer makes a trustee-to-trustee transfer of a contribution to an IRA, whether traditional or Roth, made during such taxable year from such IRA to the other type of IRA, traditional or Roth as applicable, then such contribution will be treated as having been made to the transferee plan

(and not the transferor plan). Code section 408A(d)(6). In this manner, a contribution to a traditional IRA could be recharacterized as a contribution to a Roth IRA.

In the case of a recharacterization, the contribution will be treated as having been made to the transferee IRA (and not the original, transferor IRA) as of the date of the original contribution. The recharacterization from a Roth IRA can be made with respect to the initial contribution or a contribution that was previously recharacterized (that is, a "conversion contribution").

The Act changes this rule, so that recharacterizations of conversion contributions held in a Roth IRA (but not the original contributions) are no longer allowed. Section 13611(a) of the Act. This change applies to taxable years beginning after December 31, 2017.

Change to the Rules For Providing Length of Service Award Programs for Bona Fide Public Safety Volunteers

Prior to the Act, under rules requiring an accelerated income inclusion for deferred pay, certain plans are not treated as providing for the deferral of compensation, and thus are not subject to the accelerated income recognition, including any plan paying solely length of service awards to bona fide volunteers (or their beneficiaries) on account of qualified services they perform. Code section 457(e)(11)(A)(ii). An arrangement will NOT be treated as paying solely length of service awards, and therefore as providing deferred pay, if the aggregate amount of length of service awards accruing with respect to any year of service for any bona fide volunteer exceeds $3,000. Code section 457(e)(11)(B)(ii).

The Act increases the $3,000 amount in the foregoing rule to $6,000. It also adjusts that amount in $500 increments to reflect changes in cost-of-living for future years. In addition, under

the provision, if the plan is a defined benefit plan, the $6,000 limit will apply to the actuarial present value of the aggregate amount of length of service awards accruing with respect to any year of service. The actuarial present value with respect to any year is to be calculated using reasonable actuarial assumptions and methods, assuming payment will be made under the most valuable form of payment under the plan, with payment commencing at the later of the earliest age at which unreduced benefits are payable under the plan or the participant's age at the time of the calculation.

The changes made by the Act to Section 457(e)(11) apply to taxable years beginning after December 31, 2017.

Extended Rollover Period for the Rollover of the Amount Offsets of Plan Loan

Prior to the Act, if a participant defaults on a loan from a tax-favored plan (generally, a qualified retirement plan, a 403(b) plan or a 457(b) plan), the tax-favored plan is required to offset the participant's benefit under the plan by the remaining loan balance. The amount of the offset is treated as a distribution from the plan, and is included in the participant's taxable income for the participant's taxable year in which the offset occurs. However, the participant could avoid immediate taxation due to the offset, by rolling over the amount of the offset to an eligible retirement plan (e.g., a tax-favored plan or IRA) within 60 days after the day the offset occurs.

Under the Act, the period during which the loan offset amount may be rolled over to an eligible retirement plan is extended from 60 days after the date of the offset to the due date (including extensions) for filing the participant's Federal income tax return for the taxable year

in which offset is made. For the extension to apply, the loan offset amount must be treated as distributed from a qualified retirement plan, a section 403(b) plan or a governmental section 457(b) plan solely by reason of the termination of the plan or the failure to meet the repayment terms of the loan because of the employee's severance from employment. See Code section 402(c)(3)(C).

This new rule applies to amounts treated as distributed in tax years starting after Dec. 31, 2017.

Carried Interest

The Act adds section 1061 to the Code. Under the new Section, certain (applicable) partnership interests received in connection with the performance of services are subject to a three-year holding period in order to qualify for long-term capital gain treatment. Transfers of these partnership interests held for less than three years are treated as short-term capital gain. This treatment affects partnerships in connection with the performance of substantial services to a trade or business which consist of raising or returning capital or investing in, disposing of or developing other specified assets. Under new Code section 1061, the fact that an individual may have included an amount in taxable income upon acquisition of the applicable partnership interest under Code section 83, or may have made a Section 83(b) election with respect to an applicable partnership interest, does not change the three-year holding period requirement for long-term capital gain treatment.

Specifically, new Code section 1061 treats as short-term capital gain, taxed at ordinary

income rates, the amount of the taxpayer's net long-term capital gain, using a one-year holding period, with respect to the disposition of an applicable partnership interest for the taxable year that exceeds the amount of such gain determined as if a three-year holding period applies.

The new rule applies to taxable years beginning after 2017.

Attorney Client Privilege – What It Really Covers and How to Protect It

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Attorney-Client Privilege in New York State

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September 21, 2019

I. Source of the Privilege

A. New York Law

The statutory source of attorney-client privilege in the State of New York is CPLR § 4503(A)(1), which provides:

> Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local government or by the legislature or any committee or body thereof.

However, the statute does not answer the basic question as to what is privileged. New York State courts continue to look to common law for guiding principles. *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991).

B. Federal Law

Federal courts look to state law regarding attorney-client privilege when state law provides the rule of decision. This means that in most instances, New York law will control a claim of privilege. Nevertheless, it is important to have a basic understanding of how the attorney-client privilege operates under federal law. When federal law controls, Federal Rule of Evidence 501 provides that federal common law governs claims of privilege. This represents a legislative effort "to provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis*." United States v. Gillock*, 445 U.S. 360, 367 (1980). Rule 501 differs from CPLR § 4503(A)(1) in that it applies to all claims of privilege, not just attorney-client privilege. *See, e.g.*, *In re Grand Jury Investigation*, 918 F.2d 374, 377 (3d Cir. 1990) (holding that a clergy-communicant privilege exists under Rule 501 with respect to communications to a member of the clergy, in his or her spiritual or professional capacity, by persons who seek spiritual counseling and who reasonably expect that their words will be kept in confidence); *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) (applying Rule 501 to a reporter's qualified common law privilege). Federal law also provides some additional protections from waiver of attorney-client privilege for inadvertent disclosures made in certain federal or state proceedings. The conditions under which these protections are applicable are set out in Federal Rule of Evidence 502. In most instances, however, the analysis of attorney-client privilege claims under federal common law will resemble the state law analysis.

II. Purpose of the Privilege

Attorney-client privilege "is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S. Ct. 2081 (1998). It "shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship" so long as the communication is "primarily or predominantly of a legal character." *Wrubleski v. Mary Imogene Bassett Hosp.*, 163 A.D. 3d 1248, 1250–51 (3d Dep't 2018). Privilege serves the function of promoting full and frank communications between attorneys and their clients, thereby encouraging observance of the law, and aids in the administration of justice. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348 (1985). Privilege fosters the attorney-client relationship by encouraging client candor and promotes efficiency by enabling attorney to be fully informed.

III. Elements of the Privilege

The test for identifying communications properly subject to the attorney-client privilege has been variously stated. One commonly cited and detailed test requires the following elements:

1. The asserted holder of the privilege is or sought to become a client;

2. The person to whom the communication is made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;

3. The communication related to a fact of which the attorney is informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and

4. The privilege is been (a) claimed and (b) not waived by the client.

Stirum v. Whalen, 811 F. Supp. 78, 81 (N.D.N.Y. 1993) (Munson, J.), cited with approval in *New York State Teamsters Council v. Primo & Centra*, 159 F.R.D. 386, 388 (N.D.N.Y. 1995).

Another common statement of the test for determining whether the privilege will protect both the client's communication and the corresponding legal advice:

1. where legal advice of any kind is sought

2. from a professional legal advisor in his or her capacity as such

3. the communication relates to that purpose

4. is made in confidence

5. by the client, and

6. are at his or her insistence permanently protected

7. from disclosure by the client or legal advisor

8. except if the protection is waived.

United States v. International Board of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997).

C. Communication

A protected communication may be oral or written. *See* Edna Selan Epstein, "The Attorney-Client Privilege and the Work-Product Doctrine," p. 47 (4th ed. 2001). Even wordless action, such as nodding, may constitute a communication. *Id*. Communication not only includes statements made by the client to the attorney, but also legal advice given by the attorney that discloses such information. *See In re Six Grand Jury* Witnesses, 979 F. 2d 939 (2d Cir. 1992); Rossi *v. Blue Cross*, 73 N.Y.2d 588 (1989).

The privilege protects only the contents of a communication from compelled disclosure. It does not protect the facts underlying the communication. *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991); *J.P. Foley & Co. v. Vanderbilt*, 65 F.R.D. 523 (S.D.N.Y. 1974). Facts that are merely observed by the attorney and not directly conveyed by the client are not privileged. *See e.g., United States v. Pape*, 144 F.2d 778, 782 (2d Cir. 1944) (attorney required to testify as to the presence of his client in the state and as to the type of car the attorney had observed the client driving); *Kenford Co. v. County of Erie*, 55 A.D.2d 466, 469 (4th Dep't 1977) (holding that information obtained by an attorney from other persons and sources while acting on behalf of a client was not protected by attorney-client privilege).

D. Communication Must Be Made Between Client and Counsel

(i) Which Corporate Communications are Protected?

Corporations are entitled to the benefit of the attorney-client privilege, when communications otherwise meet this standard. However, not every communication between a corporation's attorney and a corporate employee may meet this requirement. Courts historically relied on one of two tests to determine the applicability of the privilege in the corporate context: the "control group" test and the "subject matter" test.

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court rejected the control group test. The corporation's general counsel in *Upjohn* conducted an internal investigation of payments made to foreign officials. As part of the investigation, the general counsel sent questionnaires to all foreign managers regarding the payments. As part of a subsequent investigation, the IRS demanded the production of

the questionnaires. The *Upjohn* Court held that the communications by the employees were covered by the attorney-client privilege, even though not made by members of the control group. Applying factors akin to the subject matter test, the Court held that the communications were made for the purpose of obtaining legal advice from counsel, and the employees knew they were being questioned for that purpose. The subject matter test is now the preferred test and is applied in the Second Circuit.

As a result of *Upjohn*, New York courts have repeatedly found that interviews of a corporation's employees by its attorneys as part of an internal investigation can be protected by the attorney-client privilege, which even extends to the attorneys' summaries and notes pertaining to the interviews. *See, e.g., Gruss v. Zwirn*, 2001 U.S. Dist. LEXIS 79298, at *10–11 (S.D.N.Y. 2011); *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 71 (S.D.N.Y. 2010); *Robinson v. Time Warner*, 187 F.R.D. 144, 146 (S.D.N.Y. 1999).

(ii) Individual Employee or Corporation as Client?

The privilege in corporate client/attorney communications ordinarily belongs to the corporation. However, at times it may be unclear whether the legal advice is being given to the employee personally, or to the corporation as an entity. The Third Circuit, in *In re Bevill, Bressler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986), listed five factors to guide the determination of who "owns" the privilege in those cases. These factors are routinely applied in New York. *See United States v. International Bhd. Of Teamsters*, 119 F.3d 210 (2d Cir. 1997). The Court will look at whether:

(1) the employee seeking to assert a personal attorney-client privilege with respect to communications with corporate counsel can show that the employee approached counsel for the purpose of seeking legal advice;

(2) the employee made clear to counsel that the employee was seeking legal advice in the employee's individual, rather than representative, capacity;

(3) the employee can demonstrate that corporate counsel, knowing that a possible conflict could arise, nonetheless saw fit to communicate with the employee in the employee's individual capacity;

(4) the employee can prove that the conversations with corporate counsel were confidential; and

(5) the employee can show that the substance of the conversations with corporate counsel did not concern matters within the company or the general affairs of the company.

Typically, the corporation's interests are best served by it owning the privilege, and thus being in control of whether it can be waived. The problems that can arise when an employee can lay claim to the privilege is illustrated in *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009). That case involved a claim of privilege asserted by a corporate CFO Ruehle in his criminal prosecution to suppress statements that he made to corporate counsel during the course of an internal investigation into alleged stock-option backdating. Because it had not been made clear to Ruehle that his discussions with corporate counsel were not made in the context of personal representation, the District Court found that the interview statements were privileged and corporate counsel had therefore breached its duty of loyalty to Ruehle by disclosing those statements to others for the benefit of the corporation (the court reported corporate counsel to the State bar for possible disciplinary action). While on appeal the privilege ruling was overturned because it was found that Ruehle knew his statements would be disclosed to outside auditors. Nevertheless, the case demonstrates one of the problems with not providing clear "warnings" at the outset of investigatory interview as to the purpose of the interview, counsel's role, and who "owns" the privilege.

(iii) Successor Companies

Ownership of the attorney-client privilege is also a relevant consideration in the context of successor companies. One illustrative case is *Gary Friedrich Enters., LLC v. Marvel Enters*, 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154; 2011 WL 2020586 (S.D.N.Y. May 20, 2011). At issue in that case was whether Marvel could assert attorney-client privilege as a successor company. Quoting *Tekni-Plex, Inc. v. Meyner and Landis,* 89 N.Y.2d 123, 133 (1996), the Court held that "[w]hen ownership of a corporation changes hands, whether the attorney-client relationship transfers as well to the new owners turns on the practical consequences rather than the formalities of the particular transaction." *Id.* at *13. The central inquiry for courts considering the practical consequences is whether the business operations of the predecessor corporation are being continued. Thus, because Marvel had continued the business operations of its predecessor, the attorney-client privilege remained intact—even through numerous corporate reorganizations and mergers.

(iv) Disclaimer Obligation

Even apart from the privilege issue, the Rules of Professional Conduct ("Rules") in most States impose an independent ethical "disclaimer obligation" on lawyers. For example, New York Rule 1.13 provides:

> When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organizations' interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

The failure to provide this "disclaimer" to the individual is not only a direct violation of the Rules, but it could allow the individual to reasonably believe, in the right circumstances, that the lawyer represents both the company and the individual. That in turn can give rise to enough of an attorney-client relationship to create a conflict, preventing counsel's continued representation of the corporation, if the corporation's and individual's interests are or become adverse. *See*, *e.g.*, *Catizone v. Wolff*, 71 F.Supp.2d 365 (S.D.N.Y. 1999) (putative client's reasonable basis for believing attorney-client relationship exists is a factor in determining whether that relationship exists for conflict purposes); *Culver v. Merrill Lynch & Co.*, 1997 U.S. Dist. LEXIS 6041 (S.D.N.Y. 1997) (same). And if deemed a client for these purposes, that may preclude that lawyer from using or disclosing any information the individual provided to the benefit of her real client. *See* Rule 1.6(a) (prohibiting a lawyer from both knowingly *revealing* confidential information and from knowingly *using* confidential information, either to the client's disadvantage or to the advantage of another).

E. In Confidence

"A communication is made 'in confidence' if the client expressly so states or if the attorney reasonably so concludes." Edna Selan Epstein, "The Attorney-Client Privilege and the Work-Product Doctrine," p. 167 (4th ed. 2001). Once the attorney-client privilege exists, the presumption arises that "all communications made within that context are privileged." *Id*. at 171. *See Scott v. Beth Israel Medical Center*, 17 Misc.3d 934 (Sup. Ct. N.Y. County 2007) (No requisite expectations of confidentiality in communications with lawyer over employer email system); *Current Med. Directions, LLC v. Salomone*, 26 Misc.3d 1229A (Sup Ct. N.Y. County 2010 (same); *Willis v. Willis*, 79 A.D.3d 1029 (2d Dep't 2010) (using email account that is shared with one's children to communicate with lawyer prevents communications being shared in confidence for privilege purposes).

In *In re General Motors LLC Ignition Switch Litigation*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015) ("*GM Ignition Switch Litigation*"), a district court held that interview notes and memoranda of witness interviews by an outside law firm hired by a corporation to render a report giving legal advice regarding ignition switch defects continued to be protected by attorney- client privilege notwithstanding that the corporation promised to make the report itself public. The court found that there was no indication that the corporation intended to make the communications reflected in the interview notes and memoranda confidential, that the privilege is intended to protect confidential communications and therefore the attorney-client privileged is applicable to those materials notwithstanding that the law firm's report was made public. *Id.* at 528–29.

F. For the Purpose of Obtaining Legal Advice

In order for communications between lawyer and client to be privileged, the client must be seeking predominantly legal advice or services. *In re County of Erie,* 473 F. 3d 413 (2d Cir. 2007); *People v. Mitchell*, 58 N.Y.2d 368 (1983).

> "Attorneys frequently give to their clients business or other advice which, at least insofar as it can be separated from essentially professional legal services, give rise to no privilege whatsoever." *Colton v. United States,* 306 F.2d 633, 638 (2d Cir.), *cert denied* 371 U.S. 951, 83 S.Ct. 505 (1963). Attorney-client privilege "is 'triggered only' by a request for legal advice, not business advice." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d 1032, 1037 (2d Cir. 1984).

The Second Circuit has consistently stated that it looks to see whether the predominate purpose of the communication was to procure legal advice. *In re County of Erie,* 473 F.3d 413, 420, n.7 (2d Cir. 2007). "When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged." *Id.* at 421-22 (citing *In re Lindsey,* 148 F.3d 1100, 1106 (D.C. Cir. 1998)). If a business decision can be viewed as both business and legal evaluations, "the business aspects of the decision are not protected simply because legal considerations are also involved." *Hardy v. New York News, Inc.,* 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987); *see also Fine v. Facet Aerospace Products Co.,* 133 F.R.D. 439, 444 (S.D.N.Y. 1990) (privilege not extended to management advice). (The New York Court of Appeals also looks to see whether the communication is "predominately" one or the other. *Rossi*, 73 N.Y.2d at 593.)

- *In re County of Erie,* 473 F.3d 413, 422 (2d Cir. 2007) (finding predominate purpose of a communication between county attorney and county officials was to procure legal advice because the lawyer had been "asked to assess compliance with a legal obligation," and "the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation-or that advocates and promotes compliance, or oversees implementation of compliance measures-is legal advice.").

- *MSF Holding Ltd. v. Fiduciary Trust Co. Int'l,* No. 03 Civ. 1818, 2005 WL 3338510, at *1 (S.D.N.Y. Dec. 7, 2005) (finding no attorney-client privilege to communications with the deputy general counsel regarding whether to honor a letter of credit because the communications contained facts as to whether to pay an obligation, which is what any business executive would do, and did not allude to a legal principle or contain legal analysis).

- *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.,* 295 F.R.D. 28, 44-45 (E.D.N.Y. 2013) *affd,* 10-CV-0887 PKC VMS, 2014 WL 223173 (E.D.N.Y. Jan. 21, 2014) (finding communications concerning advice on human resources issues, summaries of fact-related communications and instructions from outside counsel on conducting the internal investigations were not protected by attorney-client privilege because the predominant purpose of the communications related to business and not legal advice from the outside counsel).

- In *Koumoulis,* the court found that the outside counsel's role was not just as a consultant primarily on legal issues, but that she was an adjunct member of the human resources team because of her involvement in: helping supervise and direct internal investigations; instructing human resources personnel on what actions (including disciplinary actions) should be taken, when to take those actions, and who should perform them; instructing the defendant company what facts and behavior should be documented and how it should be documented; drafting written communications to the plaintiff responding to his complaints; and drafting scripts for conversations with the plaintiff about his complaints. *Id.*

- The outside counsel's communications were considered to be more human resources/business related and not providing legal advice because the attorney would tell human resources employees exactly what questions to ask during interviews and what statements to make during meetings, including on routine human resources topics like improving job performance, customer interaction and communication skills. *Id.* at 45.

· *Chen-Oster v. Goldman, Sachs & Co.,* 293 F.R.D. 547, 552, 553-55 (S.D.N.Y. 2013) (holding, in an employee gender discrimination class-action, that a data field within defendant's human resources database regarding employee compensation, identified as "Diversity Objects," was protected by attorney-client privilege because the "Diversity Objects" category was created at the request of in-house counsel in order to respond to inquiries regarding "legal risks that might be posed by the tentative compensation decisions that the managers within [human resources] had proposed" and it did not matter that the information was communicated to in-house counsel in a database rather than in another format.

· *GM Ignition Switch Litigation, supra* at 530 (the court observed, "Rare is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed, the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line", in holding that interview notes and memoranda of those interviews prepared by the outside law firm that was hired expressly by corporation to give legal advice regarding ignition switch defects continue to be protected by attorney-client privilege notwithstanding that the firm also gave business advice).

(i) <u>Importance of Making Purpose Clear</u>

It can be important expressly to provide to those being interviewed the "legal advice" purpose of the communication:

- *Cruz v. Coach Stores Inc.,* 196 F.R.D. 228, 231 (S.D.N.Y. 2000) (an employer's failure to make employees aware that they were being questioned so that the corporation could obtain legal advice rendered the attorney-client privilege inapplicable).

- *Martin Lewis v. Wells Fargo & Co.,* 266 F.R.D. 433, 444 (N.D. Cal. 2010) ("[M]emoranda from Wells Fargo's in-house counsel to individuals in the Compensation Group and Human Resources formally requested information relating to the job duties of employees holding specific positions. These documents are clearly marked as privileged and further explain that all information collected is subject to privilege.").

- *Deel v. Bank of Am.,* 227 F.R.D. 456, 461 (W.D. Va. 2005) (questionnaires related to FLSA audit were not protected by the attorney-client privilege as employees who completed the questionnaires were not sufficiently aware that the questionnaires were being completed for the purpose of obtaining legal advice; it stated that its purpose was for the bank to remain competitive and reward its employees and that it was part of a routine check. the questionnaire never suggested it was being used for purposes of seeking a legal opinion).

IV. Third Parties Acting at the Direction of an Attorney

The privilege may extend to protect communications between the client and the agent of an attorney if the communication is confidential and made for the purpose of obtaining legal advice from counsel. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (information provided to an accountant by a client at the behest of his attorney is privileged to the extent that it is imparted in connection with the legal representation); United States v. Kovel, 296 F. 2d 918 (2d Cir. 1961) (communications between accountant and counsel retained to assist counsel in providing legal advice is privileged); *Carter v. Cornell University*, 173 F.R.D. 92, 94 (S.D.N.Y. 1997) (finding privilege applicable to communications by employees to college dean where interviews in question were conducted "at the request of counsel and for the exclusive use of counsel in rendering legal representation"), aff'd, 159 F.3d 1345 (2d Cir. 1998).

Although this rule seems easy enough to apply, the recent case of *Galasso v. Cobleskill Stone Prods., Inc.*, 169 A.D.3d 1344 (3d Dep't 2019) illustrates instances in which the privilege does not apply. Galasso sued Cobleskill Stone for wasting corporate assets and self-dealing. Prior to commencing the action, Galasso hired a valuation firm to measure the worth of the stocks he held in Cobleskill for estate tax purposes. When Cobleskill sought the report, Galasso objected based upon attorney-client privilege. Despite Galasso designating the valuation firm's engagement and report as confidential from the inception of their relationship, the Court nevertheless concluded that, because the report was for estate tax purposes and Galasso only commenced the action against Cobleskill after the report raised concerns, the report was not protected by attorney-client privilege.

When employing experts and consultants to assist, it is important to ensure that they are integrated carefully into the legal team. All communications need to be of a legal nature related to the relevant issues, and written communications between the attorney and consultant need to describe the assignment as being directly related to the client representation and should indicate that they are confidential and attorney-client privileged. If the expert has been retained prior to litigation, as was the case in *Galasso*, efforts must be made to cloak that expert and any report generated as being in anticipation of litigation.

It is also important to note that using non-lawyers to "lead" an investigation can undermine the privilege claim, even if counsel may provide some advice along the way. *See United States v. ISS Marine Servs., Inc.,* 905 F. Supp. 2d 121 (D.D.C. 2012).

V. Waiver of the Attorney-Client Privilege

There are many ways in which attorney-client privilege can be waived, whether intentionally or inadvertently. The party asserting the privilege, besides having the burden of establishing the applicability of the privilege, also has the burden of showing that there has been no waiver of the privilege. *Spectrum Sys. Int'l Corp.*, 78 N.Y.2d at 377.

A. At Issue or Advice of Counsel Waiver

The attorney-client privilege can be waived if the communication itself is "at issue" in a matter. This occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information." *Nomura Asset Capital Corp. v. Cadwalder, Wickersham & Taft*, 62 A.D.3d 581, 582 (1st Dept. 2009).

Put differently, "[a]ttorney-client privilege can be waived if the privileged communications are placed "at-issue" in the litigation and a party asserts reliance on counsel as a defense to justify its actions. *Windsor Secs., LLC v. Arent Fox LLP*, 273 F. Supp. 3d 512, 520 (S.D.N.Y. 2017) (denying request for disclosure of communications protected by attorney-client privilege where those communications would not be used as evidence). Courts will find that privileged communications were put at issue where "[i]t would be unfair for a party who has asserted facts that place privileged communications at issue to deprive the opposing party of the means to test those factual assertions through discovery of those communications." Id. at 518. However, merely consulting with counsel about a decision is not sufficient to find an at-issue waiver. *Kleeberg v. Eber*, 16-CV-9517, 2019 U.S. Dist. LEXIS 80428; 2019 WL 2085412 (S.D.N.Y. May 13, 2019).

To avoid this waiver, conversations with employees, particularly concerning particular actions to be taken by the company, must be carefully crafted, and the decision-making process must be handled in such a way that the attorney's advice does

not become the lynchpin of the determination being made.

B. Waiver by Disclosure

Disclosure of a privileged document generally waives attorney-client privilege "unless it is shown that the client intended to maintain the confidentiality of the document, [and] that reasonable steps were taken to prevent disclosure." *New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172 (1st Dep't 2002). While the privilege may be preserved where disclosure is to a third party acting at the direction of the attorney, as discussed above, this is an exception rather than the rule. Thus, disclosing information to consultants and experts who assist in litigation must be done with serious deference to the requirements necessary to preserve the attorney-client privilege.

It is also important to consider the potential impact of the use of technology on the attorney-client privilege. While the mere use of cyber technology does not, in and of itself, waive the attorney-client privilege, these means of communication are more susceptible to actual interception or misdirection (inadvertent or otherwise) than more traditional methods of communication, and in an extreme case actual interception or misdirection may affect the privilege. *Compare* Illinois State Bar Ass'n Formal Opinion 90-7 (1990) (absence of reasonable expectation of privacy when using mobile communications equipment could waive attorney-client privilege) *with* Cal. Evid. Code § 952 ("a communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer."); N.Y. C.P.L.R. § 4547 (same).

Perhaps the most significant risk to the privilege comes not from cyber communications per se but from utilizing inappropriate "systems" for communication purposes. A number of courts have recognized that an individual's otherwise privileged information loses that privilege when it is maintained on the individual's employer's computer and/or email system and explicit policies undermine any claim of employee privacy. *E.g.*, *Scott v. Beth Israel Medical Center, Inc.*, 17 Misc. 3d 934 (Sup. Ct. New York County 2007); *see also Holmes v. Petrovich Development Co., LLC*, 119 Cal. Rptr. 3d 878 (2011); *In re Asia Global Crossing, Ltd.*, 322 BR 247 (S.D.N.Y. 2005); *Long v. Marubeni America Corp.*, 2006 WL 2998671 (S.D.N.Y. 2006); *National Economics Research Associates v. Evans*, 2006 Mass. Super LEXIS 371 (Superior Court 2006); *Transocean Capital v. Fortin*, 2006 Mass. Super LEXIS 524 (Superior Court 2006); *Garrity v. John Hancock Mutual Life Ins. Co.,* 2002 WL 974676 (D. Mass. 2002); *but see, Stengart v. Loving Care Agency, Inc.,* 408 N.J. Super. 54 (2009), (finding the privilege not lost due to the narrowness of the employer's policy). Presumably sending confidential communications over any shared-access system poses similar risks.

A lawyer has an affirmative obligation to advise a client with respect to the risks associated with using technology, including e-mail communications, especially as it relates to e-mails systems that are subject to review by a third party. ABA Formal Opinion 11-459 (2011).

VI. Non-Waiver in Special Circumstances

A. The Common Interest/Joint Defense Privilege

The common interest/joint defense privilege can really be characterized as a communal attorney-client privilege among parties who have common interests. It is practical, efficient and allows party to marshal legal talent, jointly strategize, execute consistent legal tactics and effectively "gang up" on the opposing side. It has early origins and is now commonly recognized as a way to open communications between and among multiple parties and their attorneys, so long as there is mutual consent from all clients for these communications. The elements of this doctrine are as follows:

1. The underlying material must qualify for protection under the attorney-client privilege,

2. The parties to the disclosure must have a common legal interest, and

3. The material must pertain to pending or reasonably anticipated litigation for it to be protected.

Kindred Healthcare, Inc. v. SAI Glob. Compliance, Inc., 169 A.D.3d 517 (1st Dep't 2019) (citing *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (2016)).

Some best practices when creating common interest relationships with other clients and their attorneys include:

1. Making sure the subjects of communication are legal in nature and do not relate to business or other interests.

2. Memorializing the relationship in a writing to confirm everyone's consent, waiver and understanding that all discussions and materials produced are privileged.

3. Since this is a common, joint interest, making sure all communications are designated as common interest privileged.

B. The Functional Equivalent Exception

This exception allows attorney-client communications between the client and an independent third party contractor, but only under very specialized circumstances. When determining whether the exception applies, courts frequently consider whether the consultant:

1. exercised independent decision-making on the company's behalf;

2. possessed information held by no one else at the company;

3. served as a company representative to third parties;

4. maintained an office at the company or otherwise spent a substantial amount of time working for it; and

5. sought legal advice from corporate counsel to guide his or her work for the company.

In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 352 F. Supp. 3d 207, 212–13 (E.D.N.Y. 2019).

This exception is very fact sensitive and requires consideration of the relationship sought to be developed, the importance of the work done and the level of confidentiality necessary. Many times, as a practical matter, third parties are retained through counsel to cloak the work in attorney-client protection, since presumably if the attorney orders and directs the work, it is in furtherance of legal advice given.

HYPOTHETICAL 1

Patricia, the plaintiff in a Title VII sex-discrimination and sexual harassment lawsuit, retained an attorney while she was still employed by the defendant corporation, Cayuga Bank, Inc. One afternoon while she was at work, she decided to send her lawyer an email summary of her claim, while the facts were still fresh in her mind. She described a number of disturbing comments by her manager, Michael. She also said she believed she was denied a promotion because she was a woman. In the email to her lawyer, she also said: "I have to admit that Michael is a jerk to everyone – not just women who work for him. But I still think he hates me because I'm a woman." When she joined the company five years ago, Patricia was informed that employee communications would not be confidential if they were written or received on computers owned by the company.

Six months ago, Patricia filed a formal complaint with the company's head of human resources, Hugo. Hugo investigated the allegations, spoke separately with Patricia and Michael, and talked to other employees who had information about Michael's behavior in the workplace. Hugo was troubled by what he learned, so he wrote a lengthy memo summarizing what he learned and his conclusions concerning the company's responsibilities. He then sent the memo to the company's in-house counsel, Isabel. After reading Hugo's memo, Isabel advised him to meet with Michael and warn him, in the strongest possible terms, to stop using language that could be construed as creating a hostile work environment.

Michael did not heed Hugo's warnings, and Patricia could finally take it no longer. She instructed her lawyer to file a lawsuit against Cayuga Bank and Michael. The company's regular outside litigation counsel, Luis, represented Cayuga Bank. Before filing an answer he interviewed Michael to learn his side of the story. He did not expressly inform him that he was representing Cayuga Bank only, not Michael in his individual capacity. Michael told Luis that he found Patricia "harsh, abrasive, and shrill," but denied sexually harassing her.

In the company's answer, Luis raised as a defense the so-called *Faragher*/*Ellerth* doctrine, which allows an employer to escape liability for sexual harassment if it can show (1) the employer exercised reasonable care to prevent and correct any-harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided. Michael was represented by separate counsel in the litigation. He wrote a letter to both Isabel and Luis reminding them that his communications with counsel were confidential and covered by the attorney-client privilege. He threatened to report any lawyer who disclosed any confidential communications to the Third Department's disciplinary committee.

1. (a) Is the email from Patricia to her attorney privileged?

   (b) What, if anything, should Patricia's lawyer have done differently?

2. (a) Who is the client of Isabel and Luis?

   (b) With whom may the lawyers communicate and have those communications protected by the attorney-client privilege?

(c) What is the effect of Luis's failure to ensure that Michael understood the identity of Luis's client?

(d) In light of your answer to (c), what should the lawyers tell Michael in response to his threat to report them to the disciplinary authorities?

3. Can Patricia obtain discovery of Hugo's memo? Is it protected under the attorney-client privilege? What about the work product doctrine?

4. Is Isabel's advice to Hugo privileged? What is the effect on the privilege (if any) pertaining to that communication of Luis's assertion of the *Faragher*/*Ellerth* defense?

5. Who has the authority to assert or waive the privilege with respect to Michael's communications with Isabel and Luis? Could the lawyers advise the President of Cayuga Bank to throw Michael under the bus, arguing that he is a bad actor and should be (and will be) terminated, but the company itself should not be liable under the *Faragher*/*Ellerth* doctrine?

HYPOTHETICAL 2

You are union counsel assigned to a grievance arbitration for the termination of a long-term employee at a nursing home. The employee was fired for working overtime without permission, which is against company policy. The employee claims she had no choice but to work overtime due to understaffing and scheduling problems at the facility, which led to a choice between leaving residents unbathed for the next shift -- also against company policy -- or working the overtime. The employer claims that the employee has been warned that working overtime without permission is grounds for termination and claims the termination was for just cause. The employer also makes various arguments about the employee working too slowly. There is no language forbidding overtime in the contract. You have an initial meeting with the grievant and her union rep. You inform her that you represent the union and you gather information on the case to prepare. You also discuss the case with the union rep without the member present on several occasions.

The member is a bit of a squeaky wheel, and the union representative assigned to the case makes it clear that he has a hard time dealing with her numerous and lengthy inquiries. Whenever the member calls the union rep with a concern or question (which is nearly daily), the rep "turfs" them on to you. You spend a considerable amount of time soothing and working with the member to prepare. In response to one of her questions, you mention that she and the other employees at the facility may have an FLSA claim against the employer for overtime, but you also state that your firm doesn't generally handle those matters.

The arbitration date is delayed several times due to settlement negotiations that ultimately are fruitless. Finally, you represent the union's grievance at the arbitration and the member gets her job back. However, she is not awarded the $20,000.00 in backpay you had sought, as the arbitrator found that the member did not prove that she engaged in significant attempts at mitigating her damages.

A month later, the member sues the union for a violation of the duty of fair representation for failing to sufficiently inform her about the duty to mitigate. In discovery, she seeks to depose you about discussions you had with the union about her case specifically and conversations or memos you may have prepared for the union about the duty to mitigate in general with regard to other arbitrations. The member also sues you personally for malpractice, claiming that you did not sufficiently inform her about the duty to mitigate.

Right around the same time, the employees at the facility hire a lawyer to represent them in an FLSA suit against the employer. In discovery, the employees' FLSA lawyer and the employer both seek to depose you/seek discovery materials about various matters including:

(a) your conversation with the member about a possible FLSA suit,

(b) your conversations and any emails or other communications with members and union officials about working hours at the nursing home while handling other arbitrations for the union,

(c) your conversations with members and union officials present at recent negotiations with the employer about working hours,

(d) your conversations with union officials about working hours during negotiations where rank-and-file members were not present.

Questions:

(1) Can you assert attorney-client privilege regarding the conversations/ communications you had with union officials about the grievance outside of the presence of the grievant?

(2) Can the grievant sue you for malpractice?

(3) Can you assert attorney-client privilege for any of (a) - (d) above?

HYPOTHETICAL 3

Clothing maker Neon Nights, Inc. manufactures a brightly colored clothing line, used primarily by the college-aged and twenty-somethings for clubbing activities. It became so popular that one of the mainstream retailers, Tar-jay, entered into a contract for the purchase of thousands of pieces for sale in its nationwide network of stores.

Three years into a five year contract, the husband wife owners of Neon Nights began to see similar products being sold by Tar-jay in its stores, but under the name "Neon Boogie Nights – by Tar-jay!"

"We're being ripped off," the husband remarked.

"That was out product and our idea," said the wife.

They went to a lawyer who advised them they had a claim for trademark infringement.

Neon Nights elected to proceed with the litigation, but first contacted a local PR agency for advice on a PR strategy surrounding the lawsuit and particularly where a press release should be issued. The parties to a series of emails on the topic were the lawyer, the husband and wife owners of Neon Nights, and the executive at the PR agency.

During discovery, a dispute arose regarding the emails with Neon Nights' attorney contending that they were subject to the attorney-client privilege, while Tar-jay's attorney argued that the privilege had been waived.

The Court ruled in favor of Tar-jay that the privilege had been waived when Neon Nights included the PR firm on the email chain.

(1) Why?

Applicable Exceptions to Waiver Due to Disclosure to a Third Party:

(a) Third party is necessary for communication between counsel and client.

(b) Third party is the functional equivalent of an employee of a party to the litigation.

(c) Third party is used by the attorney to aid in legal tasks.

(2) Does the work product doctrine apply to preclude disclosure?

(3) What steps could have been taken to bolster applicability of the attorney-client privilege or work product doctrine?

HYPOTHETICAL 4

You are counsel to a union involved in protracted and tense negotiations with an employer. The main sticking points, as usual, are salary and the amount of required contributions to the pension fund.

You, the union president, vice president, and four rank-and-file members are present during bargaining sessions. At certain times in between sessions you caucus solely with the union officials; at others, you caucus with the union officials and the members. In the smaller caucuses, the union president is adamant that keeping the employer in the pension fund should be a priority, as he is concerned about the signal this employer's departure will send to other employers, and he wants to keep the pension fund solvent.

At times, you are left alone with the four rank-and-file members while the union officials conduct other business. They make their positions clear to you. Two members are older, and therefore receiving the full amount of their pensions in the coming years is a priority. The third member is new, with a young family, and is very much in favor of placing the priority in

negotiations on salary and health benefits. The last member has ten years with the employer, and is vested for a pension, but doesn't believe that there will be a fund around when it comes time to collect. He's fine with pushing for increased pension contributions, but only for those in his tier of employment (determined by hire date) and not at the expense of concessions in other areas, such as salary or holidays.

During one of the caucuses at which the rank-and-file are not present, you and the union officials contact the fund's actuaries and request an analysis/forecast of the fund's health and also an opinion as to what the lowest amount of contributions could be to keep the fund in the green zone. You draft a contract based on these numbers and review it solely with the union officials.

Unknown to anyone else, the union vice-president contacts the employer one evening and has a discussion with him about what it would take to get the contract signed. The employer gives him a number on salary and pension contributions that he says he can work with. The pension contribution the employer proposes fits within the amount the union's actuaries said would be enough to keep the pension fund afloat, although it is on the low end. The vice president says he'll talk to everyone, but that he thinks that should be possible. He mentions that the union has prepared a draft of a contract but doesn't state any details about it. He doesn't tell anyone about his discussion with the employer.

At the next negotiating session, the employer presents his proposals on the pension contributions and salary, which are the same as those he gave to the vice president in their private conversation. The union caucuses and rejects the proposal, countering with slightly higher pension numbers, and staying the same on salary. The employer leaves the table, and files a charge with the NLRB for failure to bargain in good faith, citing his private conversation with the vice president. You meet with the vice president and the president to discuss the conversation the VP had with the employer. The two get into a heated argument, and the vice president resigns.

The NLRB seeks to question the vice president, but he is unreachable. You accompany the president to the NLRB to give an affidavit in response to the charge, and the NLRB attorney learns from the president's testimony about the consult with the actuaries. Based on the information he has obtained from the employer and the president's testimony, the NLRB attorney does the following:

(a) he questions you as to the substance of the conversation between the vice president and president;

(b) he requests the draft contract that the vice president mentioned to the employer in his conversation;

(c) he requests the actuary's report;

(d) he questions the president as to the content of the conversation with the actuary discussed above.

<u>Question: Must you provide the requested information/documents (a) – (d)?</u>

After the above matter is resolved and a contract is obtained, the two younger employees that had been present at the negotiations, unhappy with the contract, band together with those either currently unvested for a pension or on the second-tier pension plan to file a breach of the duty of fair representation claim regarding the contract. They allege that the union president prioritized high contributions to the pension plan at the expense of all else at the negotiations to the detriment of these members. Plaintiffs seek:

(a) To depose the president and VP on what was said during any caucuses at which they were not present (but you were);

(b) The actuary's report, which they've heard about through the grapevine;

(c) The substance of the VP's private conversation with the employer;

(d) The substance of your conversation with the VP and the president about the VP's conversation with the employer;

(e) The draft contract you prepared.

Question: Must you provide the requested information/documents (a) – (e)?

NLRB 2019 Update

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NYSBA Labor & Employment Law Section 2019 Fall Meeting – Ithaca, NY September 21, 2019

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NYSBA Labor & Employment Law Section 2019 Fall Meeting – Ithaca, NY

NLRB Rulemaking on Joint Employer Status: *Where Are We Now?*

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Joint Employer Rulemaking – Background

- *Browning-Ferris Industries of California*, 362 NLRB No. 186 (2015)
- Two or more entities may be found "joint employers" under the NLRA when:
  - 1. Each entity meets the common law definition of "employer"

    - and -
  - 2. The entities share or co-determine essential terms and conditions of employment

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Joint Employer Rulemaking – Background

Browning-Ferris Industries (cont'd)

- The Board's ruling fundamentally altered the law:
  - Retention of authority to affect terms and conditions of employment is sufficient to demonstrate joint employer status; actual exercise of the authority need not be shown
  - Control may be direct or indirect; no longer required to show direct and immediate control
  - Browning-Ferris made it infinitely easier to demonstrate a joint employer relationship

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Joint Employer Rulemaking - Background

- *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017)
- Trump Board returns to pre-Browning-Ferris standard:
  - Control must actually be exercised
  - Control must be direct and immediate
  - Control must extend to essential employment terms
  - Control that is limited and routine cannot establish joint employer relationship

But that didn't last very long . . .

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Joint Employer Rulemaking – Background

- *Hy-Brand Industrial* (cont'd)
  - Board vacated decision in early 2018. Hy-Brand Industrial Contractors, Ltd., 366 NLRB No. 26 (2018)
  - NLRB's Designated Agency Ethics Official found that Member Emanuel should not have participated in the case
  - Member Emanuel's former law firm represented one of the parties in the Browning-Ferris case
  - As a result of the Board's order vacating its earlier decision, Browning-Ferris remains the law

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Joint Employer Rulemaking – Background

- *Browning-Ferris v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018)
  - While NLRB rulemaking process was getting under way, Court of Appeals for the D.C. Circuit ruled on Browning-Ferris's petition for review
  - Review denied in part, enforcement granted in part
  - Court found that Board properly considered:
    - user employer's reserved right of control, even though not exercised
    - Indirect control over supplier employer's employees
  - Remanded to NLRB for further action

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NLRB Notice of Proposed Rulemaking – The Standard for Determining Joint-Employer Status

- NPR published in Federal Register on Sept. 14, 2018
  - Comment period was extended several times and finally closed on January 28, 2019
  - Nearly 30,000 comments were received by the NLRB
  - Regulatory action remains under consideration
  - Final rule expected by end of 2019

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Text of NLRB's Proposed Rule

- 29 C.F.R. § 103.40: Joint Employers
  - "An employer as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited or routine." (Emphasis added.)

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Joint-Employer Status Under the FLSA

- Notice of Proposed Rulemaking issued April 1, 2019; comment period closed June 25
  - Purpose: Update and clarify DOL interpretation of joint employer status under the FLSA (Part 791 of Title 29 CFR)
  - No significant revisions to the rule for over 60 years
  - Proposed changes designed to promote certainty, reduce litigation, provide uniformity in judicial decisions, and encourage innovation in the economy

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Joint-Employer Status – FLSA

- 29 CFR Part 791, provides, *inter alia*, that multiple persons can be "joint employers" of an employee if they are "not completely disassociated" with respect to the employee's employment
- Proposed change would replace the "not completely disassociated" standard in situations where employment for one entity simultaneously benefits another entity -- e.g., labor user/supplier and subcontracting relationships -- with a 4-factor balancing test

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Joint-Employer Status – FLSA

- 4 Factor Balancing Test for Assessing Whether the Other Entity:
  - Hires or fires the employee
  - Supervises/controls the employee's work schedule or conditions of employment
  - Determines the employee's rate and method of payment
  - Maintains the employee's employment records
- For additional detail on the proposed rule changes, go to:
  - www.regulations.gov/document?D=WHD-2019-0003-0001

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NYSBA Labor & Employment Law Section 2019 Fall Meeting – Ithaca, NY

Legal Update on Independent Contractors Under the NLRA

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September 21, 2019

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Independent Contractors

- The 10-Factor Common-Law Agency Test
  - The extent of control which, by the agreement, the master may exercise over the details of the work
  - Whether or not the one employed is engaged in a distinct occupation or business
  - The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision
  - The skill required in the particular occupation
  - Whether the employer or worker supplies the instrumentalities, tools, and the place of work for the person doing the work

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Independent Contractors

- The 10-Factor Common-Law Agency Test (cont'd)
  - The length of time for which the person is employed
  - The method of payment, whether by time or by the job
  - Whether or not the work is part of the regular business of the employer
  - Whether or not the parties believe they are creating a "master and servant" relationship
  - Whether the principal is or is not in business

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Independent Contractors

- *Super Shuttle DFW, Inc.,* 367 NLRB No. 75 (1/25/19)
  - Overruled *FedEx Home Delivery,* 361 NLRB 610 (2014), decided by the Obama Board
  - *FedEx* decision altered common-law agency test; Trump Board restored it in *SuperShuttle*
  - In *FedEx*, as read by the Trump Board in *SuperShuttle*, the NLRB "significantly limited the importance of entrepreneurial opportunity by creating a new factor ("rendering services as part of an independent business") and then making entrepreneurial opportunity merely 'one aspect' of that factor"

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Independent Contractors

- *Super Shuttle* – The Facts
  - Franchisees owned or leased their vehicles
  - Controlled their daily schedules and working conditions
  - SuperShuttle exercised little control over franchisee performance
  - Franchisees retained all fares earned and paid a flat monthly fee to SuperShuttle that was unrelated to fares collected
  - Franchise agreement negated employee status and recited that an independent contractor relationship was created

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Independent Contractors

Super Shuttle – Factors Supporting Independent Contractor Status

- Franchisees owned/controlled their vans, the principal instrumentality of their work
- Franchisees exercised nearly complete control over where and when to work
- Payment of a flat fee to SuperShuttle provided franchisees with "significant entrepreneurial opportunity" and control over their earnings

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Independent Contractors

Super Shuttle – Factors Supporting Independent Contractor Status (cont'd)

- SuperShuttle exercised little control over the "manner and means" of franchisee performance, as it had no effect on franchisor's compensation
- "Unit Franchise Agreement" demonstrated intent to create independent contractor relationship

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Independent Contractors

Super Shuttle – Factors Supporting Employee Status

- Uber driver's skill level
- Driving not a distinct occupation
- Franchisees provided a service that was essential to *SuperShuttle*'s business

NLRB held that "these factors are relatively less significant and do not outweigh those factors that support independent contractor status"

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Independent Contractors

- *Uber Technologies, Inc.*, NLRB Division of Advice (4/16/19)
  - *Issue*: Whether Uber drivers are statutory employees protected by the NLRA or independent contractors
  - Division of Advice focused in particular on whether the job presents the "opportunities and risks inherent in entrepreneurship"
  - *Conclusion*: Applying *SuperShuttle* analysis, Advice concluded that UberX and Uber Black drivers are bona fide independent contractors

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Independent Contractors

- *Uber Technologies* (cont'd)
  - Factors Supporting Independent Contractor Status:
    - Driver's ability to work for competing on-demand rideshare services
    - Driver's control over vehicle
    - Control over work schedules and login locations, the latter having a direct impact on compensation
  - Factors Supporting Employee Status:
    - Absence of Special Skills
    - Uber shared in every fare collected by the driver

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Independent Contractors

- *Velox Express, Inc.*, 368 NLRB No. 61 (8/29/19)
  - Board applied *SuperShuttle* analysis again, this time to couriers who collected medical specimens from physician offices for shipment to diagnostic laboratories
  - *Conclusion*: Velox's couriers were employees, not independent contractors, as they "have little opportunity for economic gain or, conversely, risk of loss"
  - NLRB also ruled that Velox's misclassification of its couriers as independent contractors was not, in and of itself, an unfair labor practice

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Independent Contractors

- *Velox Express* – The Facts
  - Velox assigned all routes with specific stops on designated days
  - Couriers had no discretion to determine when/how long they work
  - Couriers had no proprietary interest in their routes; no right to sell or transfer
  - Couriers were not allowed to engage others to service their routes
  - Couriers were paid the same rate for every day worked; they "cannot work harder, let alone smarter, to increase their economic gain"
- *Conclusion*: Factors supporting employee status far outweighed any supporting independent contractor status

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Independent Contractors

- *Velox Express* (cont'd)
- *Question*: Is misclassification standing alone an unfair labor practice? No!
  - Employer's communication of its position to employees, that they are independent contractors, has no unlawful implications
  - Finding an unfair labor practice would deny employers the certainty needed to "reach decisions without fear of later evaluations labeling its conduct an unfair labor practice"
  - Complex Factual Determination: Even Board members can't always agree on whether an individual is an employee or independent contractor

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Independent Contractors

- *Velox Express* (cont'd)
- *Question*: Is misclassification standing alone an unfair labor practice? No! (cont'd)
  - Board also was concerned that any other conclusion "would significantly chill the creation of independent contractor relationships"
  - Employer's independent contractor determination and communication of it to its workers will be treated "as a legal opinion protected by Section 8(c)"

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Access to Employer Property Under the NLRA

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Rulemaking or Adjudication?

On May 22, 2019 Chairman Ring announced a rulemaking agenda that included **"standards for access to an employer's private property."**

- No new rules have been proposed yet.

But . . .

In a trio of cases decided in the last several months, the Trump Board has begun **remaking access law through adjudication**.

- *UPMC Presbyterian Hospital*, 368 NLRB No. 2 (June 14, 2019)
- *Kroger Limited Partnership*, 368 NLRB No. 64 (September 6, 2019)
- *Bexar Performing Arts Center*, 368 NLRB No.46 (August 23, 2019)

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UPMC, 368 NLRB No. 2 (June 14, 2019)

Issue: When can an employer can bar nonemployee union representatives from a portion of its property that is open to the public?

Pre-*UPMC* Answer: Only when union representatives are disruptive.

UPMC Answer: Any time, unless it allows other nonemployees to engage in "similar activity in similar relevant circumstances."

The Board overruled prior case law and imposed a narrower interpretation of the *Babcock & Wilcox* "discrimination exception" to the general rule that employers can prohibit nonemployees from accessing their property.

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The UPMC Dissent

Member McFerran dissented, finding the majority's definition to be "impermissibly narrow."

- When an employer has opened a portion of its property to the public, it's opposition to statutorily protected activities should not be a legitimate basis to exclude individuals from that property.
- The result of the new standard is that employers are permitted to exclude union representataives based entirely on their union affiliation.

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Kroger, 368 NLRB No. 64 (September 6, 2019)

(Another case involving the *Babcock & Wilcox* discrimination exception)

Issue: When can an employer bar nonemployee union organizers engaging in Section 7 activities from its parking lots or sidewalks?

> Pre-*Kroger* Answer: Only when it has also prohibited other nonemployees from engaging in "civic, charitable and promotional activities." *Sandusky Mall*, 329 NLRB 618 (1999).
>
> *Kroger* Answer: Any time, unless it has allowed access to others nonemployees for "activities similar in nature."

- Overruled *Sandusky Mall*.
- Employers may now deny access to union organizers seeking to engage in "protest activities" on its property, while allowing nonemployee access for a "wide range of charitable, civic and commercial activities" because they are not "similar in nature."

The *Kroger* Dissent

Member McFerran dissented, stating that much like its decision in *UPMC*, the majority's holding "creates a license for an employer to permit almost any third-party activity on its property *but* union solicitation and distribution." (emphasis in original)

- The majority's new standard was expressly rejected by the Supreme Court in *Stowe Spinning*, 336 U.S. 226 (1949) (pre-dates *Babcock & Wilcox*).
- When an employer grants access to nonemployees other than union representatives, it is clear the employer's claim that union access would burden its property rights is weak, and that its real objection is not to solicitation and distribution by outsiders generally, but *to the union.*

Bexar, 368 NLRB No.46 (August 23, 2019)

Issue: When can an employer prohibit contractor-employees working on employer premises to access employer property for Section 7 purposes?

Pre-*Bexar* Answer: Only if the contractor-employees' activities "significantly interfere" with the employer's use of the property or the exclusion is justified by "another legitimate business reason." *New York New York*, 356 NLRB 907 (2011) and *Simon DeBartolo Group*, 357 NLRB 1887 (2011).

Bexar Answer: Any time, unless the contractor-employees (i) work both regularly and exclusively on the property and (ii) have no reasonable alternative means to communicate their message.

- Overruled *New York New York* and *DeBartolo.*

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The *Bexar* Dissent

Member McFerran dissented, finding the new standard damages employees' Section 7 rights far more than is necessary to protect employers' property rights.

- The requirement that contractor-employees seeking access work both regularly *and exclusively* on the employer's premises is arbitrary and will leave many workers with no workplace to exercise their Section 7 rights because they are exclusively employed *nowhere*.
- And, property owners will almost always be able to show that employees have means of communication available (e.g., billboard, social media), notwithstanding that they may be prohibitively expensive or entirely ineffective.

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We don't have a crystal ball, but . . .

Among the areas we may expect to see some additional changes are:

- Access rights of off-duty employees
- Distinctions in access rights for picketing vs. handbilling/other communications

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Access rights of Off-Duty Employees

The controlling case is *Tri-County Medical Center*, 222 NLRB 1089 (1976).

An employer rule barring off-duty employees from union solicitation or distribution at the workplace violates the Act unless the rule:

1) limits access solely with respect to the interior of the plant and other working areas;
2) is clearly disseminated to all employees; and
3) applies to off-duty employees seeking access for any purpose, and not just those engaging in union activity.

A rule that denies off-duty employees access to parking lots, gates and other outside nonworking areas is unlawful.

The *Tri-County* standard may be in jeopardy.

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Access rights of Off-Duty Employees (cont'd)

Piedmont Gardens, 360 NLRB 813 (2014)

Employer rule at issue: employees may not remain on company premises after their shift *unless previously authorized by their supervisor*.

- The Board majority held that the rule failed to satisfy the 3rd prong of *Tri-County* because the employer had discretion to decide when and why off-duty employees could access the facility.

- **Member Miscimarra** joined the decision only because he believed the rule to be unlawful *as applied*. **He believed the rule was facially lawful notwithstanding the exception allowing access with supervisory authorization.**

Access rights of Off-Duty Employees (cont'd)

General Counsel Robb issued a call for mandatory submission in December 2017, shortly after becoming GC. (GC Memo 18-02)

Required submissions of cases involving "[o]ff-duty employee access to property, " specifically those cases where the current law would require "[f]inding that access must be permitted under *Tri-County* unless employees are excluded for all purposes, including where supervisor expressly authorized access (e.g., *Piedmont Gardens*, 360 NLRB No. 100 (2014))."

Suggested that the GC may choose the provide the Board with an alternate analysis in these cases.

Access rights of Off-Duty Employees (cont'd)

In *Burger King and Michigan Workers Organizing Committee*, 366 NLRB No. 156 (August 15, 2018), the Board held that an employer policy prohibiting employees from handbilling "in and around" the Burger King property violated the Act by unlawfully restricting Section 7 activity.

Member Emmanuel joined the decision, but in a footnote suggested that the Board should **revisit *Tri-County*** "to the extent that it allows off-duty employees to engage in Sec. 7 activities on an employer's parking lot and other exterior areas of the employer's property."

Picketing vs. Handbilling and Other Activities

In GC 18-02, the General Counsel also required submission of cases that pertain to "Applying *Republic Aviation* to picketing by off-duty employees (e.g., *Capital Medical Center*, 364 NLRB No. 69 (2016), equating picketing with handbilling despite greater impact on legitimate employer interest (including patient care concerns))."

> *Republic Aviation*, 324 U.S. 793 (1945), held that an employer may not bar employees from engaging in solicitation or distribution in non-working areas of its property unless it is necessary to maintain discipline and production.
>
> In *Capital Medical Center* the Board applied *Republic Aviation* and found the employer violated the Act by prohibiting off-duty employees from engaging in peaceful informational picketing.
>
> **Member Miscimarra** dissented, arguing that **picketing** on an employers premises is **inherently coercive** and is not entitled to the same protection as handbilling and other solicitation/distribution.

Update on Recent Proposed Changes by General Counsel Peter Robb and Recent Board Decisions

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DOES THIS RAT SCARE OR COERCE YOU?

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Scabby the Rat may be deflated if the General Counsel's views are adopted by the NLRB

The Rat is a common symbol of a labor protest.

Unions have been placing the rat outside employers often accompanied by stationary banners held by union members or union members handbilling the public describing its labor dispute.

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Should the Rat or Large Bannering be enjoined by the NLRB as picketing or coercive conduct?

- Under 8(b)(4)(i) and (ii) B, picketing by a union outside a neutral employer's premises will be found to be conduct covered under 8(b)(4)(i)B. It is conduct that seeks to induce the employees of the neutral employer to engage in a work stoppage in support of the union's labor dispute with another employer known as the primary employer. The picketing will also be found to "coerce" the neutral employer in violation of 8(b)(4)(ii)B and presumed in either situation (i or ii), to have an object to put pressure on the neutral employer to cease doing business with the primary employer.
- This is what we call unlawful secondary activity and the General Counsel will be required to file a petition in federal district court under Section 10(l) of the Act and to issue a complaint enjoining the unlawful conduct.

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Coercive Conduct under Section 8(b)(4)(ii) B

- When conduct is not picketing, it can still be unlawful if it threatens, coerces, or restrains a neutral Employer with the object of pressuring the neutral employer to cease doing business with the primary employer.
- Examples of such conduct-loud bullhorn or microphone blasting messages outside neutral employer premises; throwing garbage outside a neutral employer; blocking the entrances of a neutral employer, or conducting a large demonstration outside the neutral employer's premises.

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Edward DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 US. 568 (1988)

This is the starting off point in analyzing the conduct of placing inflatable rats or large banners outside a neutral employer's premises.

In DeBartolo, Supreme Court held that peaceful and truthful handbilling urging a secondary boycott by customers to cease shopping at all stores in a mall to protest one tenant constructing store with non-union labor, was lawful protected speech. Not a violation under 8(b)(4)(B).

Court was mindful of its constitutional avoidance doctrine and was concerned that handbilling was arguably protected by the first amendment free speech clause. For this and other reasons, the handbilling was deemed lawful conduct.

In three Board cases discussed below, the NLRB relied upon the DeBartolo holding to conclude the use of the rat and banners were also protected conduct. They found that the conduct was not tantamount to picketing or coercive, but rather, expressive communication directed to the public.

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Should the Board reverse current law and find use of inflatable rat and/or stationary banner violates 8(b)(4)(i) or (ii)(B)?

- General Counsel Peter Robb is revisiting this issue which was decided by the Board back in 2010 and 2011.
- Carpenters Local 1506 (Eliason & Knuth of Arizona), 355 NLRB 797 (2010) (placement of large stationary banners near the secondary employer publicizing hiring of non-union contractor by neutral with wordage on banners saying “Shame on named Employer”
- Sheet Metal Workers Local 15 (Brandon Medical Center, Brandon II), 356 NLRB 1290 (2011)(placement of large inflated rat and distribution of handbills outside neutral employer’s hospital criticizing it for hiring non-union contractor)

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Southwest Regional Council Locals 184 and 1498 (New Star) 356 NLRB 613 (2011)

In Southwest, the union erected banners at 19 different neutral employers’ premises identifying neutral and stating “shame” on each of the neutral employer’s banners.)

- In all three cases the Board relied upon the DeBartolo decision and found the conduct in question was neither picketing nor coercive conduct.
- Rather the Board held that the conduct in all three cases was symbolic speech and persuasive communication directed to the public seeking to have them support the Union’s labor dispute.

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Recent Cases where the General Counsel is relitigating the issue of the rat and banner as secondary activity under 8(b)(4)(B)

- Kathy Drew King, Regional Director, Region 29 and Laborers Local 79, 2019, U.S. LEXIS 11316 July 1, 2019, Case No. 29-CC-241297 (Eastern District Court of New York) involving use of inflatable rat at neutral's place of business.
- Strongly worded decision by Eastern District Judge Garaufis dismissing the 10(l) petition relying on DeBartolo, prior Board cases, and his view of the conduct as peaceful, non-threatening expressive conduct.
- No appeal of 10(l) dismissal and complaint hearing postponed.
- International Brotherhood of Electrical Workers, Local 98 (Fairfield Inn & Suites by Marriot, Case No. 04-CC-223346 involving use of inflatable rat and large stationary banners outside neutral place of business.

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Current Cases issued by the General Counsel
(cont'd)

- Decision by Chief Administrative Law Judge Robert Giannasi dismissing the complaint relying on prior Board decisions.
- Exceptions filed by the General Counsel and are pending before the Board.
- International Operating Engineers Local 150 (Lippert Components, Inc.) Case No. 25-CC-22834 involving union staging large inflatable rat and stationary banners near public entrance of a trade show to publicize labor dispute. ALJ Kimberly R. Sorg-Graves dismissed complaint and held activity was protected communication and not coercive secondary activity.
- Likely exceptions will be filed by the General Counsel so both cases can be heard by the Board.

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Outcome by the Board

- If the Board decides to reverse prior Board decisions and find the use of inflatable rats and stationary banners to be secondary activity, what is the likely outcome?
- Appeal by the Unions and Court of Appeals review.
- Will Court be persuaded to distinguish this conduct as coercive activity despite the need to protect first amendment right to publicize the union's labor dispute with the public?
- What do you all think?

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Legal Update on Employer Rules After Boeing

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September 21, 2019

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Employer Rules After Boeing

- *Boeing Co.,* 365 NLRB No. 154 (2017)
  - NLRB overruled Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), and held that it "will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry which made legality turn on whether an employee 'would reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future."

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Employer Rules After Boeing

- *Boeing Co.* (cont'd)
  - The NLRB delineated three categories of employment policies, rules and handbook provisions for analysis under Section 8 of the NLRA:

    Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.

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Employer Rules After Boeing

- *Boeing Co.* (cont'd)

Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

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Employer Rules After Boeing

- *Boeing Co.* (cont'd)

Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

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Employer Rules After Boeing

- Recently Released NLRB Advice Memoranda
  - *Nuance Transcription Services*, Case 28-CA-216065 (11/14/18)

Unlawful: Rule required that contents of employee handbook be kept confidential (Category 3)

Unlawful: Rule prohibited employee use of company email to send messages "not considered in support of [Employer] objectives" (Category 2)

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Employer Rules After Boeing

- Recently Released NLRB Advice Memoranda
  - *CVS Health*, Case 31-CA-210099 (9/15/18)

Unlawful: Rule prohibited disclosure of any "employee information" through social media and on-line communication (Category 2)

Lawful: Rule prohibited posting of material that is "discriminatory, harassing, bullying, threatening, defamatory or unlawful" (Category 1)

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Employer Rules After Boeing

- Recently Released NLRB Advice Memoranda
  - Coastal Shower Doors, Case 12-CA-194162 (8/30/18)

Lawful:	Rule prohibited employees from "obtaining unauthorized confidential information pertaining to . . . employees" (Category 1)
Lawful:	Rule prohibited "discord with clients or fellow employees (Category 1)
Lawful:	Rule required that all solicitation/distribution be in "good taste" (Category 1)
Unlawful:	Rule prohibited "disclosure of any confidential information [i.e., any information "generated" or retained by the employer] to anyone outside the company without appropriate authorization (Category 3)
Unlawful:	Rule prohibited personal use of cell phones during "working hours" (Category 2)

Employer Rules After Boeing

- Recently Released NLRB Advice Memoranda
  - Ally Financial, Case 12-CA-21123 (7/5/18)

Lawful:	"Workplace Behavior" policy prohibited insubordination, neglect of duties or other disrespectful conduct" (Category 1)
Unlawful:	Rule prohibited conduct or activity "not in the best interests of the Company" (Category 2)
Unlawful:	Rule prohibited solicitation or distribution of literature at any time without approval of HR (Category 3)
Unlawful:	Rule prohibited use of company equipment, including email system, to engage in solicitation

Employer Rules After Boeing

- Recently Released NLRB Advice Memoranda
  - ADT, LLC, Case 21-CA-209339 (7/31/18)

Lawful:	Dress code prohibited "any items of apparel with inappropriate commercial advertising or insignia" (Category 1)
Unlawful:	Rule prohibited personal cell phone use at any time on premises except for "work-related or critical, quality of life activities" (Category 2)
Lawful:	Rule prohibited discussion of "confidential information," but only by employees who had access to same as part of their job duties. (Category 1)
Lawful:	Rule provided that "all information provided to media, financial analysts, investors or any other person outside the [company] may be provided only by [company] designated spokespersons or officers" (Category 1)

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Employer Rules After Boeing

- Recently Released NLRB Advice Memoranda
  - *Colorado Professional Security Services, LLC*, Case Nos. 27-CA-203915, -206097 and -206104 (8/7/18)

Unlawful:	Policy entitled "Harm to Business or Reputation," required employees to "refrain from . . . conduct that could adversely affect the Company's business or reputation . . . [including] . . . publicly criticizing the company, its management or its employees" (Category 2)
Unlawful:	Standard disciplinary letters prohibited discussion of discipline with coworkers and clients (Category 3)

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Employer Rules After Boeing

- Recently Released NLRB Advice Memoranda
  - *Wilson Health*, Case 09-CA-210124 (6/20/18)

Lawful: "Commitment to My Coworkers" document in which employees were required to agree to: (i) "accept responsibility for establishing and maintaining healthy interpersonal relationships with you and every member of this team;" (ii) "talk to you promptly if I am having a problem with you;" (iii) "not complain about another team member and ask you not to as well;" and (iv) "be committed to finding solutions to problems rather than complaining about them or blaming someone for them, and asks you to do the same" (Category 1)

Lawful: Rule prohibited use of cell phones except during scheduled breaks and in lounges or designated break areas (Category 1)

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Update on Recent Proposed Changes by General Counsel Peter Robb and Recent Board Decisions

Presented by Karen P. Fernbach, Esq.
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"Sticks and Stones will break my bones but Names will never harm me" OR WILL THEY?

- Under Board law, employees have greater latitude in expressing their views when engaging in Section 7 Activity so long as they don't make statements that are so flagrant, violent or extreme so as to lose the protective shield of the Act. In current case, General Motors, 368 NLRB No. 68, (Notice & Invitation to File Briefs issued on Sept. 5) determining whether to revise the Board law.
- Specifically, the Board is looking to consider whether to revise and potentially limit the protections afforded to employees, citing to three recent cases where employees did not lose the protection despite their profane, or racially or sexually offensive statements made in the course of engaging in union or other protected activity.
- The three cases are Plaza Auto Center, 360 NLRB 972(2014); Pier Sixty, LLC, 362 NLRB 505(2015), enfd. 855 F.3d 115 (2nd Cir. 2017); Cooper Tire & Rubber Co., 363 NLRB NO. 194 (2016), enfd. 866 F.3d 885 (8th Cir. 2017)

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When should an employee lose protection?

- Plaza Auto involved profanity laced statements by employee to supervisor while engaged in protected activity;
- Pier Sixty involved profanity and offensive comments made by employee on Facebook about his supervisor while engaging in protected and union activity asking employees to vote Yes in the upcoming NLRB election;
- Cooper Tire- picketing employee uttered racially offensive comments to a replacement employee
- In all three cases the Board concluded that the conduct while offensive did not cross the line of losing protection.
- Board understood that these statements were impulsive and made in the course of otherwise protected conduct.

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Current Standards

- Atlantic Steel, 245 NLRB 814 (1979) factors to determine if employee outburst at the workplace uttered to supervisor loses the protection. Board considers 1)location of the discussion; 2) subject matter of the discussion; 3) the nature of the employee's outburst; 4)whether the outburst was provoked by the employer's unfair labor practice. This standard applied in Plaza Auto. (Applied in Plaza Auto)
- Pier Sixty involved profanity and offensive statements made on the internet. Board recognized that Atlantic Steel standard was not suited and applied the totality of the circumstances test that the ALJ had considered in evaluating employee conduct.

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Pier Sixty

- Factors the Board considered when viewing Facebook posts (not made in a work setting and not made directly to a supervisor or manager)
- Factors include: 1) whether the record contained any evidence of the Employer's antiunion hostility; 2) whether the Employer provoke the employee's conduct; 3) whether the conduct was impulsive or deliberate; 4) the location of the Facebook post; 5) the subject matter of the post; 6) the nature of the post; 7) whether the Employer considered language similar to that used by employee to be offensive; 8) whether the Employer maintained a specific rule prohibiting the language at issue; and 9) whether the discipline imposed on employees was typical of that imposed for similar violations or disproportionate to his offense

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Standards to Apply

- Cooper Tire involved racially offensive comments made on the picket line to employees who crossed over. The Court evaluated the employees conduct under the doctrine set forth in Clear Pine Moulding, 268 NLRB 1044, 1046 (1984) that considers "whether the conduct … may reasonably tend to intimidate employees of rights protected under the Act",
- Board Member McFerran objects to the majority revisiting this area of the law, emphasizing that the Board already has satisfactory standards and is capable of evaluating employee conduct noting that there are many cases where the Board has found the employee to have lost protection. (including in the case before it in General Motors)

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Standards to be reconsidered

- Board is asking for input from public.
- Query: What if the employer has adopted a code of civility in its workplace banning profanity? Under Boeing this is lawful.
- But should it be applied to employee engaging in protected concerted activity?
- Courts have recognized that labor disputes often result in heated discussions and intemperate outbursts by employees should be given more leeway.
- Input has been solicited from the public on whether to adhere to, modify, or overrule the standard applied specifically relating to the three cases noted above. (Briefs due Nov. 4, 2019)

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NLRB Rulemaking – Representation Case Procedures

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September 21, 2019

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NLRB Rulemaking – Representation Case Procedures

- Notice of Public Rulemaking Published on August 12, 2019
- Comment period ends on October 11, 2019
- Three areas addressed
  - Blocking Charge Policy
  - Recognition Bar
  - Proof of Section 9(a) Status (Construction Industry)

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NLRB Rulemaking – Election Procedure

- § 103.20 – Blocking Charge Procedure

  Whenever any party to a representation proceeding files an unfair labor practice charge together with a request that it block the election process, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the election process, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge. The offer of proof shall provide the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony. The party seeking to block the election process shall also promptly make available to the regional director the witnesses identified in its offer of proof. The regional director shall continue to process the petition and conduct the election. If the charge has not been withdrawn, dismissed, or settled prior to the conclusion of the election, the ballots shall be impounded until there is a final determination regarding the charge and its effect, if any, on the election petition or fairness of the election.

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NLRB Rulemaking – Election Procedure

- § 103.21(a) – Petitions Filed After Voluntary Recognition

  a) An employer's voluntary recognition of a labor organization as exclusive bargaining representative of an appropriate unit of the employer's employees under Section 9(a) of the Act, and any collective-bargaining agreement executed by the parties on or after the date of voluntary recognition, will not bar the processing of an election petition unless:

  1) The employer and labor organization notify the Regional Office that recognition has been granted;

  2) The employer posts a notice of recognition (provided by the Regional Office) informing employees that recognition has been granted and that they have a right, during a 45-day "window period," to file a decertification or rival-union petition; and

  3) 45 days from the posting date pass without a properly supported petition being filed.

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NLRB Rulemaking – Election Procedure

- § 103.21(b) – Proof of Section 9(a) Bargaining Relationship

  b) A voluntary recognition or collective-bargaining agreement between an employer primarily engaged in the building and construction industry and a labor organization will not bar any election petition filed pursuant to Section 9(c) or 9(e) of the Act absent positive evidence that the union unequivocally demanded recognition as the Section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit, and that the employer unequivocally accepted it as such, based on a contemporaneous showing of support from a majority of employees in an appropriate unit. Contract language, standing alone, will not be sufficient to prove the showing of majority support.

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Ridgewood Healthcare Center, 367 NLRB No. 110 (2019) overruling Galloway School Lines, 321 NLRB 1442 (1996)

- Ridgewood decision narrows the imposition of a Loves Barbecue remedy .
- Under Loves Barbecue when an Employer violates Section 8(a)(3) of the Act by refusing to hire the predecessor's employees who were represented by a union in order to avoid a bargaining obligation pursuant to Burns Supreme Court decision, Board concluded that the "perfectly clear exception" set forth in Burns and Spruce Up Board decision should apply. In prior cases applying Loves Barbecue, the employer was required to retain the predecessors' prior terms and conditions of employment and to commence bargaining under those terms because of its unfair labor practices even if it never planned on hiring all of substantially all of the predecessor's employees. (Galloway School Lines decision)
- The Employer was also required to make whole employees for any unilateral changes that caused a loss of benefits under prior contract, and offer reinstatement and backpay to those it refused to hire.

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Ridgewood narrows the application of the "perfectly clear exception"

- Under Ridgewood, the only time the Loves Barbecue remedy should apply is when the Successor has refused to hire all or substantially all of the predecessor's employees in violation of Section 8(a)(3) and (5) of the Act.
- According to the majority, the prior Board decisions strayed from the "perfectly clear" exception that the Supreme Court discussed in Burns and which the Board in Spruce Up applied by applying it even if successor only refused to hire some of the former employees.
- Majority finds that the Loves Barbecue remedy should only be awarded when the employer has failed or refused to rehire "all or substantially all of the former employees". Majority finds that to impose this remedy is punitive.

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Dissent in Ridgewood

- Board Member McFerran concluded that the Board was upending 20 years of Board precedent without any notice to the public to weigh in.
- Moreover, this decision would result in more employers willing to risk violating the NLRA by refusing to hire some but not all of the former employees to avoid a bargaining order under Burns. Without the Loves Barbecue remedy, they knew they could risk making unilateral changes before bargaining with the Union, with no fear of being forced to reinstate the prior terms under the union contract and to make employees whole for changes.
- Majority believed this remedy was not in keeping with the Supreme Court's desire to permit employers to purchase a business under their own economic terms rather than to risk failure that would destabilize labor relations.

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Board Adopts Contract Coverage Standard for determining whether unilateral changes violate the Act

- Just issued on Sept. 10, 2019, M.V. Transportation, Inc. 368 NLRB No. 66 which adopts the contract coverage standard or covered by the contract standard.
- Abandons the "clear and unmistakable waiver" standard noting that the D.C. Circuit has applied the contract coverage standard for more than 25 years and sanctioned the Board in 2016 for continuing to advocate for application of the clear and unmistakable waiver standard in proceedings before the Court.
- Under the contract coverage standard, the Board will examine the plain language of the contract to determine if the change was within the compass or scope of the contractual language. If yes, no violation to fail to bargain over change. Board will only consider waiver argument it contract does not cover the employer's disputed action.

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Employer Withdrawal Of Recognition Under The NLRA

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Employers Are Required to Recognize Unions With Majority Status

Section 9(a) of the Act: If a majority of employees in a bargaining unit select a union, the employer is obligated to recognize and bargain with that union.

Once a union is established as the employees' representative, it enjoys a *presumption of continuing majority status*.

- Sometimes the presumption is *irrebuttable* – e.g., during the term of a CBA, up to 3 years.
- Sometimes the presumption is *rebuttable* – e.g., upon expiration of the CBA

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When Can An Employer Withdraw Recognition?

Johnson Controls, 368 NLRB No. 20 (July 3, 2019)

Overruled *Levitz Furniture Co*., 333 NLRB 717 (2001) and held that where an incumbent union has lost majority support within 90 days prior to contract expiration, employer may unilaterally withdraw recognition when contract expires; union can only reestablish majority status by petitioning for and winning a Board election.

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Pre-*Levitz* law on Employer Withdrawal of Recognition

To rebut the presumption of a union's majority status, the employer could demonstrate that either (1) the union does not in fact enjoy majority support or (2) the employer has a good faith reasonable doubt as to the union's continued majority support. *Celanese Corp. of America*, 95 NLRB 664 (1951).

Anticipatory Withdrawal: If, during the term of the CBA, the union loses majority status, or the employer had a good faith reasonable doubt that it lost majority status, the employer could announce its intention to withdraw recognition when the contract expires, refuse to negotiate a successor agreement, and then lawfully withdraw recognition upon expiration. *See Burger Pits*, 273 NLRB 1001 (1984).

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Levitz

The Board abandoned the "good faith doubt" standard for withdrawal of recognition.

> An employer may rebut the presumption of a union's majority status only where it can prove the union actually lost majority support.

Levitz's "actual loss of majority" standard has been applied to the anticipatory withdrawal doctrine. *Parkwood Developmental Center*, 347 NLRB 974, 975, fn. 10 (2006).

> If an employer announces intent to withdraw recognition upon contract expiration based on evidence of loss of support prior to expiration, and withdrew recognition when contract expired, it had to prove the union did not have majority status *at the time of withdrawal*.

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Under *Levitz*, Employers withdraw recognition at their peril under *Levitz*, but have a safe-harbor

If a union challenges an employer's withdrawal of recognition in an unfair labor practice proceeding, and the employer cannot prove loss of majority support *at the time of withdrawal*, the withdrawal and any changes to terms and conditions of employment, violate the Act.

But, Employers had an alternative – continue to recognize the union, maintain status quo terms and conditions of employment, and petition for a Board election to determine majority status.

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Johnson Controls overrules *Levitz* in the context of anticipatory withdrawal

Majority criticizes the *Levitz* framework:

- *Levitz* failed to properly safeguard employee free choice by using the "last in time" principle.
  - Where employer announces an anticipatory withdrawal based upon purported loss of majority status prior to contract expiration, and the union "reacquires" majority status, *Levitz* gives controlling effect to the union's later evidence of majority support over the prior evidence of union disaffection
- *Levitz* fostered labor instability by creating a situation where employers may withdraw recognition and make unilateral changes only to later discovery it had violated the act because the Union "reestablished" majority support.

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New Standard under *Johnson Controls*

- If an employer has evidence that the union has actually lost majority support within 90 days before contract expiration, it may notify the union of its intention to withdraw recognition when the contract expires.
- The employer may then actually withdraw recognition upon expiration, notwithstanding the fact that the union may have actual majority support at the time of withdrawal
- If the Union wishes to reestablish its majority status, its only means of doing so is to file an election petition within 45 days from the date the employer announced its anticipatory withdrawal, and win the election.

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The *Johnson Controls* Dissent

Member McFerran dissented: the majority misconceived the issue, mischaracterized existing law, and devised a new scheme that is contrary to baisc labor law principles.

The question is not *How can a union reacquire majority status after an anticipatory withdrawal?* Rather, the question is *Has the employer met its burden of demonstrating that the union has lost majority support at the time it withdraw recognition?*

If the employer cannot meet that burden, the union need not "reacquire" majority status **because that status was never lost** and the employer should not be free to withdraw recognition.

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The *Johnson Controls* Dissent (cont'd)

- Member McFerran suggests that to the extent a new standard is warranted, the Board should prohibit employers from unilaterally withdrawing recognition and, instead, always require a Board election before allowing an employer to cease recognition and change terms and conditions.
- This approach would avoid disrupting the bargaining relationship and would give effect to employee sentiments through the best method – a Board election.

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2019 Fall Meeting – Ithaca, NY
September 21, 2019

NLRB 2019 Update

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NLRB Rulemaking on Joint Employer Status: Where Are We Now?

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NEW YORK STATE BAR ASSOCIATION
LABOR AND EMPLOYMENT LAW SECTION
2019 FALL MEETING – ITHACA, NY
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NLRB RULEMAKING ON JOINT EMPLOYER STATUS: *Where Are We Now?*

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In 2015, the National Labor Relations Board announced a new joint-employer standard in *Browning-Ferris Industries of California*, 362 NLRB 1599 (2015). Under that ruling, "[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." *Browning-Ferris*, 362 NLRB at 1613.

Significantly, and in a departure from longstanding precedent, the Board announced in *Browning-Ferris* (i) that "[r]eserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry," and (ii) that "if otherwise sufficient, control exercised indirectly -- such as through an intermediary -- may establish joint employer status." *Id.* at 1600.

In late 2017, the Trump Board, in a 3-2 decision, attempted to revert to the pre-*Browning-Ferris* standard, to "once again require proof that putative joint employer entities have *exercised* joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-

[1] The author gratefully acknowledges the assistance of Jacob L. Hirsch, an associate in Proskauer's Labor and Employment Law Department in New York City.

employer status will not result from control that is 'limited and routine.'" *Hy-Brand Indus. Contractors*, 365 NLRB No. 156, slip op. at 5 (Dec. 14, 2017).

However, a few months later the Board vacated the *Hy-Brand* decision after the NLRB's Designated Agency Ethics Official found that Member Emanuel should not have participated in the case in light of a conflict of interest. *Hy-Brand Indus. Contractors*, 366 NLRB No. 26 (Feb. 26, 2018). Member Emanuel's prior law firm had represented Leadpoint, the entity found to be a joint employer with Browning-Ferris. Because the *Hy-Brand* decision was bound to impact the rights of the parties in the *Browning-Ferris* case, who were then still engaged in an enforcement proceeding in the D.C. Circuit (see below), the DAEO determined that Member Emanuel should have recused himself.

Then, on September 14, 2018, the NLRB published a Notice of Proposed Rulemaking in the Federal Register titled "The Standard for Determining Joint-Employer Status." Under the proposed regulation, an entity could be found to be a joint-employer of another employer's employees only if the requirements of the pre-*Browning-Ferris* test are met. As published, new §103.40 of the Board's Rules and Regulations would provide as follows: "An employer as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. *A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited or routine."* (Emphasis added.)

Under the proposed regulation, no longer would an entity be deemed a joint-employer based solely on indirect influence over employees' employment terms or a contractual reservation of authority that is never in fact exercised. The Board reasoned that this approach to the joint-employer standard would avoid drawing peripheral third parties into a collective-bargaining relationship with another employer's employees.

During the course of the public comment period, the Court of Appeals for the D.C. Circuit upheld the *Browning-Ferris* standard. The Court "affirm[ed] the Board's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment." *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1200 (D.C. Cir. 2018).

However, "because the Board did not confine its consideration of indirect control consistently with common-law limitations, [the D.C. Circuit] grant[ed] the petition for review in part, den[ied] the cross-application for enforcement, dismiss[ed] without prejudice the application for enforcement as to Leadpoint, and remand[ed] for further proceedings consistent with [its] opinion." *Id.* Nevertheless, the Court noted that "the Board's conclusion that it need not avert its eyes from indicia of indirect control . . . is consonant with established common law." *Id.* at 1218.

With respect to the NLRB's rulemaking process itself, the D.C. Circuit pointedly observed that "[t]he policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary." *Id.* at 1208.

By the close of the notice and comment period, nearly 30,000 comments had been received. The Board is still in the process of reviewing those comments and anticipates issuance of a final rule by the end of this year. NLRB General Counsel Peter B. Robb, commenting on behalf of his office, took the position that the proposed rule needed to go farther to satisfy the legitimate concerns of management.

Specifically, the General Counsel wrote that "[t]o provide better guidance and more consistency in analyzing these relationships, the Board will certainly need to provide more granular, nuanced, and useful indications of the exact parameters of the joint employer definition in the final rule itself, in comments or explanation attendant to the rule, or in future adjudication or rulemaking." Robb cautioned that without such direction the Board will be subject to "endless litigation and piecemeal decisions necessary to achieve something approaching equivalent guidance."

The NLRB is not the only agency now grappling with recurring litigation of this issue. The Department of Labor also is reexamining the joint-employer standard under the Fair Labor Standards Act. On April 1, 2019, the DOL announced a proposed revision of that standard, introducing a four-factor test that would consider whether the putative joint-employer (i) hires or fires employees; (ii) supervises and controls the employees' work schedules or conditions of employment; (iii) determines the employees' rate and method of payment; and (iv) maintains the employees' employment records. Like the NLRB, the DOL's NPR makes plain that it, too, takes the position that "[o]nly actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the [Fair Labor Standards] Act."

The comment period has closed and we are awaiting the DOL's final rule. It is entirely possible that DOL will await the outcome of the NLRB rulemaking process before promulgating a new rule of its own.

Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery *and* FPR-II, LLC, d/b/a Leadpoint Business Services *and* Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner. Case 32–RC–109684

August 27, 2015

DECISION ON REVIEW AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND MCFERRAN

In this case, we consider whether the Board should adhere to its current standard for assessing joint-employer status under the National Labor Relations Act or whether that standard should be revised to better effectuate the purposes of the Act, in the current economic landscape.

The issue in this case is whether BFI Newby Island Recyclery (BFI), and Leadpoint Business Services (Leadpoint) are joint employers of the sorters, screen cleaners, and housekeepers whom the Union petitioned to represent. The Regional Director issued a Decision and Direction of Election finding that Leadpoint is the sole employer of the petitioned-for employees.[1] The Union filed a timely request for review of that decision, contending that (a) the Regional Director ignored significant evidence and reached the incorrect conclusion under current Board precedent; and (b) in the alternative, the Board should reconsider its standard for evaluating joint-employer relationships.

In granting the Union's request for review, we invited the parties and interested amici to file briefs addressing the following questions:

> 1. Under the Board's current joint-employer standard, as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984), is Leadpoint Business Services the sole employer of the petitioned-for employees?
>
> 2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?
>
> 3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

[1] An election was conducted on April 25, 2014, after which the ballots were impounded.

In response, the General Counsel, a group of labor and employment law professors, and several labor organizations, as well as other amici, have urged the Board to adopt a new standard. Employer groups, in contrast, argue that the Board should adhere to its current standard.

The current standard, as reflected in Board decisions such as *TLI* and *Laerco*, supra, is ostensibly based on a decision of the United States Court of Appeals for the Third Circuit, *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), which endorsed the Board's then-longstanding standard. But, as we will explain, the Board, without explanation, has since imposed additional requirements for finding joint-employer status, which have no clear basis in the Third Circuit's decision, in the common law, or in the text or policies of the Act. The Board has never articulated how these additional requirements are compelled by the Act or by the common-law definition of the employment relationship. They appear inconsistent with prior caselaw that has not been expressly overruled.

Moreover, these additional requirements—which serve to significantly and unjustifiably narrow the circumstances where a joint-employment relationship can be found—leave the Board's joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes.

In the Supreme Court's words, federal regulatory agencies "are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."[2] Having carefully considered the record and the briefs,[3] we have decided to revisit and to revise

[2] *American Trucking Assns. v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967). See, e.g., *UGL-UNICCO Service Co.*, 357 NLRB 801, 801 (2011) (quoting *American Trucking Assns.*, supra, and revising Board's successor-bar doctrine).

[3] The Union, BFI and Leadpoint each filed an initial brief and a brief in response to amici's briefs. Amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations; the American Staffing Association; a group of entities consisting of the Coalition for a Democratic Workplace and 15 other amici; the Council on Labor Law Equality; the Driver Employer Council of America; the Equal Opportunity Employment Commission; the General Counsel; the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada; the International Franchise Association; a group of labor and employment law professors; the Labor Relations and Research Center at the University of Massachusetts, Amherst; a group of entities consisting of the National Association of Manufacturers and two other amici; a group of entities consisting of the National Council for Occupational Health and Safety and nine other amici; a

the Board's joint-employer standard. Our aim today is to put the Board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of "encouraging the practice and procedure of collective bargaining."[4]

Today, we restate the Board's joint-employer standard to reaffirm the standard articulated by the Third Circuit in *Browning-Ferris* decision. Under this standard, the Board may find that two or more statutory employers are joint employers of the same statutory employees if they "share or codetermine those matters governing the essential terms and conditions of employment."[5] In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

Central to both of these inquiries is the existence, extent, and object of the putative joint employer's control. Consistent with earlier Board decisions, as well as the common law, we will examine how control is manifested in a particular employment relationship. We reject those limiting requirements that the Board has imposed—without foundation in the statute or common law—after *Browning-Ferris*. We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.[6] As the Supreme Court has observed, the question is whether one statutory employer "possesse[s] sufficient control over the work of the employees to qualify as a joint employer with" another employer.[7] Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.[8]

The Board's established presumption in representation cases like this one is to apply a new rule retroactively.[9] Applying the restated joint-employer standard here, we reverse the Regional Director and find that the Union established that BFI and Leadpoint are joint employers of the employees in the petitioned-for unit.

I. FACTS

A. Overview

BFI owns and operates the Newby Island recycling facility, which receives approximately 1,200 tons per day of mixed materials, mixed waste, and mixed recyclables. The essential part of its operation is the sorting of these materials into separate commodities that are sold to other businesses at the end of the recycling process. BFI solely employs approximately 60 employees, including loader operators, equipment operators, forklift operators, and spotters. Most of these BFI employees work outside the facility, where they move materials and prepare them to be sorted inside the facility. These BFI employees are part of an existing separate bargaining unit that is represented by the Union.

The interior of the facility houses four conveyor belts, called material streams. Each stream carries a different category of materials into the facility: residential mixed recyclables, commercial mixed recyclables, dry waste process, and wet waste process. Workers provided to BFI by Leadpoint stand on platforms beside the streams and sort through the material as it passes; depending on where they are stationed, workers remove from the stream either recyclable materials or prohibited materials. Other material is automatically sorted when it passes through screens that are positioned near the conveyor belts.

As indicated, BFI, the user firm, contracts with Leadpoint, the supplier firm, to provide the workers who manually sort the material on the streams (sorters), clean

group of entities consisting of the National Employment Law Project and nine other amici; the Retail Litigation Center; the Service Employees International Union; and the United States Chamber of Commerce.

[4] 29 U.S.C. §151.

[5] *Browning-Ferris Industries of Pennsylvania, Inc.*, supra, 691 F.2d at 1123. As explained below, we will adhere to the Board's inclusive approach in defining the "essential terms and conditions of employment." The Board's current joint-employer standard, articulated in *TLI*, supra, refers to "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction," a nonexhaustive list of bargaining subjects. *TLI*, supra, 271 NLRB at 798 (emphasis added).

[6] See, e.g., *Restatement (Second) of Agency* §2(1) ("A master is a principal who employs an agent to perform service in his affairs and who controls *or has the right to control* the physical conduct of the other in the performance of the service.") (emphasis added); id., §220(1) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control *or right to control*.") (emphasis added).

[7] *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). To be sure, a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful.

[8] See, e.g., *Restatement (Second) of Agency* §220, comment d ("[T]he control or right to control needed to establish the relation of master and servant may be very attenuated.").

[9] See, e.g., *UGL-UNICCO*, 357 NLRB 801, 808 and fn. 28 (2011).

the screens on the sorting equipment and clear jams (screen cleaners), and clean the facility (housekeepers).[10] The Union seeks to represent approximately 240 full-time, part-time, and on-call sorters, screen cleaners, and housekeepers who work at the facility.[11]

The relationship between BFI and Leadpoint is governed by a temporary labor services agreement (Agreement), which took effect in October 2009, and remains effective indefinitely. It can be terminated by either party at will with 30 days' notice. The Agreement states that Leadpoint is the sole employer of the personnel it supplies, and that nothing in the Agreement shall be construed as creating an employment relationship between BFI and the personnel that Leadpoint supplies.

B. Management Structure

BFI and Leadpoint employ separate supervisors and lead workers at the facility. BFI Operations Manager Paul Keck oversees the material recovery facility and supervises the BFI employees. BFI Division Manager Carl Mennie oversees the recycling and compost operations and reports to Keck. Shift Supervisors Augustine Ortiz and John Sutter supervise BFI employees at the site, including the control room operator. They also spend a percentage of each workday in the material stream areas, monitoring the operation and productivity of the streams. Ortiz testified that part of his job is to ensure the productivity of the streams.

Leadpoint employs Acting On-Site Manager Vincent Haas, three shift supervisors, and seven line leads who work with the Leadpoint sorters. Haas oversees Leadpoint operations at the facility and reports to the Leadpoint corporate office in Arizona. The shift supervisors, who report to Haas, create the sorters' schedules, oversee the material streams, and coach the line leads. The line leads work on the floor with the sorters and are Leadpoint's first-line supervisors.[12] Frank Ramirez, Leadpoint's CEO and President, visits the facility two or three times per quarter to evaluate whether Leadpoint is meeting BFI's expectations and goals; he also meets with BFI and Leadpoint managers, and addresses any problems.

[10] Consistent with previous Board decisions, we refer to the company that supplies employees as a "supplier" firm and the company that uses those employees as a "user" firm.

[11] BFI solely employs one sorter who works alongside the Leadpoint employees and performs identical job duties. She is part of the Union's existing unit of BFI employees and makes approximately $5/hour more in wages than the Leadpoint employees. BFI asserts that she was given sorter duties years ago after her position was eliminated owing to the loss of a municipal contract; she is grandfathered into BFI's existing contract with the Union, which otherwise exempts sorters from that bargaining unit.

[12] The parties agreed that Leadpoint's line leads are statutory supervisors.

BFI and Leadpoint maintain separate human resource departments. BFI does not have an HR manager onsite. Leadpoint has an onsite HR manager who operates in a trailer (marked with the Leadpoint logo) outside the facility. Leadpoint employees use the BFI break rooms, bathrooms, and parking lot.

C. Hiring

The Agreement between BFI and Leadpoint provides that Leadpoint will recruit, interview, test, select, and hire personnel to perform work for BFI. BFI Managers Keck and Mennie, and Shift Supervisors Ortiz and Sutter testified that they are not involved in Leadpoint's hiring procedure and have no input into Leadpoint's hiring decisions. However, as to hiring, the Agreement requires Leadpoint to ensure that its personnel "have the appropriate qualifications (including certification and training) consistent with all applicable laws and instructions from [BFI], to perform the general duties of the assigned position." BFI also has the right to request that personnel supplied by Leadpoint "meet or exceed [BFI's] own standard selection procedures and tests."

The Agreement also requires Leadpoint to make "reasonable efforts" not to refer workers who were previously employed by BFI and were deemed ineligible for rehire. Under the Agreement, Leadpoint must ask workers if they were previously employed by BFI and verify with BFI that all workers provided are eligible to work with BFI. If Leadpoint inadvertently refers an ineligible worker, it must immediately cease referring her, upon notification by BFI.

Before it refers a worker to BFI, Leadpoint is also required to ensure, in accordance with the Agreement, that she has passed, at minimum, a five-panel urinalysis drug screen, "or similar testing as agreed to in writing with [BFI's] safety, legal and commercial group." Leadpoint is not permitted to refer workers who do not successfully complete the drug screen, and BFI may request written certification of such completion. After Leadpoint has referred workers, it is responsible for ensuring that they remain free from the effects of alcohol and drug use and in condition to perform their job duties for BFI.

When an applicant arrives at the Newby Island facility, she reports to Leadpoint's HR department. Leadpoint tests and evaluates an applicant's ability to perform the required job tasks at BFI by giving her a try-out on the material stream and assessing whether she has adequate hand-eye coordination. If the applicant passes the test, she returns to the Leadpoint HR department for drug testing and background checks.

D. Discipline and Termination

Although the Agreement provides that Leadpoint has sole responsibility to counsel, discipline, review, evaluate, and terminate personnel who are assigned to BFI, it also grants BFI the authority to "reject any Personnel, and . . . discontinue the use of any personnel for any or no reason."

BFI Managers Keck and Mennie, and Shift Supervisors Ortiz and Sutter testified that they have never been involved in any disciplinary decisions for Leadpoint employees. However, the record includes evidence of two incidents where discipline of Leadpoint employees was prompted by BFI action. In a June 2013 email from BFI Operations Manager Keck to Leadpoint CEO Ramirez, Keck stated that he observed two Leadpoint employees passing a pint of whiskey at the jobsite. Keck then contacted Leadpoint Manager Haas, who immediately sent the two employees for alcohol and drug screening. Ramirez testified that, in response to Keck's email "request[ing] [the employees'] immediate dismissal," Leadpoint investigated the complaint and terminated one employee and reassigned the other.

In the same email to Ramirez, Keck indicated that he had observed damage to BFI property, including a paperwork drop box that had been destroyed. Keck stated that a surveillance camera recorded a Leadpoint employee punching the box, and that he hoped Ramirez agreed that "this Leadpoint employee should be immediately dismissed." Haas testified that, pursuant to Keck's email, he reviewed the video, identified the employee, and Leadpoint terminated the employee after an investigation. Haas stated that BFI was not involved in the investigation of the employee and was not consulted in the decision to terminate him.

E. Wages and Benefits

The Agreement includes a rate schedule that requires BFI to compensate Leadpoint for each worker's wage plus a specified percentage mark-up; the mark-up varies based on whether the work is performed during regular hours or as overtime. Although the Agreement provides that Leadpoint "solely determines the pay rates paid to its Personnel," it may not, without BFI's approval, "pay a pay rate in excess of the pay rate for full-time employees of [BFI] who perform similar tasks." Mennie testified that Leadpoint has never made such a request. Leadpoint issues paychecks to employees and maintains their payroll records.

The record includes a Rate Schedule Addendum between BFI and Leadpoint executed in response to a minimum wage increase from $8.75 to $10 by the City of San Jose. Pursuant to the Addendum, the parties agreed that BFI would pay a higher hourly rate for the services of Leadpoint employees after the minimum wage increase took effect.

Leadpoint employees are required to sign a benefits waiver stating they are eligible only for benefits offered by Leadpoint and are not eligible to participate in any benefit plan offered by BFI. Leadpoint provides employees with paid time-off and three paid holidays after they have worked for 2,000 hours, and the option to purchase medical, life, and disability insurance.

F. Scheduling and Hours

BFI establishes the facility's schedule of working hours. It operates three set shifts on weekdays: 4 a.m.—1 p.m., 2 p.m.—11:30 p.m., and 10:30 p.m.—7 a.m. Leadpoint is responsible for providing employees to cover all three shifts. Although Leadpoint alone schedules which employees will work each shift,[13] Leadpoint has no input on shift schedules. Keck testified that any modification in shift times would require modifying the facility's hours of operation and the work schedules for all BFI employees.

BFI will keep a stream running into overtime if it determines that the material on a specific stream cannot be processed by the end of a shift. A BFI manager will normally convey this decision to a Leadpoint shift supervisor; Leadpoint, in turn, determines which employees will stay on the stream to complete the overtime work.

BFI also dictates when the streams stop running so that Leadpoint employees can take breaks. Keck has instructed Leadpoint employees to spend 5 minutes gathering the debris around their stations before breaking. Although Keck asserted that this assignment would not affect the length of breaks, sorter Andrew Mendez testified that, as a practical matter, the clean-up requirement has cut into employees' break time.

The Agreement requires that Leadpoint employees must, at the end of each week, submit to Leadpoint a summary of their "hours of services rendered." Employees must obtain the signature of an authorized BFI representative attesting to the accuracy of the hours on the form. BFI may refuse payment to Leadpoint for any time claimed for which a worker failed to obtain a signature.

G. Work Processes

BFI determines which material streams will run each day and provides Leadpoint with a target headcount of workers needed. BFI also dictates the number of Leadpoint laborers to be assigned to each material stream, but

[13] Leadpoint must also supply housekeepers to work a Saturday shift.

Leadpoint assigns specific Leadpoint employees to specific posts. The record includes an email from Keck to Haas directing Haas to reduce the number of sorters on a specific line by two per shift. The email detailed what positions sorters should occupy on the stream, what materials should be prioritized, and whether a right-handed or left-handed sorter was preferred.[14] The email concluded by stating "[t]his staffing change is effective Monday, August 5, 2013." Ramirez testified that the sorters occupy set work stations along each stream and that BFI dictates the location of these stations. During a shift, BFI might direct Leadpoint supervisors to move employees to another stream in response to processing demands.

Before each shift, BFI's Shift Supervisors Ortiz and Sutter hold meetings with Leadpoint supervisors—the onsite manager and leads—to present and coordinate the day's operating plan. During those meetings, BFI's managers dictate which streams will be operating and establish the work priorities for the shift. Ortiz testified that he uses the preshift meeting to advise Leadpoint supervisors of the specific tasks that need to be completed during the shift, i.e. maintenance, quality, and cleaning issues. Ortiz indicated that Leadpoint supervisors assign employees so as to accomplish these designated tasks.

BFI managers set productivity standards for the material streams. BFI Division Manager Mennie testified that BFI tracks the tons per hour processed on each stream, the proportion of running time to downtime on each stream, and various quality standards. BFI has sole authority to set the speed of the material streams based on its ongoing assessment of the optimal speed at which materials can be sorted most efficiently. If sorters are unable to keep up with the speed of the stream, BFI—but not Leadpoint—can make various adjustments, such as slowing the speed of the stream or changing the angle of the screens. The record indicates that the speed of the streams has been a source of contention between BFI and Leadpoint employees. For instance, former-sorter Clarence Harlin described an incident during which BFI Shift Supervisor Sutter stood across the stream from sorters and criticized them for failing to remove a sufficient amount of plastic. Harlin responded that it was not possible to pull that much material unless the stream was slowed down or stopped. Sutter responded by calling the entire line of sorters to the control room, where he directed them to work more efficiently and dismissed their requests to slow down or stop the line.

[14] For instance, the email stated that "[t]wo of your employees should be positioned at the east end of the presorts focusing primarily on glass. Their secondary picks should be plastics into the Recycling Stream drop chute."

Leadpoint employees are able to stop the streams by hitting an emergency stop switch. Sutter testified that he has instructed Leadpoint supervisors on when it is appropriate for Leadpoint employees to use the switch. A BFI employee who works in the control room monitors the operating status of the streams and is required to restart a stream after it has been stopped. Sorter Travis Stevens testified that he has been instructed by BFI managers on multiple occasions not to overuse the emergency stop switch. He stated that BFI Operations Manager Keck and BFI Shift Supervisor Ortiz held a meeting with an entire line of Leadpoint employees to call attention to the frequency of their emergency stops and to direct Leadpoint employees to minimize the number of stops to reduce downtime.

BFI's managers testified that when, in the course of monitoring stream operation and productivity, they identify problems, including problems with the job performance of a Leadpoint employee, they communicate their concerns to a Leadpoint supervisor. The Leadpoint supervisor is expected to address those issues with the employees. According to the testimony of Leadpoint employees, BFI managers have, on occasion, addressed them directly regarding job tasks and quality issues. Leadpoint Housekeeper Clarence Harlin testified that he receives work directions from BFI managers and employees at least twice a week. Sorters Mendez and Stevens both testified that they have received specific assignments from BFI managers that took priority over the tasks assigned by their immediate Leadpoint supervisors. Sorter Marivel Mendoza testified that Sutter has directed him to remove more plastic from the stream, and has moved him to other streams where assistance was needed.

H. Training and Safety

When Leadpoint employees begin working at the facility, they receive an orientation and job training from Leadpoint supervisors. Periodically, they also receive substantive training and counseling from BFI managers. For instance, following customer complaints about the quality of BFI's end product, Keck held two or three educational meetings with Leadpoint employees and supervisors who worked on the wet waste stream. During the meetings, Keck highlighted the objectives of the operation to make sure that Leadpoint employees understood BFI's goals. He also explained the difference between organic and nonorganic materials and specified which materials should be removed from the line. Keck held a similar meeting with Leadpoint employees who worked on the commercial single stream because he was concerned that sorters were allowing too many materials

to pass by on the stream without being sorted.[15] With regard to one line, Keck told the sorters that BFI would only be able to cover the labor expenses for the line if the processed material generated revenue for BFI. As noted above, BFI Shift Supervisor Sutter similarly called a meeting with a group of sorters to direct them to work more productively.

As to safety, the Agreement mandates that Leadpoint require its employees to comply with BFI's safety policies, procedures, and training requirements. For all employees working in positions deemed safety-sensitive by BFI, Leadpoint must obtain a written acknowledgement that they have read, understand, and agree to comply with BFI's safety policy. BFI also "reserves the right to enforce the Safety Policy provided to [Leadpoint] personnel."[16]

New Leadpoint employees attend a safety orientation that is presented by Leadpoint managers. The record shows that, on occasion, BFI also provides safety training to Leadpoint employees.

I. Other Terms

According to the terms of the Agreement, Leadpoint personnel shall not be assigned to BFI for more than 6 months. Ramirez testified that Leadpoint employees have been assigned to BFI for more than 6 months, and BFI has never invoked this provision. The Agreement also allows BFI to examine "[Leadpoint's] books and records pertaining to the Personnel, [Leadpoint's] obligations and duties under this Agreement, and all services rendered by [Leadpoint] or the Personnel under this Agreement, at any time for purposes of auditing compliance with this Agreement, or otherwise." Mennie testified that he has never asked to inspect Leadpoint's personnel files.

II. THE REGIONAL DIRECTOR'S FINDINGS

The Regional Director, applying *TLI*, supra, found that BFI is not a joint-employer of the Leadpoint employees because it does not "share or codetermine [with Leadpoint] those matters governing the essential terms and conditions of employment" of the sorters, screen cleaners, or housekeepers. First, the Regional Director found that Leadpoint sets employee pay and is the sole provider of benefits. He acknowledged that, under the Agreement, Leadpoint is prevented from paying employees more than BFI pays employees who perform similar work. But he found that this provision was not indicative of BFI's control over wages because it limits only employees' maximum wage rate; it would not prevent Leadpoint from lowering wages or offering more benefits. Moreover, he found that the provision only applies to Leadpoint sorters, since BFI does not employ any screen cleaners or housekeepers.

Next, the Regional Director found that Leadpoint has sole control over the recruitment, hiring, counseling, discipline, and termination of its employees. He noted that there was no evidence to suggest that BFI participates in any of these decisions. With regard to Keck's email reporting the misconduct of Leadpoint employees, the Regional Director found that Keck merely requested that the employees be terminated; he did not order or direct Leadpoint to terminate them. He thus concluded that BFI does not possess the authority to terminate Leadpoint employees.

Finally, the Regional Director found that BFI does not control or codetermine employees' daily work. He found that Leadpoint employees were supervised solely by the Leadpoint onsite manager and leads, and that nothing in the record supported the Union's argument that BFI controls employees' daily work functions. While acknowledging BFI's control over the speed of the material stream, the Regional Director found that BFI does not mandate how many employees work on the line, the speed at which the employees work, where they stand on the stream, or how they pick material off the stream.[17] The mere ability to control the speed of the stream, he stated, does not "create a level of control that is sufficiently direct or immediate" to warrant a finding of joint control.

The Regional Director also stated that if BFI has a problem with a Leadpoint employee, it complains to a Leadpoint supervisor who takes care of the matter using her own discretion. To the extent that BFI has directly instructed Leadpoint employees, he found "the instruction was merely routine in nature and insufficient to warrant a finding that BFI jointly controls Leadpoint employees' daily work." Although BFI sets the work hours and shifts of the facility's operation, the Regional Director observed that Leadpoint is solely in control of scheduling its own employees' shifts, scheduling employees for overtime, and administering requests for sick leave and vacation.

[15] Ortiz indicated that he also held educational sessions with Leadpoint employees after he became concerned that sorters were not removing a sufficient amount of contaminants from the stream.

[16] Leadpoint employees' personal protective equipment—a safety vest, a hardhat, safety glasses, ear plugs, and gloves—is provided by Leadpoint and differs from the gear that BFI employees use.

[17] Based on our review of the record, we disagree with the Regional Director's factual findings that BFI does not mandate how many employees work on the line, the speed at which they work, where they stand, or how they pick material.

III. POSITIONS OF THE PARTIES AND AMICI

A. The Union

The Union argues first that, under the Board's current joint-employer standard, BFI constitutes a joint employer of the Leadpoint employees because it shares or codetermines the following essential terms and conditions of employment: employment qualifications, work hours, breaks, productivity standards, staffing levels, work rules and performance, the speed of the lines, dismissal, and wages. BFI's direct control over employees is evinced by its regular oversight of the employees and its constant control of their work. BFI, it argues, demands compliance with "detailed specifications, including the number of employees on each line, where they stand, what they pick, and at what rate they sort." BFI also trains and instructs employees as to how to do their jobs, directing them on picking techniques, what to prioritize, how to clear jams, and when to use the emergency stop.

Alternatively, the Union contends that the Board should adopt a broader standard to better effectuate the purpose of the Act and respond to industrial realities. The Union states that the Board's current emphasis on whether an employer exercises direct and immediate control over employees conflicts with the language and purpose of the Act, which is focused on ensuring employees' bargaining rights to the fullest extent. Further, the Union argues that the Board must consider all indicia of control in its joint-employer analysis, rather than the narrow subset of criteria set forth in *TLI*, supra, 271 NLRB at 798 (hiring, firing, discipline, supervision, and direction). It observes that "a myriad of other essential terms that are mandatory subjects of bargaining may [] also be pertinent to the employees involved." Based on these concerns, the Union recommends that the Board find joint-employer status where an employer "possesses sufficient authority over the employees or their employer such that its participation is a requisite to meaningful collective bargaining. Such authority can be either direct or indirect."

Finally, the Union asserts that absent a change in the joint-employer standard, a putative employer, like BFI, that is a necessary party to meaningful collective bargaining will continue to insulate itself by the "calculated restructuring of employment and insertion of a contractor to insulate itself from the basic legal obligation to recognize and bargain with the employees' representative."

B. BFI and Leadpoint

BFI argues that, under the Board's current joint-employer test, the Regional Director correctly found that BFI is not a joint employer of Leadpoint's employees. To this end, BFI contends that the Regional Director properly concluded that Leadpoint has sole authority to hire, fire, discipline, supervise, direct, assign, train, and schedule its employees. It further contends that the Union points to only a handful of instances in which BFI managers gave routine instructions to Leadpoint employees, evidence that falls far short of establishing that BFI exerted any meaningful control over them. Although BFI's physical plant dictates where Leadpoint employees must work, BFI does not decide where particular employees work. Likewise, despite the fact that BFI managers meet with Leadpoint supervisors daily to discuss operations, Leadpoint supervisors are solely responsible for controlling and directing their employees. Finally, contrary to the Union, meaningful control cannot be established by a contractual right or its occasional exercise; instead the Board properly looks to the actual practice of the parties.

BFI also urges the Board not to modify its joint-employer standard. It contends that the Union has not presented any compelling reason to revisit Board policy. Any modification, it argues, would undermine the predictability of the law in this area, which the Board has applied uniformly for over 30 years. The Union's proposed standard, in its view, imposes "no meaningful limit on who could be deemed a joint employer of another's workers." Thus, a regional director "would be free to exercise her substantial discretion to determine that completely separate companies constituted a joint employer simply because she believes that bargaining would be more effective if both companies were at the table."

Leadpoint echoes the arguments presented by BFI: that Leadpoint is the sole employer of its employees, and that the Board should not modify its joint-employer standard. In support of the current standard, Leadpoint contends that it is a clear and understandable approach that has not proven overly onerous for parties seeking to establish a joint-employer relationship. Leadpoint argues that the "vague and ambiguous" standard proposed by the Union lacks clarity and provides minimal, if any, guidance as to what factors are significant for evaluating joint-employer status.

C. The General Counsel

The General Counsel urges the Board to abandon its existing joint-employer standard because it "undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining."[18] The Board, since *TLI*, supra, has significantly narrowed its approach by (a) requiring evidence of direct and immediate control over employees; (b) looking only to the actual practice of

[18] The General Counsel's brief takes no position on the merits of this representation proceeding.

the parties rather than their contract; and (c) requiring an employer's control to be substantial and not "limited and routine." He posits that this approach is not consistent with the Act, which broadly defines the term "employer." Moreover, the contingent work force has grown significantly over the past several decades. The General Counsel submits that in many contingent arrangements, the user firm only has limited and routine supervision over employees, and indirect or potential control over terms and conditions of employment. Nonetheless, the user firm can influence the supplier firm's bargaining posture by threatening to terminate its contract with the supplier if wages and benefits rise above a set cost threshold.

The General Counsel recommends that the Board find joint-employer status where an employer "wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence." Such an approach would make no distinction between direct, indirect, and potential control, and would find joint-employer status where industrial realities make an entity essential for bargaining.

D. Other Amici

Amici in support of the Union uniformly urge the Board to adopt a more inclusive joint-employer standard that would give dispositive weight to more forms of employer control. Specifically, they urge the Board to abandon its recent focus on direct and immediate control and consider instead the totality of a putative employer's influence over employees' working conditions, including control that is exercised indirectly or reserved via contractual right. They also argue that the Board should evaluate a putative employer's control over a broad range of terms and conditions of employment rather than the limited set of factors enumerated in *TLI*, supra. In urging the Board to modify its approach, many amici note that that the number of contingent employment relationships has grown significantly in recent years, and that a sizeable proportion of the labor force now works for staffing agencies. They posit that the Board's current narrow focus on direct control absolves many user employers of bargaining responsibilities under the Act despite the fact that their participation is required for meaningful bargaining to occur.

Amici in support of BFI uniformly contend that BFI is not a joint-employer of Leadpoint's employees, and urge the Board not to modify its existing approach. They argue primarily that the Board's standard—which has been applied consistently for over 30 years—has provided employers with stability and predictability in entering into labor supply arrangements in response to fluctuating market needs. Any change, they contend, would destabilize these relationships and undermine the expectations of the contracting parties. A more inclusive standard, they argue, would also widen the scope of labor disputes and force firms to participate in bargaining even where they have no authority to set or control terms and conditions of employment. Some amici contend that a broader standard could potentially include—and consequently disrupt—any contractual relationship involving labor. Other amici argue that a broader standard would expose employers to unwarranted liability for unfair labor practices committed by the other firm. Some argue too that the common law of agency prohibits the Board from adopting an open-ended approach that considers all of the economic realities of the parties' relationship.

IV. THE EVOLUTION OF THE BOARD'S JOINT-EMPLOYER STANDARD

In analyzing the joint-employer issue, and evaluating the various arguments raised by the parties and amici, it is instructive to review the development of the Board's law in this area. Three aspects of that development seem clear. First, the Board's approach has been consistent with the common-law concept of control, within the framework of the National Labor Relations Act. Second, before the current joint-employer standard was adopted, the Board (with judicial approval) generally took a broader approach to the concept of control. Third, the Board has never offered a clear and comprehensive explanation for its joint-employer standard, either when it adopted the current restrictive test or in the decades before.

The core of the joint-employer standard, which we preserve today, can be traced at least as far back as the *Greyhound* case, a representation proceeding that involved a company operating a bus terminal and its cleaning contractor. There, the Board in 1965 found two statutory employers to be joint employers of certain workers because they "share[d], or codetermine[d], those matters governing essential terms and conditions of employment."[19] Significantly, at an earlier stage of that case, the Supreme Court explained the issue presented—whether Greyhound "possessed sufficient control over the work of the employees to qualify as a joint employer with" the cleaning contractor—was "essentially a factual issue" for the Board to determine.[20]

[19] *Greyhound Corp.*, 153 NLRB 1488, 1495 (1965), enfd. 368 F.2d 778 (5th Cir. 1966). See also *Franklin Simon & Co., Inc*., 94 NLRB 576, 579 (1951) (finding joint-employer status where "a substantial right of control over matters fundamental to the employment relationship [was] retained and exercised" by both department store and company operating shoe department).

[20] *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). The Supreme Court reversed a district court injunction against the Board pro-

During the period after *Greyhound* but before the Third Circuit's 1982 decision in *Browning-Ferris Industries of Pennsylvania*, supra, some (though certainly not all) of the Board's joint-employer decisions used the "share or co-determine" formulation.[21] But regardless of the wording used, the Board typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status. The Board did not require that this right be exercised, or that it be exercised in any particular manner. Thus, the Board's joint-employer decisions found it probative that employers retained the contractual power to reject or terminate workers;[22] set wage rates;[23] set working hours;[24] approve overtime;[25] dictate the number of workers to be supplied;[26] determine "the manner and method of work performance";[27] "inspect and approve work,"[28] and terminate the contractual agreement itself at will.[29] The Board stressed that "the power to control is present by virtue of the operating agreement."[30] Reviewing courts expressly endorsed this approach.[31]

In addition to recognizing the right to control as probative, the Board gave weight to a putative joint employer's "indirect" exercise of control over workers' terms and conditions of employment.[32] In so doing, the Board emphasized that, in order to exercise significant control, a putative employer need not "hover over [workers], directing each turn of their screwdrivers and each connection that they made."[33] Instead, the Board assessed whether a putative employer exercised "ultimate control" over their employment.[34]

Consistent with this principle, the Board in certain cases found evidence of joint-employer status where a putative employer, although not responsible for directly supervising another firm's employees, inspected their work, issued work directives through the other firm's supervisors, and exercised its authority to open and close the plant based on production needs.[35] Likewise, the Board found significant indicia of control where a putative employer, although it "did not exercise direct supervisory authority over" the workers at issue, nonetheless held "day-to-day responsibility for the overall operations" of the worksite and determined the scope and nature of the contractors' work assignments.[36] Contractual arrangements under which the user employer reimbursed the supplier for workers' wages or imposed limits on wages were also viewed as tending to show joint-employer status.[37]

The Third Circuit's *Browning-Ferris* decision did not question, much less reject, any of these lines of Board precedent. That decision, rather, carefully untangled the

ceeding, rejecting Greyhound's argument that the Board was acting in excess of its powers under the Act, given the exclusion of independent contractors from the statutory definition of "employee."

[21] See, e.g., *C.R. Adams Trucking, Inc.*, 262 NLRB 563, 566 (1982), enfd. 718 F.2d 869 (8th Cir. 1983); *Springfield Retirement Residence*, 235 NLRB 884, 891 (1978); *Greenhoot, Inc.*, 205 NLRB 250, 251 (1973).

[22] See *Ref-Chem Co.*, 169 NLRB 376, 379 (1968), enf. denied on other grounds 418 F.2d 127 (5th Cir. 1969); *Jewel Tea Co.*, 162 NLRB 508, 510 (1966).

[23] See *Ref-Chem*, supra, 169 NLRB at 379; *Harvey Aluminum*, 147 NLRB 1287, 1289 (1964).

[24] See *Jewel Tea*, supra, 162 NLRB at 510; *Mobil Oil Corp.*, 219 NLRB 511, 516 (1975), enf. denied on other grounds sub nom. *Alaska Roughnecks and Drillers Assn. v. NLRB*, 555 F.2d 732 (9th Cir. 1977), cert. denied 43 U.S. 1069 (1978).

[25] *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969).

[26] See *Harvey Aluminum*, supra, 147 NLRB at 1289; *Mobil Oil*, supra, 219 NLRB at 516.

[27] *Value Village*, 161 NLRB 603, 607 (1966).

[28] *Ref-Chem Co. v. NLRB*, supra, 418 F.2d at 129.

[29] *Value Village*, supra, 161 NLRB at 607; *Mobil Oil*, supra, 219 NLRB at 516.

[30] *Value Village*, supra, 161 NLRB at 607. See also *Jewel Tea*, supra, 162 NLRB at 510 ("That the licensor has not exercised such power is not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control"); *Lowery Trucking Co.*, 177 NLRB 13, 15 (1969), enfd. sub nom. *Ace-Alkire Freight Lines v. NLRB*, 431 F.2d 280 (8th Cir. 1970) (observing that "[w]hile [putative employer] never rejected a driver hired by [supplier], it had the right to do so").

[31] See *Ref-Chem Co. v. NLRB*, supra, 418 F.2d at 129 (affirming the Board's joint-employer finding where "[t]he terms of the agreements with these two companies gave [putative employer] the right to approve employees, control the number of employees, have an employee removed, inspect and approve work, pass on changes in pay and overtime allowed"). See also *Ace-Alkire Freight Lines, Inc. v. NLRB*, 431 F.2d 280, 282 (8th Cir. 1970) (same where putative employer "retained the right to reject drivers sent to them"); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (same where, under parties' agreement, putative employer "had the authority to reject any driver that did not meet its standards and it could also direct [supplier firm] to remove any driver").

[32] *Floyd Epperson*, 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974).

[33] *Sun-Maid Growers of California*, 239 NLRB 346, 351 (1978), enfd. 618 F.2d 56 (9th Cir. 1980) (finding joint-employer status).

[34] *Int'l Trailer Co.*, 133 NLRB 1527, 1529 (1961), enfd. sub nom. *NLRB v. Gibraltar Industries*, 307 F.2d 428 (1962) (finding joint-employer status), cert. denied 372 U.S. 911 (1963).

[35] Id. See also *Hamburg Industries*, 193 NLRB 67, 67 (1971) (finding joint-employer status where putative employer's superintendents checked the performance of supplier's workers and the quality of their work, and communicated work directions via supplier's supervisors).

[36] *Clayton B. Metcalf*, 223 NLRB 642, 643 (1976).

[37] See *Hamburg Industries*, supra, 193 NLRB at 67–68 (assigning weight to putative employer's "indirect control over wages" via cost-plus arrangement); *Hoskins Ready-Mix*, 161 NLRB 1492, 1493 (1966) (same, noting that user employer would be the "ultimate source of any wage increases" for workers); *Ref-Chem Co.*, supra, 169 NLRB at 379 (supplier could not make any wage modification without securing approval of the user). See also *Industrial Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981) (relying on the Board's finding that user employer reimbursed supplier for employees' wages), cert. denied 454 U.S. 1148 (1982).

joint-employer doctrine from the distinct single-employer doctrine (which addresses integrated enterprises only nominally separate), endorsed the Board's "share or codetermine" formulation, and enforced the Board's order finding joint-employer status. The Third Circuit explained:

> The basis of the [joint employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. . . .Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate but that they *share or codetermine those matters governing the essential terms and conditions of employment.*

691 F.2d at 1123 (citations omitted; emphasis added).

The Board subsequently embraced the Third Circuit's decision, but simultaneously took Board law in a new and different direction. *Laerco* and *TLI*, both decided in 1984, marked the beginning of a 30-year period during which the Board—without any explanation or even acknowledgement and without overruling a single prior decision—imposed additional requirements that effectively narrowed the joint-employer standard. Most significantly, the Board's decisions have implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status. The Board has foreclosed consideration of a putative employer's right to control workers, and has instead focused exclusively on its actual exercise of that control—and required its exercise to be direct, immediate, and not "limited and routine."[38]

The Board has thus refused to assign any significance to contractual language expressly giving a putative employer the power to dictate workers' terms and conditions of employment. In *TLI*, for instance, the parties' contract provided, among other things, that the user employer "at all times will solely and exclusively be responsible for maintaining operational control, direction and supervision over said drivers".[39] Although prior precedent found this type of contractual authority probative of joint employer status, the *TLI* Board found it irrelevant, absent evidence that the putative employer "affect[ed] the terms and conditions of employment to such a degree that it may be deemed a joint employer."[40] The Board later emphasized this narrowed approach in *AM Property Holding Corp.*, a 2007 decision, supra, where it stated that "[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."[41]

In *Airborne Express*,[42] a 2002 decision, the Board held that "[t]he essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate."[43] This restrictive approach has resulted in findings that an entity is not a joint employer even where it indirectly exercised control that significantly affected employees' terms and conditions of employment. For example, the Board refused to find that a building management company that utilized employees supplied by a janitorial company was a joint employer notwithstanding evidence that the user dictated the number of workers to be employed, communicated specific work assignments and directives to the supplier's manager, and exercised ongoing oversight as to whether job tasks were performed properly.[44] Likewise, the Board has found, contrary to its earlier approach, that cost-plus arrangements between the employing parties are *not* probative of joint-employer status.[45]

Even where a putative joint employer has exercised direct control over employees, the Board has given no weight to various forms of supervision deemed "limited and routine." In *TLI*, for instance, the user employer instructed contract drivers as to which deliveries were to be made on a given day, filed incident reports with the supplier when drivers engaged in conduct adverse to its operation, received accident reports, and maintained driver logs and records.[46] Nonetheless, the Board concluded that "the supervision and direction exercised by [the us-

[38] *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007), enfd. in relevant part sub nom. *Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d. Cir. 2011)

[39] *TLI*, supra, 271 NLRB at 803.

[40] Id. at 799.

[41] 350 NLRB at 1000. The *AM Property* Board refused to give weight to a contractual provision requiring that the supplier plan, organize, and coordinate its operations "in conjunction with the directions, requests and suggestions" of the user's management, and that all new hires were subject to the initial approval of the user. Id. at 1019.

[42] 338 NLRB 597, 597 fn. 1 (2002).

[43] The Board in *Airborne Express* added this element in a footnote without any explanation; it cited only *TLI* as support. But the *TLI* Board did not use the phrase "direct and immediate control," let alone identify that concept as the "essential element" in the Board's test. The *Airborne Express* majority also asserted that the Board in *TLI* "abandoned its previous test in this area, which had focused on a putative joint employer's indirect control over matters relating to the employment relationship." 338 NLRB at 597 fn. 1. But *TLI* did not, in fact, purport to overrule any precedent or alter the Board's approach.

[44] *Southern California Gas Co.*, 302 NLRB 456, 461–462 (1991).

[45] See *Goodyear Tire and Rubber Co.*, 312 NLRB 674, 677–678 (1993) (rejecting the argument that participation in a cost-plus contract represented a form of codetermination).

[46] 271 NLRB at 799.

er] on a day-to-day basis is both limited and routine."[47] The Board elaborated on this concept in *AM Property*, supra, where it stated that "[t]he Board has generally found supervision to be 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."[48] There, the Board found that the user's oversight of a supplier's cleaning employees was "limited and routine" where the user distributed supplies to workers, prepared their timecards, ensured that their work was done properly, and occasionally assigned work.[49]

V. REVISITING THE JOINT-EMPLOYER STANDARD

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.[50] The most recent Bureau of Labor Statistics survey from 2005 indicated that contingent workers accounted for as much as 4.1 percent of all employment, or 5.7 million workers.[51] Employment in the temporary help services industry, a subset of contingent work, grew from 1.1 million to 2.3 million workers from 1990 to 2008.[52] As of August 2014, the number of workers employed through temporary agencies had climbed to a new high of 2.87 million, a 2 percent share of the nation's work force.[53] Over the same period, temporary employment also expanded into a much wider range of occupations.[54] A recent report projects that the number of jobs in the employment services industry, which includes employment placement agencies and temporary help services, will increase to almost 4 million by 2022, making it "one of the largest and fastest growing [industries] in terms of employment."[55]

This development is reason enough to revisit the Board's current joint-employer standard. "[T]he primary function and responsibility of the Board . . . is that 'of applying the general provisions of the Act to the complexities of industrial life.'"[56] If the current joint-employer standard is narrower than statutorily necessary, and if joint-employment arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's "responsibility to adapt the Act to the changing patterns of industrial life."[57] As we have seen, however, the Board has never clearly and comprehensively explained its joint-employer doctrine or, in particular, the shift in approach reflected in the current standard.[58] Our decision today is intended to address this shortcoming. For the reasons that follow, we are persuaded that the current joint-employer standard is not mandated by the Act and that it does not best serve the Act's policies.

We begin with the obvious proposition that in order to find that a statutory employer (i.e., an employer subject to the National Labor Relations Act) has a duty to bargain with a union representing a particular group of statutory employees, the Act requires the existence of an employment relationship between the employer and the employees. Section 2(3) of the Act provides that the "term 'employee' . . . shall not be limited to the employees of a particular employer, *unless the Act explicitly states otherwise*."[59] Section 9(c) authorizes the Board to process a representation petition when it alleges that "employees . . . wish to be represented for collective bargaining . . . and *their* employer declines to recognize their representative."[60] Section 8(a)(5), in turn, makes it an unfair labor practice for an employer "to refuse to

[47] Id. The Board also discounted the user's role in influencing bargaining where user attended the supplier's collective bargaining negotiations and explained that the contract was in jeopardy if the supplier failed to achieve cost savings. 271 NLRB at 798–799.

[48] 350 NLRB at 1001. See also *Flagstaff Medical Center*, 357 NLRB 659, 667 (2011), enfd. in part 715 F.3d 928 (D.C. Cir. 2013).

[49] 350 NLRB at 1001.

[50] The Board previously recognized the "ongoing changes in the American work force and workplace and the growth of joint employer arrangements, including the increased use of companies that specialize in supplying 'temporary' and 'contract workers' to augment the workforces of traditional employers." *M. B. Sturgis, Inc.*, 331 NLRB 1298, 1298 (2000).

[51] Bureau of Labor Statistics, U.S. Department of Labor, "Contingent and Alternative Employment Arrangements, February 2005," (July 27, 2005).

[52] See Tian Luo, et al., "The Expanding Role of Temporary Help Services from 1990 to 2008," Monthly Labor Review, Bureau of Labor Statistics, August 2010 at 12.

[53] Steven Greenhouse, "The Changing Face of Temporary Employment," NY Times website, August, N.Y. TIMES, Aug. 31, 2014, at http://www.nytimes.com/2014/09/01/upshot/the-changing-face-of-temporary-employment.html

[54] See Luo et al., supra at 5.

[55] Richard Henderson, "Industry Employment and Output Projections to 2022," Monthly Labor Review, Bureau of Labor Statistics, December 2013.

[56] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979), quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); and *NLRB v. Steelworkers*, 357 U.S. 357, 362–363 (1958).

[57] See *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 266 (1975).

[58] It is well established that even when an agency is creating policies to fill a gap in an ambiguous statute, the agency has a responsibility to explain its failure to follow established precedent. *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–809 (1973).

[59] 29 U.S.C. §152(3) (emphasis added).

[60] 29 U.S.C. §159(c) (emphasis added).

bargain collectively with the representatives of *his* employees."[61]

In determining whether an employment relationship exists for purposes of the Act, the Board must follow the common-law agency test. The Supreme Court has made this clear in connection with Section 2(3) of the Act and its exclusion of "any individual having the status of an independent contractor" from the Act's otherwise broad definition of statutory employees.[62] In determining whether a common-law employment relationship exists in cases arising under Federal statutes like the Act, the Court has regularly looked to the *Restatement (Second) of Agency* (1958) for guidance.[63] Section 220(1) of the *Restatement (Second)* provides that a "servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

The Board's joint-employer doctrine is best understood as always having incorporated the common-law concept of control—as the Supreme Court's one decision involving the doctrine confirms. In the *Greyhound* case, as we have seen, the Court framed the issue presented as whether one statutory employer "possessed sufficient control over the work of the employees to qualify as a joint employer with" another statutory employer.[64] Thus, the Board properly considers the existence, extent, and object of the putative joint employer's control, in the context of examining the factors relevant to determining the existence of an employment relationship.[65] Accordingly, mere "service under an agreement to accomplish results or to use care and skill in accomplishing results" is not evidence of an employment, or joint-employment, relationship.[66]

Deciding the joint-employer issue under common-law principles is not always a simple task, just as distinguishing between employees and independent contractors in the common law can be challenging (as the Supreme Court has recognized).[67] In cases where the common law would *not* permit the Board to find joint-employer status, we do not believe the Board is free to do so. Even where the common law *does* permit the Board to find joint-employer status in a particular case, the Board must determine whether it would serve the purposes of the Act to do so, taking into account the Act's paramount policy to "encourage[] the practice and procedure of collective bargaining" (in the words of Section 1). In other words, the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status.[68] As the Supreme Court has explained, "[o]ne of

[61] 29 U.S.C. §158(a)(5) (emphasis added).

[62] See *NLRB v. United Insurance Co. of America* 390 U.S. 254, 256–258 (1968). See also *FedEx Home Delivery*, 361 NLRB 610, 610–611 (2014) (reviewing Supreme Court's application of common-law test in independent-contractor cases arising under Federal statutes). See also *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 92–95 (1995) *(*where Congress has used the term "employee" in a statute without clearly defining it, the Court assumes that Congress "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine"); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–740 (1989) (same).

[63] See, e.g., *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323–324 (1992) (interpreting Employee Retirement Income Security Act). See also *Restatement (Second) of Agency* §220, comment g ("Under the existing regulations and decisions involving the Federal Labor Relations Act, there is little, if any, distinction between employee and servant as here used.").

[64] *Boire v. Greyhound Corp.*, supra, 376 U.S. at 481.

[65] See generally *Vizcaino v. U.S. District Court of the Western District of Washington*, 173 F.3d 713, 723 (9th Cir. 1999) (describing *Restatement (Second)* Sec. 220 factors as "useful" in determining whether common-law employment relationship existed between worker and client firm of temporary employment agency for purposes of ERISA).

Section 220(2) of the *Restatement (Second)* provides that:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

[66] *Restatement (Second) of Agency* §220, comment e (addressing distinction between employees and independent contractors).

[67] *United Insurance*, supra, 390 U.S. at 258 (noting the "innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor"). See also *Restatement (Second) of Agency* §220, comment c ("The relation of master and servant is one not capable of exact definition. . . . [I]t is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation.").

[68] The General Counsel urges the Board to find joint-employer status:

> where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful collective bargaining could not occur in its absence. Under this approach, the Board would return to its traditional standard and would make no

the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."[69] To best promote this policy, our joint-employer standard—to the extent permitted by the common law—should encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible.[70]

The core of the Board's current joint-employer standard—with its focus on whether the putative joint employer "share(s) or codetermine(s) those matters governing the essential terms and conditions of employment"—is firmly grounded in the concept of control that is central to the common-law definition of an employment relationship. The Act surely permits the Board to adopt that formulation. No federal court has suggested otherwise, and the Third Circuit in *Browning-Ferris*, of course, has endorsed this aspect of the standard.

The Board's post-*Browning-Ferris* narrowing of the joint-employer standard, however, has a much weaker footing. The Board has never looked to the common law to justify the requirements that a putative joint employer's control be exercised and that the exercise be direct and immediate, not "limited and routine." This aspect of the current standard is not, in fact, compelled by the common law—and, indeed, seems inconsistent with common-law principles. Because the Board thus is not obligated to adhere to the current standard, we must ask whether there are compelling policy reasons for doing so. The Board's prior decisions failed to offer any policy rationale at all, and we are not persuaded that there is a sound one, given the clear goals of the Act.

Under common-law principles, the right to control is probative of an employment relationship—whether or not that right is exercised. Sections 2(2) and 220(1) of the *Restatement (Second) of Agency* make this plain, in referring to a master as someone who "controls or has the *right to control*" another and to a servant as "subject to the [employer's] control *or right to control*" (emphasis added). In setting forth the test for distinguishing between employees and independent contractors, *Restatement (Second)* Section 220(2), considers (among other factors) the "extent of control which, *by the agreement*, the master *may* exercise over the details of the work" (emphasis added). The Board's joint-employer decisions requiring the exercise of control impermissibly ignore this principle.

Nothing about the joint-employer context suggests that the principle should not apply in cases like this one. Indeed, the Supreme Court's decision in *Greyhound*, supra, was entirely consistent with the *Restatement (Second)* when it described the issue as whether one firm "*possessed* [not exercised] sufficient control over the work of the employees to qualify as a joint employer."[71] Where a user employer reserves a contractual right (emphasis added) to set a specific term 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. Even where it appears that the user, in practice, has ceded administration of a term to the supplier, the user can still compel the supplier to conform to its expectations. In such a case, a supplier's apparently independent control over hiring, discipline, and work direction is actually exer-

> distinction between direct, indirect, and potential control over working conditions and would find joint employer status where "industrial realities" make an entity essential for meaningful bargaining.

Amicus Brief of the General Counsel at 17. We decline to adopt this test insofar as it might suggest that the applicable inquiry is based on "industrial realities" rather than the common law. To be sure, however, we agree with the General Counsel that "direct, indirect, and potential control over working conditions"—at least as we have explained those concepts here— are all relevant to the joint-employer inquiry.

We also agree with the General Counsel that the "way the separate entities have structured their commercial relationship" is relevant to the joint-employer inquiry. Its relevance depends on whether the entities' relationship tends to show that the putative joint employer controls, or has the right to control—in the common-law sense—employees' essential terms and conditions of employment. "Sufficient influence" is not enough, however, if it does not amount to control.

As explained, we will not find joint-employer status where a putative joint-employer—despite the existence of a common-law employment relationship—could not engage in meaningful collective bargaining. But we reject any suggestion that such status should be found *only* where meaningful collective bargaining over employees' terms and conditions could not occur *without* the participation of the putative joint employer. Where two entities "share or codetermine those matters governing the essential terms and conditions of employment," they are *both* joint employers—regardless of whether collective bargaining with one entity alone might still be regarded as meaningful, notwithstanding that certain terms and conditions controlled only by the *other* entity would be excluded from bargaining.

[69] *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 211 (1964).

[70] See *Management Training Corp.*, 317 NLRB 1355, 1357 (1995) (recognizing, with regard to employers with close ties to government entities, that an employer may engage in meaningful bargaining with employees even where it does not exercise control over the full range of economic issues).

Our dissenting colleagues cite *Management Training* for the proposition that the bargaining obligation should be limited to the employees' most proximate employer because "employees and their exclusive bargaining representatives can still engage in meaningful bargaining under the Act even with an employer who lacks control over a substantial number of essential terms of employment." But the Board approved of such limited bargaining in *Management Training* only because some terms of employment were controlled by a government entity that was outside of the Board's jurisdiction. No such obstacle to bargaining exists here. Moreover, the thrust of *Management Training* was that an employer subject to the Act is required to bargain over the significant terms of employment that it *does* control.

[71] *Boire v. Greyhound Corp.*, supra, 376 U.S. at 481.

cised subject to the user's control. If the supplier does not exercise its discretion in conformance with the user's requirements, the user may at any time exercise its contractual right and intervene. Where a user has reserved authority, we assume that it has rationally chosen to do so, in its own interest. There is no unfairness, then, in holding that legal consequences may follow from this choice.[72]

Just as the common law does not require that control must be exercised in order to establish an employment relationship, neither does it require that control (when it *is* exercised) must be exercised directly and immediately, and not in a limited and routine manner (as the Board's current joint-employer standard demands). Comment d ("Control or right to control") to Section 220(1) of the *Restatement (Second)* observes that "the control or right to control needed to establish the relation of master and servant may be very attenuated."[73] The common law, indeed, recognizes that control may be *indirect*. For example, the *Restatement of Agency (Second)* §220, comment l ("Control of the premises") observes that

> [i]f the work is done upon the premises of the employer with his machinery by workmen who agree to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are the servants of the owner...

and illustrates this principle by citing the example of a coal mine owner employing miners who, in turn, supply their own helpers. Both the miners *and* their helpers are servants of the mine owner.[74] As the illustration demonstrates, the common law's "subservant" doctrine addresses situations in which one employer's control is or may be exercised indirectly, where a second employer directly controls the employee.[75] The Federal courts have applied the "subservant" doctrine in cases under Federal statutes that incorporate the common-law standard for determining an employment relationship[76]—including the National Labor Relations Act.[77] The most recent authoritative effort to restate the common law related to employment is consistent with traditional doctrine and similarly makes clear that direct and immediate control is *not* required.[78]

In this respect, too, nothing supports the view that common-law principles can or should be ignored in the Board's joint-employer doctrine. Board case law suggests that in many contingent arrangements, control over employees is bifurcated between employing firms with each exercising authority over a different facet of decision making. Where the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user's guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees' working conditions are a byproduct of two layers of control. The

[72] The dissent observes that the Board has assigned probative weight only to evidence of actual authority or control in its assessment of various statutory exclusions, including independent contractors and supervisors. But the guiding policy in those areas, as here, is to ensure that statutory coverage is fully effectuated. See *FedEx Home Delivery*, 361 NLRB No. 55, slip. op. at 9 (2014), quoting *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996), ("[A]dministrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach."). To recognize the significance of the right to control in the joint employment context, in which two putative employers are involved, both serves that policy and is consistent with the common law.

[73] "[I]t is not so much the actual exercise of controls as possession of the right to control which is determinative. In other words, 'subject to the control of the master' does not mean that the master must stand over the servant and constantly give directions." *The Law of Agency and Partnership* Sec. 50 (2nd ed. 1990).

[74] See also *Restatement (Second) of Agency*, Sec. 5, comments e & f, & illustration 6 (discussing subservant relationship between mine owner and miner's helper).

[75] See *Restatement (Second) of Agency*, Sec. 5 ("Subagents and Subservants") (1958); Warren A. Seavey, *Subagents and Subservants*, 68 Harv. L. Rev. 658, 669 (1955) (in subservant situation, the "employing servant . . . is in the position of a master to those whom he employs but they are also in the position of servants to the master in charge of the entire enterprise"). The *Restatement (Second)* Sec. 5, comment e observes that:

> Illustrations of the subservant relation include that between the mine owner and the assistant of a miner who furnishes his own tools and assistants, the latter, however, being subject to the general mine discipline; the relation between the owner of a building and an employee of a janitor; the relation between the employees of a branch manager of a corporation where the branch manager is free to control and pay his assistants, but where all are subject to control by the corporation as to their conduct.

[76] See, e.g., *Schmidt v. Burlington Northern & Santa Fe Railway Co.*, 605 F. 3d 686, 689–690 (9th Cir. 2010) (applying Federal Employers' Liability Act and finding evidence sufficient to establish employment relationship between railroad line and employee of railroad-car maintenance and repair company). Cf. *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1350 (3d. Cir. 1991) (observing that use of subservant doctrine is unnecessary where there is evidence of direct control). See generally *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 325 (1974) (recognizing subservant doctrine for purposes of Federal Employers' Liability Act).

[77] *Allbritton Communications Co. v. NLRB*, 766 F.2d. 812, 818–819 (3d Cir. 1985) (upholding Board's determination that newspaper was statutory employer of mailroom employees, although second employer operated mailroom).

[78] See *Restatement of Employment Law*, Section 1.04(b) (June 2015) ("An individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each *control or* supervise such rendering of services as provided in § 1.01(a)(3).")(emphasis added). (In relevant part, Sec. 1.01(a)(3) defines an employee as an individual who renders service to an employer who "controls the manner and means by which the individual renders service.")

Board's current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers' terms and conditions of employment of the user.[79]

The common-law definition of an employment relationship establishes the outer limits of a permissible joint-employer standard under the Act. But the Board's current joint-employer standard is significantly narrower than the common law would permit. The result is that employees covered by the Act may be deprived of their statutory right to bargain effectively over wages, hours, and working conditions, solely because they work pursuant to an arrangement involving two or more employing firms, rather than one. Such an outcome seems clearly at odds with the policies of the Act.

VI. THE RESTATED JOINT-EMPLOYER STANDARD

Having fully considered the issue and all of the arguments presented, we have decided to restate the Board's legal standard for joint-employer determinations and make clear how that standard is to be applied going forward.

We return to the traditional test used by the Board (and endorsed by the Third Circuit in *Browning-Ferris*): The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, as the Board and the courts have done in the past.[80]

We adhere to the Board's inclusive approach in defining "essential terms and conditions of employment." The Board's current joint-employer standard refers to "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction" a nonexhaustive list of bargaining subjects.[81] Essential terms indisputably include wages and hours, as reflected in the Act itself.[82] Other examples of control over mandatory terms and conditions of employment found probative by the Board include dictating the number of workers to be supplied;[83] controlling scheduling,[84] seniority, and overtime;[85] and assigning work and determining the manner and method of work performance.[86] This approach has generally been endorsed by the Federal courts of appeals.[87]

Also consistent with the Board's traditional approach, we reaffirm that the common-law concept of control informs the Board's joint-employer standard. But we will no longer require that a joint employer not only possess the authority to control employees' terms and conditions

[79] As noted in several briefs in support of the Union, the Board's longstanding legal formulation for joint-employer status, even post-*TLI*, nominally acknowledges this bifurcated dynamic by covering employers that "codetermine" employees' terms and conditions of employment. But the Board's restrictive application of the test, which precludes any holistic assessment of the way control is allocated between the contracting parties, undermines this aspect of the joint-employer standard.

[80] In some cases (or as to certain issues), employers may engage in genuinely shared decisionmaking, e.g., they confer or collaborate directly to set a term of employment. See *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966) (noting that employers "banded themselves together so as to set up joint machinery for hiring employees, for establishing working rules for employees, for giving operating instructions to employees, for disciplining employees for violation of rules, for disciplining employees for violation of safety regulations"). Alternatively, employers may exercise comprehensive authority over different terms and conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. See *D & F Industries*, 339 NLRB 618, 640 (2003). Or employers may affect different components of the same term, e.g., one employer defines and assigns work tasks, while the other supervises how those tasks are carried out. See *Hamburg Industries*, supra, 193 NLRB at 67. Finally, one employer may retain the contractual right to set a term or condition of employment. See *Hoskins Ready-Mix Concrete*, supra, 161 NLRB at 1493.

[81] *TLI*, supra, 271 NLRB at 798 (emphasis added). After *TLI*, the Board has continued to take a broad, inclusive approach to determining the relevant object of a putative joint employer's control, i.e., which terms and conditions of employment matter to the joint-employer inquiry. See *Aldworth Co.*, 338 NLRB 137, 139 (2002) (the "relevant facts involved in [the joint-employer] determination extend to nearly every aspect of employees' terms and conditions of employment and must be given weight commensurate with their significance to employees' work life"), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004).

[82] Sec. 8(d), defining an employer's duty to bargain, specifically refers to the obligation to "confer in good faith over *wages, hours,* and other terms and conditions of employment." 29 U.S.C. Sec. 158(d) (emphasis added).

[83] *Mobil Oil*, supra, 219 NLRB at 516.

[84] *Continental Winding Co.*, 305 NLRB 122, 123 fn. 4 (1991).

[85] *D&F Industries*, supra, 339 NLRB at 649 fn. 77.

[86] *DiMucci Const. Co. v. NLRB.*, 24 F.3d 949, 952 (7th Cir. 1994) ("Factors to consider in determining joint employer status are: (1) supervision of employees' day-to-day activities; (2) authority to hire or fire employees; (3) promulgation of work rules and conditions of employment; (4) issuance of work assignments; and (5) issuance of operating instructions").

[87] See, e.g., *Tanforan Park Food Purveyors Council v. NLRB*, 656 F.2d 1358, 1361 (9th Cir. 1981); *Sun-Maid Growers of California v. NLRB*, 618 F.2d 56, 59 (9th Cir. 1980) ("A joint employer relationship exists when an employer exercises authority over employment conditions which are within the area of mandatory collective bargaining."); *Cabot Corp.*, 223 NLRB 1388, 1389–1390 (1976), enfd. sub nom. *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977) (labor relations policies of the contractor or impact over the wages, hours, and working conditions of the contractor's employees).

of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner. Accordingly, we overrule *Laerco*, *TLI*, *A&M Property*, and *Airborne Express*, supra, and other Board decisions, to the extent that they are inconsistent with our decision today. The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.

The existence, extent, and object of a putative joint employer's control, of course, all may present material issues. For example, it is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining. Moreover, as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control.

The dissent repeatedly criticizes our decision as articulating a test under which "there can be no certainty or predictability regarding the identity of the 'employer.'" But we do not and cannot attempt today to articulate every fact and circumstance that could define the contours of a joint employment relationship. Issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment will undoubtedly arise in future cases—just as they do under the current test—and those issues are best examined and resolved in the context of specific factual circumstances. In this area of labor law, as in others, the "'nature of the problem, as revealed by unfolding variant situations,' requires 'an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer."'[88]

Further, while our dissenting colleagues concede that the common law must form the basis of the Board's joint-employer test, they seem unwilling to apply its mode of analysis. As the Supreme Court has acknowledged, multifactor common-law inquiries are inherently nuanced and indeterminate: "In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles."[89] Accordingly, the nuanced approach that the dissent decries is a longstanding necessity of our common-law mandate, and not a novel or discretionary feature that we introduce here.

Our dissenting colleagues also accuse us of articulating a test "with no limiting principle" that "removes all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding." This is simply not the case. The dissent ignores the limitations that are inherent to the common law, particularly those set forth in the Restatement provisions enumerated above. Instead, the dissent suggests that, under the revised joint-employer test, a homeowner who hires a plumber or a lender who sets the homeowner's financing terms may each be deemed a statutory employer. But by any common-law analysis, these parties will not exercise, or have the right to exercise, the requisite control over the details of employees' work to forge common-law employment relationships. It should therefore come as no surprise that the annals of Board precedent contain no cases that implicate the consumer services purchased by unsuspecting homeowners or lenders.

The dissent is particularly pointed in its criticism of our assignment of probative weight to a putative employer's indirect control over employees; it contends that "anyone contracting for services, master or not, inevitably will exert and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain." We do not suggest today that a putative employer's bare rights to dictate the results of a contracted service or to control or protect its own property constitute probative indicia of employer status. Instead, we will evaluate the evidence to determine whether a user employer affects the means or manner of employees' work and terms of employment, either directly or through an intermediary. In this case, for instance, BFI communicated precise directives regarding employee work performance through Leadpoint's supervisors. We see no reason why this obvious control of employees by BFI should be discounted merely because it was exercised via the supplier rather than directly.

Finally, the dissent asserts that today's decision gives the Board license to find joint-employer status based on only the slightest, most tangential evidence of control and "any degree of indirect or reserved control over a single term . . . may suffice to establish joint-employer status." Today's decision, however, makes clear that "all of the incidents of the relationship must be assessed."[90] Here, for example, our conclusion that BFI is a joint employer is based on a full assessment of the facts (set forth

[88] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574–575 (1978), quoting *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961).

[89] *United Insurance*, supra, 390 U.S. at 258.

[90] *United Insurance*, supra, 390 U.S. at 258.

below) that reveals multiple examples of reserved, direct, and indirect control over Leadpoint employees.

VII. RESPONSE TO DISSENT'S ARGUMENTS REGARDING THE COMMON LAW

Notwithstanding the strong basis in common law for the standard we adopt, our dissenting colleagues assert repeatedly that the Board is not applying common law but instead reverting to the "economic realities" test that was once applied by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). In *Hearst*, the Court interpreted the Act to include "employees (who) are at times brought into an economic relationship with employers who are not their employers"; to "reject conventional limitations" in defining an employee or employer; and to intend that those definitions be applied "broadly . . . by underlying economic facts."[91] Our dissenting colleagues also assert that while the *Hearst* standard would include indirect control over terms of employment within the definition of joint employer, common law does not.

Both of these assertions are incorrect. As we have already made clear, our revised standard considers—as does common law—only an entity's control over terms of employment, not the wider universe of all "underlying economic facts" that surround an employment relationship.[92] Moreover, courts applying the "economic realities" test for an employer under the Fair Labor Standards Act and the Agricultural Workers Protection Act (AWPA) have recognized that although that test is significantly more expansive than the common-law test, indirect control over terms of employment is clearly a factor in the common-law test.[93]

The dissent also insists that the "current test is fully consistent with the common law agency principles" and should not be revisited or altered. But it fails to dispute or even acknowledge the extensive legal authority we cite to establish the common-law foundation of our approach.[94]

[91] Id. at 129.

[92] Citing Justice Stewart's concurrence in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the dissent sets up a straw man suggesting that our test encroaches on an employer's decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales. Here, we are dealing only with subjects that are indisputably bargainable.

[93] "[The factor of] 'degree of supervision by the grower, *direct or indirect*, of the work' [regulation citation omitted] . . . like the growers' control over the workers, has more to do with common-law employment concepts of control than with economic dependence." *Antenor v. D & S Farms*, 88 F.3d 925, 934 (11th Cir. 1996) (applying AWPA, emphasis added). "[I]n considering a joint-employment relationship [under the AWPA] . . . our inquiry looks *not* to the common law definitions of employer and employee (for instance, to tests measuring *the amount of control an ostensible employer exercised over a putative employee*), but *rather* to the 'economic reality' of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer." Id. at 933, quoting *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994) (emphasis added). See also *Williamson v. Consolidated Rail Corp*., supra, 926 F.2d at 1350 (in the common-law test for an employment relationship under FELA, "the factual issue before the jury included direct control, as well as indirect control through sub-agency.")

[94] Even where our dissenting colleagues cite case law, their efforts are wholly unpersuasive. In support of their contention (notwithstanding their acknowledgment to the contrary) that the common law requires proof of direct and immediate control to substantiate employer status, our colleagues rely on a number of early common-law decisions that merely confirm the traditional legal distinction between an employer's control over the final product and an employer's control over the work of employees, which we do not dispute. Our colleagues also cite various independent-contractor decisions to support their proposition that courts have "implicitly limited their analysis to looking for direct and immediate control." But none of these decisions hold, even implicitly, that the existence of indirect control would *not* be probative of employer status; they are merely garden-variety independent-contractor cases in which courts found that individuals were not employees based on the totality of the circumstances. The dissent's attempt to glean any kind of general principle disfavoring indirect control as a relevant factor from these decisions—without citing any specific facts—is tenuous at best. Likewise, the comments from Sec. 220 of the *Restatement (Second) of Agency* on which our colleagues rely do not state or suggest that the consideration of indirect control is proscribed under the common law.

As to the more recent circuit court decisions that our colleagues cite, the dissent's assertions regarding direct control depend largely on the quotation of key phrases taken out of context. In *Gulino v. N.Y. State Education Dept.*, 460 F.3d 361 (2d Cir. 2006), for instance, the court found that the Education Department was not a joint employer (subject to Title VII liability) because it did not hire, promote, or demote teachers, or determine their pay, tenure or benefits. Id. at 379. Although the court stated that it was looking for a "level of control [that] is direct, obvious, and concrete, not merely indirect or abstract", it did so only to emphasize that all of the evidence presented to support a joint-employer finding was attenuated and insubstantial. Id. In *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009), the plaintiffs were overseas employees who alleged that Wal-Mart was their joint employer because it contracted with their local employers for production of goods. The court emphasized that Wal-Mart contracted with the factories only regarding prices, the quality of products, and the materials used. Id. at 683. As in *Gulino*, the court's statement that Wal-Mart did not have the right to exercise an "immediate level of day to day control" over employees was a reflection of Wal-Mart's total lack of control over working conditions rather than a specific holding on the probative value of indirect control evidence. Id. Indeed, neither of these cases were close, and the courts' decisions did not turn on any refusal to assign weight to indirect control; rather, in both decisions, there was little if any relevant evidence of control of any sort. In *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 740 (Cal. 2014), while the Supreme Court of California stated that its employer standard required "a comprehensive and immediate level of day-to-day authority over matters such as hiring, firing, direction, supervision, and discipline of the employee" (internal quotations omitted), the court was expressly relying on precedent under the California Fair Employment and Housing Act. That decision also addressed the particularized features of franchisor/franchisee relationships, none of which are present here.

VIII. APPLICATION OF THE RESTATED TEST

With the above principles in mind, we evaluate here whether BFI constitutes a joint employer under the Act. As always, the burden of proving joint-employer status rests with the party asserting that relationship.[95] Having assessed all of the relevant record evidence, we conclude that the Union has met its burden of establishing that BFI is a statutory joint employer of the sorters, screen cleaners, and housekeepers at issue. BFI is an employer under common-law principles,[96] and the facts demonstrate that it shares or codetermines those matters governing the essential terms and conditions of employment for the Leadpoint employees. In many relevant respects, its right to control is indisputable. Moreover, it has exercised that control, both directly and indirectly. Finding joint-employer status here is consistent with common-law principles, and it serves the purposes of the National Labor Relations Act. We rely on the following factors in reaching this conclusion.

A. Hiring, Firing, and Discipline

BFI possesses significant control over who Leadpoint can hire to work at its facility. By virtue of the parties' Agreement, which is terminable at will,[97] BFI retains the right to require that Leadpoint "meet or exceed [BFI's] own standard selection procedures and tests,"[98] requires that all applicants undergo and pass drug tests, and proscribes the hiring of workers deemed by BFI to be ineligible for rehire.[99] Although BFI does not participate in Leadpoint's day-to-day hiring process, it codetermines the outcome of that process by imposing specific conditions on Leadpoint's ability to make hiring decisions. Moreover, even after Leadpoint has determined that an applicant has the requisite qualifications, BFI retains the right to reject any worker that Leadpoint refers to its facility "for any or no reason."[100]

Similarly, BFI possesses the same unqualified right to "discontinue the use of any personnel" that Leadpoint has assigned.[101] Although BFI managers testified that they have never discontinued use of a Leadpoint employee or been involved in disciplinary procedures, record evidence includes two specific instances where BFI Operations Manager Keck reported employees' misconduct to Leadpoint and "request[ed] their immediate dismissal." In response to Keck's directive, Leadpoint officials immediately removed the employees from their line duties and dismissed them from the BFI facility shortly thereafter. Though the evidence shows that Leadpoint conducted its own investigation of the alleged misconduct, it is also plain that the outcome was preordained by BFI's ultimate right under the terms of the Agreement to dictate who works at its facility.[102]

B. Supervision, Direction of Work, and Hours

In addition, BFI exercises control over the processes that shape the day-to-day work of the petitioned-for employees. Of particular importance is BFI's unilateral control over the speed of the streams and specific productivity standards for sorting.[103] BFI argues that, although it controls the pace of work, Leadpoint supervisors alone decide how employees will respond to BFI's adjustments. This characterization of the process, however, discounts the clear and direct connection between BFI's decisions and employee work performance. The evi-

[95] See, e.g. *Flagstaff Medical Center*, supra, 357 NLRB 659, 667.

[96] It is clear that Leadpoint employees are, in the words of *Restatement (Second) of Agency* §220(1) "employed to perform services in the affairs of" BFI and "with respect to the physical conduct in the performance of the services" are "subject to [BFI's] control or right to control." The record shows that BFI engages in "de facto close supervision" of the work of Leadpoint employees; that the work of Leadpoint employees "does not require the services of one highly educated or skilled;" that Leadpoint employees have "employment over a considerable period of time with regular hours;" and that the work of Leadpoint employees "is part of the regular business" of BFI. *Restatement (Second) of Agency* Sec. 220, comment h ("Factors indicating the relation of master and servant"). As a general matter, this case closely resembles the situation addressed in *Restatement (Second)* Sec. 220, comment l, which explains that where "work is done upon the premises of the employer with his machinery by workmen who agree to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are the servants of the owner." Finally, the record here fairly permits categorizing the Leadpoint employees as subservants of BFI, as well as servants of Leadpoint.

[97] See *Value Village*, supra, 161 NLRB at 607; *Mobil Oil*, supra, 219 NLRB at 516 (relying on user's right to terminate contract at will as evidence of control).

[98] Applicants are tested on BFI's equipment and are required to meet specific productivity benchmarks in order to qualify for hire.

[99] See *K-Mart*, 159 NLRB 256, 258 (1966) (relying, in part, on contract language stating that contracting parties would not "hire an employee or former employee of the other without first checking" with the other party).

[100] See *Pacemaker Driver Service*, 269 NLRB 971, 975 (1984), enfd. 768 F.2d 778 (6th Cir. 1985) (relying on user's unilateral right to reject any driver referred by contractor); *Lowery Trucking*, supra, 177 NLRB at 15 (noting that "while [the user] never rejected a driver hired by [the supplier], it had the right to do so.").

[101] See *Ref-Chem Co.*, supra, 169 NLRB at 379 (emphasizing user's "virtually unqualified right to request the removal of an employee of the contractor."); *Hamburg Industries*, supra, 193 NLRB at 67 (relying on user's right to force supplier to remove employees from its plant).

[102] As Keck stated in his e-mail to Leadpoint on this matter, the misconduct Keck witnessed "is all I need to proceed." See *Grand Central Liquors*, 155 NLRB 295, 297 (1965) (noting that where the user requested the discharge of employees, the supplier complied).

[103] *Clayton B. Metcalf*, supra, 223 NLRB at 644 (emphasizing that putative employer had "day-to-day responsibility for the overall operation of the [facility] and all . . . operations were performed in accordance with [its] . . . plan" and that it "exercised considerable control over the manner and means by which [the subcontractor] performed its operations.")

dence reveals that the speed of the line and the resultant productivity issues have been a major source of strife between BFI and the workers. BFI managers have directly implored workers to work faster and smarter; likewise, they have repeatedly counseled workers, in the interest of productivity, against stopping the streams. Tellingly, there is no evidence that Leadpoint has had any say in these decisions. Indeed, given BFI's "ultimate control" over these matters, it 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.[104]

BFI managers also assign the specific tasks that need to be completed, specify where Leadpoint workers are to be positioned, and exercise near-constant oversight of employees' work performance.[105] The fact that many of their directives are communicated through Leadpoint supervisors hardly disguises the fact that BFI alone is making these decisions.[106] Further, in numerous instances, BFI has dispensed with the middleman altogether. BFI managers have communicated detailed work directions to employees on the stream; held meetings with employees to address customer complaints and business objectives, and to disseminate preferred work practices; and assigned to employees tasks that take precedence over any work assigned by Leadpoint.[107] We find that all of these forms of control – both direct and indirect – are indicative of an employer-employee relationship.

In addition, BFI specifies the number of workers that it requires,[108] dictates the timing of employees' shifts,[109] and determines when overtime is necessary.[110] Although Leadpoint is responsible for selecting the specific employees who will work during a particular shift, it is BFI that makes the core staffing and operational decisions that define all employees' work days. In turn, Leadpoint employees are required to obtain the signature of an authorized *BFI* representative attesting to their "hours of services rendered" each week; failure to do so permits BFI to refuse payment to Leadpoint for time claimed by a Leadpoint worker.

C. Wages

We find too that BFI plays a significant role in determining employees' wages. Under the parties' contract, Leadpoint determines employees' pay rates, administers all payments, retains payroll records, and is solely responsible for providing and administering benefits. But BFI specifically prevents Leadpoint from paying employees more than BFI employees performing comparable work.[111] BFI's employment of its own sorter at $5 more an hour creates a de facto wage ceiling for Leadpoint workers. In addition, BFI and Leadpoint are parties to a cost-plus contract, under which BFI is required to reimburse Leadpoint for labor costs plus a specified percentage markup.[112] Although this arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship,[113] it is coupled here with the apparent requirement of BFI approval over employee pay increases.[114] Thus, after new minimum wage legislation went into effect, BFI and Leadpoint entered into an agreement verifying that BFI would pay a higher rate for the services of Leadpoint employees.[115]

[104] *Int'l Trailer*, supra, 133 NLRB at 1529. See also *Carrier Corp. v. NLRB*, supra, 768 F.2d at 781 (finding substantial evidence in support of the Board's joint-employer finding where putative employer "exercised substantial day-to-day control over the drivers' working conditions.").

[105] See *Hamburg Industries*, supra, 193 NLRB at 67 (finding indicia of control where putative employer instructed supplier on the work to be performed and "constantly check[ed] the performance of the workers and the quality of the work.")

[106] See *Int'l Trailer*, supra, 133 NLRB at 1529 (noting that, although putative employer did not directly supervise employees, it issued orders, through the other firm's supervisor, as to how employees should perform their duties).

[107] See *Sun-Maid Growers*, supra, 239 NLRB at 350 (finding indicia of control where putative employer's supervisors "occasionally provided specifications and instructions regarding the manner in which the work could be performed" and directly assigned work that took precedence over other assignments).

[108] See *Mobil Oil*, supra, 219 NLRB at 516 (relying on user's ability to dictate the size of the supplier's crew); *Hamburg Industries*, supra, 193 NLRB at 67 (same).

[109] BFI also affects the length of break periods by requiring employees to clean around their work stations before releasing them on break.

[110] *Sun-Maid Growers*, supra, 239 NLRB at 351 (finding indicia of control where the user dictated employees' "basic workweek" and number of overtime hours available based on its production schedule); *Floyd Epperson*, supra, 202 NLRB at 23 (user established work schedules).

[111] See *K-Mart*, 161 NLRB 1127, 1129 (1966) (relying on the fact that putative employer directed other firm to start full-time employees at no less than the rate that it paid to certain categories of its employees).

[112] See *CNN America*, 361 NLRB 439, 444 (2014) (relying on parties' cost-plus arrangement as evidence of joint-employer status); *Hoskins Ready-Mix Concrete*, supra, 161 NLRB at 1493, and the cases cited in footnote 37.

[113] See *Pulitzer Publishing Co.*, 242 NLRB 35, 36 (1979), enf. denied 618 F.2d 1275 (8th Cir. 1980), cert. denied 499 U.S. 875 (1980) (assessing parties' cost-plus contract as one factor among many).

[114] See *Hoskins Ready-Mix Concrete*, supra, 161 NLRB at 1493 (relying on the fact that supplier was required to consult with user and obtain clearance before changing pay rates or hiring new employees at a rate above a specified level).

[115] In addition to the factors stated, we rely on the fact that BFI, by the terms of the Agreement, compels Leadpoint and its employees to comply with BFI's safety policy, and reserves the right to enforce its safety policy as to the workers. See *Hamburg Industries*, 193 NLRB at 67 (user requires all employees to follow its own safety rules); *Man-*

We find BFI's role in sharing and codetermining the terms and conditions of employment establishes that it is a joint employer with Leadpoint.[116] Accordingly, we reverse the Regional Director and find that BFI and Leadpoint are joint employers of the sorters, screen cleaners, and housekeepers at issue.[117]

VIII. THE IMPLICATIONS OF TODAY'S DECISION

Today's decision is grounded firmly in the common law, while advancing the policies of the National Labor Relations Act. In both respects, its approach is superior to prior law, which, as we have explained, imposed restrictions on the joint-employer standard that have no common-law basis and that foreclosed collective bargaining even in situations where it could be productive. Certainly, we have modified the legal landscape for employers with respect to one federal statute, the National Labor Relations Act.[118] But "reevaluating doctrines, refining legal rules, and sometimes reversing precedent are familiar parts of the Board's work—and rightly so."[119] As recognized by the Supreme Court:

> The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development . . . of the national labor law would misconceive the nature of administrative decisionmaking.

NLRB v. J. Weingarten, supra, 420 U.S. at 265–266.

Our colleagues' long and hyperbolic dissent persistently mischaracterizes the standard we adopt today and grossly exaggerates its consequences, but makes no real effort to address the difficult issue presented here: how best to "encourag[e] the practice and procedure of collective bargaining" (in the Act's words) when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer. Instead, the dissent puts the preservation of the current status quo far ahead of any cognizable statutory policy. Our colleagues never adequately explain why the Board should adhere to an approach that they essentially concede is not compelled by the common law and that demonstrably fails to fully advance the goals of the Act.[120]

As a practical matter, the criticisms that our colleagues level at our joint-employer standard could be made about the concept of joint employment generally—which has been recognized under the Act for many decades and which has long been a familiar feature of labor and employment law. The law-school-exam hypothetical of doomsday scenarios that they predict will result from today's decision is likewise based on an exaggeration of the challenges that can sometimes arise when multiple employers are required to engage in collective bargaining. The potential for these types of challenges to arise has existed for as long as the Board has recognized the joint-employer concept. Nonetheless, employers and unions have long managed to navigate these challenges, and the predicted disasters have not come to pass.[121]

power, 164 NLRB 287, 287–288 (1967) (user gives employees safety instruction and conducts periodic safety meetings). We also note that BFI and Leadpoint have jointly determined, also by terms of the Agreement, that employees cannot work at BFI for more than 6 months. We find that these terms are further indicative of BFI's status as an employer of the employees at issue.

[116] See *Hamburg Industries*, supra, 193 NLRB at 67 (finding user to be joint-employer, in substantially similar factual scenario, where user had "considerable control over [supplier's] operations in such critical areas as work instructions, quality control and the right to reject finished work, work scheduling, and indirect control over wages").

[117] The dissent, in its brief discussion of the facts in this case, contends that "the majority's evidence amounts to a collection of general contract terms or business practices . . . plus a few extremely limited actions that had some routine impact on Leadpoint employees." In so doing, however, the dissent cannot avoid setting out a list of nine specific ways in which BFI has exercised or reserved control over Leadpoint employees. In our view, our colleagues' accounting of these factors makes a persuasive case for BFI's joint-employer status. Nonetheless, we note that the dissent's analysis excludes or downplays several additional critical factors, including BFI's control over the speed of the lines, productivity standards, and the use of the stop switches, as well as BFI's direct and ongoing instruction of Leadpoint employees in the details of job performance.

[118] The Board's joint-employer standard, of course, does not govern joint-employer determinations under the many other statutes, federal and state, that govern the workplace and that use a variety of different standards to determine whether a particular business entity has legal duties with respect to particular workers.

[119] *UGL-UNICCO Service Co.*, 357 NLRB 801, 805 (2011).

[120] The dissent is simply wrong when it insists that today's decision "fundamentally alters the law" with regard to the employment relationships that may arise under various legal relationships between different entities: "lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer." None of those situations are before us today, and we decline the dissent's implicit invitation to address the facts in every hypothetical situation in which the Board might be called on to make a joint-employer determination. As we have made clear, the common-law test requires us to review, in each case, all of the relevant control factors that are present determining the terms of employment. In this case we are specifically concerned with only two employers: BFI and Leadpoint.

Likewise, we need not address the dissent's assertion that the decision somehow undermines other rules under the Act that are not at issue here, such as the prohibition on secondary boycott activity, other than to emphasize that our decision today does not modify any other legal doctrine, create "different tests" for "other circumstances," or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act.

[121] For example, 20 years ago, the Board changed its approach in cases involving government contractors, rejecting the position that the Board should assert jurisdiction only where the contractor controlled economic terms and conditions of employment. *Management Training Corp.*, supra. The dissent insisted that the Board had "radically change[d] extant law," adopting a "doctrine that ha[d] virtually no

It is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace. Such an approach has no basis in the Act or in federal labor policy.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 32 shall, within 14 days of this Decision on Review and Direction, open and count the impounded ballots cast by the employees in the petitioned-for unit, prepare and serve on the parties a tally of ballots, and thereafter issue the appropriate certification.

MEMBERS MISCIMARRA AND JOHNSON, dissenting.

The National Labor Relations Act (the Act) establishes a comprehensive set of rules for industrial relations in this country, and a primary function of the Board is to foster compliance with those rules by employees, unions, and employers. To comply with these rules, as they have grown and evolved over the last eight decades, substantial planning is required. This is especially true in regard to collective bargaining, a process that is central to the Act. The Act's bargaining obligations are formidable—as they should be—and violations can result in significant liability. When it comes to the duty to bargain, the resort to strikes or picketing, and even the basic question of "who is bound by this collective-bargaining agreement," there is no more important issue than correctly identifying the "employer." Changing the test for identifying the "employer," therefore, has dramatic implications for labor relations policy and its effect on the economy.

Today, in the most sweeping of recent major decisions, the Board majority rewrites the decades-old test for determining who the "employer" is. More specifically, the majority redefines and expands the test that makes two separate and independent entities a "joint employer" of certain employees. This change will subject countless entities to unprecedented new 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, including what have heretofore been unlawful secondary strikes, boycotts, and picketing.

Our colleagues are driven by a desire to ensure that the prospect of collective bargaining is not foreclosed by business relationships that allegedly deny employees' right to bargain with employers that share control over essential terms and conditions of their employment. However well intentioned they may be, there are five major problems with this objective.

First, no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority's new standards. In this regard, we believe the majority's new test impermissibly exceeds our statutory authority. From the majority's perspective, the change in the joint-employer analysis is an allegedly necessary adaptation of Board law to reflect changes in the national economy. In making this change, they purport to operate within the limits of traditional common-law principles by restoring and clarifying what they claim to be the law applied by the Board prior to 1984. In actuality, however, our colleagues incorporate theories of "economic realities" and "statutory purpose" that extend the definitions of "employee" and "employer" far beyond the common-law limits of agency principles that Congress and the Supreme Court have stated must apply.[1] Their decision represents a further expansion of revisions made in the majority decisions in *FedEx*,[2] which similarly revised the Board's longstanding definition of independent contractor status in a way that will predictably extend the Act's coverage to many individuals previously considered to be excluded as independent contractors, and in *CNN*,[3] which imposed after-the-fact joint-employer obligations contrary to the parties' 20-year-bargaining history, applicable collective-bargaining agreements (CBAs), relevant services contracts and the Board's own prior union certifications.

Second, the majority's rationale for overhauling the Act's "employer" definition—to protect bargaining from limitations resulting from third-party relationships that indirectly control employment issues—relies in substantial part on the notion that these relationships are unique in our modern economy and represent a radical departure from simpler times when labor negotiations were unaffected by the direct employer's commercial dealings with other entities. However, such an economy has not existed in this country for more than 200 years.[4] Many forms

limitation" and would "cause more problems than it solve[d]." 317 NLRB at 1360–1362. These dire predictions did not come to pass, and *Management Training* remains the law today.

[1] The common-law agency principles are also known as "master-servant" principles in the older cases and literature, and these terms are used interchangeably both in the doctrine and here.

[2] *FedEx Home Delivery*, 361 NLRB 610 (2014).

[3] *CNN America, Inc.*, 361 NLRB 439 (2014).

[4] If our colleagues desired to return to a time when labor-management relations were insulated from third-party business relationships and competitive pressures, they would need to go back to our country's origins. The work of labor economists John R. Commons and Selig Perlman, who are perhaps the two most authoritative historians of the American labor movement, indicates that unions expanded and contracted for the first several centuries of economic development in the United States, and the transition to national markets, combined with unprecedented business competition, caused extensive labor-management instability. See 1 John R. Commons, *HISTORY OF LABOUR*

of subcontracting, outsourcing, and temporary or contingent employment date back to long before the 1935 passage of the Act. Congress was obviously aware of the existence of third-party intermediary business relationships in 1935, when it limited bargaining obligations to the "employer," in 1947, when it limited the definition of "employee" and "employer" to their common-law agency meaning, and in 1947 and 1959, when Congress strengthened secondary boycott protection afforded to third parties who, notwithstanding their dealings with the "employer," could not lawfully be subject to picketing and other forms of economic coercion based on their dealings with that "employer."[5] This is not mere conjecture; it is the inescapable conclusion that follows from Supreme Court precedent recognizing that the Act did not confer "employer" status on third parties merely because commercial relationships made them interdependent with an "employer" and its employees.[6]

Third, courts have afforded the Board deference in this context merely as to the Board's ability to make factual distinctions when applying the common-law agency standard.[7] However, our colleagues mistakenly interpret this as a *grant of authority to modify the agency standard itself*. This type of change is clearly within the province of Congress, not the Board. Thus, in *Yellow Taxi Co. of Minneapolis v. NLRB*,[8] in which the D.C. Circuit denounced the Board majority's "thinly veiled defiance" of controlling precedent regarding the "common law rules of agency," the court of appeals stated that "[n]o court can overlook an agency's defiant refusal to follow well established law," and it observed:

> The Board here is acting in an area where it is called upon to apply common law principles that have been established since 1800 and where the application of that law under the National Labor Relations Act has been declared by Congress and settled by the courts, including the Supreme Court, for some 36 years. In this area, there is no dispute as to the governing principles of law; what is involved is the application of law to facts. "[S]uch a determination of pure agency law involve[s] no special administrative expertise that a court does not possess." [*NLRB v. United Ins. Co. of America*, 390 U.S. 254, 260 (1968).]

To be specific, we understand the common-law standard as codified by the Act to put a premium on direct control before making an entity the joint employer of certain workers. Our fundamental disagreement with the majority's test is not just that they view indicia of indirect, and even potential, control to be probative of employer status, they hold such indicia can be *dispositive* without *any* evidence of direct control. Under the common law, in our view, evidence of indirect control is probative only to the extent that it supplements and reinforces evidence of direct control.

Fourth, the majority abandons a longstanding test that provided certainty and predictability, and replaces it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, even if this is based solely on a never-exercised "right" to exercise "indirect" control over what a Board majority may later characterize as "essential" employment terms. This new test leaves employees, unions, and employers in a position where there can be no certainty or predictability regarding the identity of the "employer." Just like the test of employee status rejected by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 530 U.S. 318, 326 (1992), the majority's new joint-employer standard constitutes "an approach infected with circularity and unable to furnish predictable results." This confusion and disarray threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties, including employees, employers, unions, and countless entities who are now cast into indeterminate legal limbo, with consequent delay, risk, and litigation expense. Nor can this type of

IN THE UNITED STATES 25–30 (1918); Selig Perlman, A *HISTORY OF TRADE UNIONISM IN THE UNITED STATES* 36–41 (1922); see also Philip S. Foner, *THE HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: FROM COLONIAL TIMES TO THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR* 338–340 (1947).

[5] See, e.g., Sec. 8(b)(4) and (e).

[6] See, e.g., *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951) (holding that construction industry general contractors have no "employer" relationship with the employees of subcontractors, notwithstanding the general contractor's responsibility for the entire project). In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), an employer contracted out the maintenance work and "merely replaced existing employees with those of an independent contractor," and even though the subcontractor's employees continued "to do the same work under similar conditions of employment" and the "maintenance work still had to be performed in the plant," id. at 213, *Fibreboard ceased being the "employer."* Indeed, the premise of *Fibreboard* and comparable decisions is that the outsourcing of work may "quite clearly imperil job security, or indeed terminate employment entirely" for employees of the contracting employer. Id. at 223 (Stewart, J., concurring).

[7] The Supreme Court's decision in *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), speaks directly only to the Board's ability to make factual distinctions under the common-law agency standard. The determination of whether two entities are joint employers "is essentially a factual issue." Id.

[8] 721 F.2d 366 (D.C. Cir. 1983). See also *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995) ("In some cases, there may be a question about whether the Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, renders its interpretation unreasonable.").

fundamental uncertainty be positively regarded by the courts.[9]

Fifth, to the extent the majority seeks to correct a perceived inequality of bargaining leverage resulting from complex business relationships, where some entities are currently nonparticipants in bargaining, the "inequality" addressed by the majority is the wrong target, and collective bargaining is the wrong remedy. As noted above, the inequality targeted by the new "joint-employer" test is a fixture of our economy—business entities have diverse relationships with different interests and leverage that varies in their dealings with one another. There are contractually "more powerful" business entities and "less powerful" business entities, and all pursue their own interests. The Board needs a clear congressional command—and none exists here—before undertaking an attempt to reshape this aspect of economic reality. The Act does not redress imbalances of power between employers, even if those imbalances have some derivative effect on employees. As Justice Stewart observed 50 years ago:

> [I]t surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. *Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative*.

Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964) (Stewart, J., concurring) (emphasis added); see also *First National Maintenance Corp. v. NLRB*, 452 U.S. at 676 (In adopting the NLRA, Congress "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."). Requiring collective bargaining wherever there is some interdependence between or among employers is much more likely to thwart labor peace than advance it.

Indeed, on matters of economic power and relative inequality, the Board is not even vested with "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970). Therefore, we are certainly not vested with general authority to define national economic policy by balancing the competing interests of different business enterprises.

The Act encourages collective bargaining, but only by an "employer" in direct relation to its employees. Our colleagues take this purpose way beyond what Congress intended, and the result unavoidably will be too much of a good thing. We believe the majority's test will actually foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the "employer" side. Indeed, even the commencement of good-faith bargaining may be delayed by disputes over whether the correct "employer" parties are present. This predictable outcome is irreconcilable with the Act's overriding policy to "*eliminate* the causes of certain substantial obstructions to the free flow of commerce."[10]

In sum, today's majority holding does not represent a "return to the traditional test used by the Board," as our colleagues claim even while admitting that the Board has never before described or articulated the test they announce today. Contrary to their characterization, the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act. In addition, because the commerce data applicable to joint employers is combined for jurisdictional purposes,[11] the Act's coverage will extend to small businesses whose separate operations and employees have until now not been subject to Board jurisdiction. As explained in detail below, we believe the majority impermissibly exceeds our statutory authority, misreads and departs from prior case law, and subverts traditional common-law agency principles. The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships. It will do violence as well to other requirements imposed by the Act, notably including the secondary boycott protection that Congress afforded to neutral employers. For all of these reasons, we dissent.

[9] See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678-679, 684–686 (1981), and other cases discussed in part V, subpart B of this opinion, emphasizing the need for certainty, predictability, and stability.

[10] Sec. 1 (emphasis added).

[11] *Valentine Properties*, 319 NLRB 8 (1995).

I. THE CURRENT JOINT-EMPLOYER TEST

The Act does not expressly define who is an employer, whether joint or sole. In relevant part, Section 2(2) states only that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly." In cases decided prior to 1984, both the Board and courts occasionally confused resolution of the issue whether two entities are joint employers by, among other things, blurring the distinction between the test for determining "single employer" and the test for determining "joint-employer" status.[12] In two cases decided in 1984—*Laerco Transportation*[13] and *TLI, Inc.*[14]—the Board clarified the law by expressly adopting the Third Circuit's joint-employer standard in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982): "The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." Applying this test as to "essential terms" in both *Laerco* and *TLI*, the Board stated it would focus on whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[15]

Both *TLI* and *Laerco* were cases applying the joint-employer test to the relationship between a company supplying labor to a company using it, the same business relationship at issue in the present case. The Board found that evidence of the "user" employer's actual but "limited and routine" supervision and direction would not suffice to establish joint-employer status.[16] Subsequently, in *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007), the Board further explained that it has "generally found supervision to be 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."

In *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002), the Board explained that under the existing joint-employer test, "[t]he essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate."[17] Consistent with this rationale, in *AM Property* the Board found that a contractual provision giving the user company (AM) the right to approve hires by the supplier company (PBS) to work at AM's office building was not, standing alone, sufficient to show AM's status as a joint employer. Instead, "[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."[18]

The *AM Property* distinction between potential authority and the actual exercise of authority is a commonplace, well-established fixture in Board jurisprudence. For example, in the Board's single-employer test, we have repeatedly required proof that "one of the entities exercises actual or active control [as distinguished from potential control] over the day-to-day operations or labor relations of the other."[19] In other contexts where a party bears the burden of proving that an entity falls within a particular statutory definition, members of today's majority have endorsed this evidentiary distinction, giving weight only to the actual exercise of authority or control.[20]

As discussed in section III below, the current test is fully consistent with the common-law agency principles

[12] See, e.g., *Parklane Hosiery Co.*, 203 NLRB 597, amended 207 NLRB 991 (1973).

[13] 269 NLRB 324 (1984).

[14] 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985).

[15] *Laerco*, 269 NLRB at 325; *TLI*, 271 NLRB at 798.

[16] *Laerco*, 269 NLRB at 326; *TLI*, 271 NLRB at 799. *Laerco* and *TLI* were decided by different 3-member panels of a Board then comprised of four sitting members. As such, they collectively represented the unanimous opinion of the full Board at that time.

[17] We note that, although concurring Member Liebman advocated revisiting the joint-employer standard represented by *TLI*, she expressly agreed with the majority that Board decisions applying this precedent "have required that the joint employer's control over these matters be direct and immediate." 338 NLRB 597, 597 fn. 1. The majority here is completely mistaken in asserting that the focus on "direct and immediate control" was a new addition to the *Browning-Ferris* joint-employer test in *Airborne*. Further, as we shall later explain, there is ample precedent in the common law for this requirement predating 1984.

[18] 350 NLRB at 1000.

[19] *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001). See also, e.g., *Dow Chemical Co.*, 326 NLRB 288 (1998); *Gerace Construction, Inc.*, 193 NLRB 645 (1971); *Los Angeles Newspaper Guild, Local 69*, 185 NLRB 303, 304 (1970).

[20] E.g., *FedEx Home Delivery*, 361 NLRB 1494, 1507 (2014) ("The Board has been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial autonomy, and those that are circumscribed or effectively blocked by the employer."); *Pacific Lutheran University*, 361 NLRB 1404, 1427 (2014) ("In order for decisions in a particular policy area to be attributed to the faculty, the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations."); and *Lucky Cab Co.*, 360 NLRB 271, 273 (2014) ("We reject, therefore, the judge's reliance on 'paper authority' set forth in the handbook, in light of the contrary evidence of the road supervisors' actual practice. *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000), enfg. in relevant part 327 NLRB 253 (1998) (no authority to discipline, despite statement in job description, where the alleged supervisors did not actually discipline or recommend discipline).").

that the Board must apply in determining joint-employer status. Further, as an administrative law judge has accurately summarized, the test reflects a commonsense, practical understanding of the nature of contractual relationships in our modern economy. "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. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees."[21]

II. THE MAJORITY'S NEW JOINT-EMPLOYER TEST

The majority today expressly overrules *TLI*, *Laerco*, *Airborne Express*, *AM Property*, supra and related precedent, *and* purports to return to a joint-employer test that allegedly applied prior to this line of precedent. Their analysis begins in a manner that is consistent with the Board's modern precedent: "The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." The "share or codetermine" language is the general statement of the joint-employer test in *Browning-Ferris* that was adopted and applied by the Board in both *TLI* and *Laerco*. Our colleagues go on to adopt *TLI* and *Laerco*'s description of essential terms and conditions of employment as "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction." If this was the extent of the majority's holding, there would be no need to overrule precedent.

However, the majority's decision makes clear that the new test expands joint-employer status far beyond anything that has existed under current precedent and, contrary to the majority's claim, under precedent predating *TLI* and *Laerco*. In a two-step progression, the first of which misleadingly depicts the limits of common law, the majority removes all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding:

> [W]e will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.

Moreover, the new test will evaluate the exercise of control by construing "share or codetermine" broadly:

> In some cases (or as to certain issues) employers may engage in genuinely *shared decision-making*, e.g., they *confer or collaborate* to set a term of employment. . . . Alternatively, employers may exercise *comprehensive authority* over different terms and conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. . . . Or employers *may affect different components of the same term*, e.g. one employer *defines and assigns work tasks*, while the other supervises *how those tasks are carried out*. . . . Finally, one employer may *retain the contractual right to set a term or condition of employment*. [Emphasis added.]

Our colleagues concede "it is certainly possible that in a particular case a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining." However, the majority fails to provide any guidance as to what control, under what circumstances, would be insufficient to establish joint-employer status.

What do the preceding passages and the overruling of cited precedent indicate? First, in any particular case, the majority may consider evidence about virtually any aspect of employment and may give dispositive weight to an employer's control over any essential term and condition of employment in finding a joint-employer relationship. Second, there will be no requirement that control over any essential term of employment be "direct and immediate" in order for it to be probative and potentially determinative. Indirect control, even a power reserved by contract but never exercised, will be considered and may suffice, *standing alone*, to find joint-employer status. Finally, while the majority purports to base its standard on the common law and "sufficient control . . . to permit meaningful collective bargaining," it remains to be seen whether even the occasional limited and routine discussion or collaboration about a single essential term of employment may suffice to establish joint-employer status. The majority repeatedly states that almost every aspect of a business relationship may be *probative*, but it provides no significant guidance as to what may or should be *determinative*.

The majority's new test represents a major unexplained departure from precedent. This test promises to effect a sea change in labor relations and business rela-

[21] *Southern California Gas Co.*, 302 NLRB 456, 461 (1991).

tionships. 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 multifactor standard. It is an analytical grab bag from which any scrap of evidence regarding indirect control or incidental collaboration as to any aspect of work may suffice to prove that multiple entities—whether they number two or two dozen—"share or codetermine essential terms and conditions of employment."

III. THE MAJORITY'S NEW TEST IMPERMISSIBLY DEPARTS FROM THE COMMON-LAW AGENCY TEST AND RESURRECTS THE CONGRESSIONALLY-REJECTED ECONOMIC REALITY AND BARGAINING INEQUALITY THEORIES

A. The Majority's Implicit Reliance on Economic Reality and Statutory Purpose Theory Directly Contravenes Congressional Intent

The threshold insurmountable problem with the majority's reformulated joint-employer test is that it far exceeds the limits of our statutory authority.[22] In fact, this is the third case decided recently where Board majorities have tested or exceeded those limits when dramatically expanding "employer" and "employee" status.

In *FedEx Home Delivery*, 361 NLRB No. 55 (2014), the majority claimed to be applying the common law when it broadened the Act's definition of "employee," which (based on language added in 1947 as part of the Taft-Hartley amendments) explicitly excludes any "independent contractor."[23] In altering the analysis for distinguishing employees from independent contractors, the majority distorted the common-law test to emphasize the perceived economic dependency of the putative employee on the putative employer. Member Johnson's dissent explained that the majority's treatment of "employee" and "independent contractor" status in *FedEx* was contrary to the Act and its legislative history, and the majority's factual findings were contrary to the record.[24]

In *CNN America, Inc*., 361 NLRB No. 47 (2014), the majority concluded that a client (CNN) was a joint employer of technical employees supplied by a contractor (TVS), although CNN undisputedly had no direct role in hiring, firing, disciplining, discharging, promoting, or evaluating TVS' employees, and CNN's "employer" status was contrary to the TVS collective-bargaining agreements, the services agreement entered into between CNN and TVS, two decades of bargaining history and CBAs (all identifying the contractor as the only "employer"), and prior union certifications by the Board. The Board majority, though ostensibly applying the traditional joint-employer test, relied on factors similar to those emphasized by the majority here (e.g., finding that CNN's services agreement gave it "considerable authority" over "staffing levels"). Member Miscimarra's dissent explained that the Board and the courts had long dealt with situations where contractor employees worked at client locations, with substantial interaction between the client and contracting employer, without conferring "employer" status on the client. *CNN America, Inc*., slip op. at 28, 31–32 (citing *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692; and *Fibreboard Corp. v. NLRB*, supra, 379 U.S. at 203 (other citations omitted)).[25]

In this case, our colleagues abandon extant joint-employer law, which had already been strained beyond its rational breaking point in *CNN*. Instead, similar to what was done in *FedEx* for the definition of a statutory employee, they have announced a new test of joint-employer status that, notwithstanding their adamant disclaimers, effectively resurrects and relies, at least in substantial part, on intertwined theories of "economic realities" and "statutory purpose" endorsed by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), which Congress expressly rejected in the Taft-Hartley Amendments of 1947. In *Hearst*, the Court applied the same rationale for the definitions of employee *and* employer under the original Wagner Act.

> To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper "physical conduct in the performance of the service." On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes.

[22] The majority cites the following passage from *American Trucking Assns. v. Atchison, T. & S.F. Ry. Co*., 387 U.S. 397, 416 (1967), purporting to justify the change in the joint-employer standard: "[Regulatory agencies] are supposed, *within the limits of the law and of fair and prudent administration*, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." Id. (emphasis supplied). As hereafter discussed, the change in the joint-employer standard is neither within the limits of the law nor representative of fair and prudent administration.

[23] Sec. 2(3).

[24] Member Miscimarra did not participate in *FedEx*, but he agrees with Member Johnson's criticism of the economic realities test applied by the majority and the analysis of "employee" and "independent contractor" issues addressed in Member Johnson's dissent.

[25] Member Johnson did not participate in *CNN*, but he agrees with the criticism of the majority's joint-employer finding as expressed in Member Miscimarra's dissent.

> Its Reports on the bill disclose clearly the understanding that "employers and employees not in proximate relationship may be drawn into common controversies by economic forces, and that the very disputes sought to be avoided might involve "employees (who) are at times brought into an economic relationship with employers who are not their employers." In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.[26]

In reaction to *Hearst*, Congress expressly excluded "independent contractors" from the Act's definition of a statutory employee in the Taft-Hartley Amendments of 1947. The purpose of this revision was manifest in the legislative history of the Amendments and repeatedly acknowledged thereafter by the Supreme Court, which stated in one case that

> [in *Hearst*] the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in s 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. . . . Thus there is no doubt that we should apply the common law agency test here in distinguishing an employee from an independent contractor.[27]

Our colleagues nevertheless cling to the notion that economic and policy considerations may determine the definition of employee and employer. Even assuming that may be true in some cases *not* dealing with the right to control under common law,[28] the Supreme Court squarely rejected reliance on these considerations in *Darden*, stating that

> *Hearst* and *Silk*, which interpreted "employee" for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read "employee," which neither statute helpfully defined, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning. . . . To be sure, Congress did not, strictly speaking, "overrule" our interpretation of those statutes, since the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law. But a principle of statutory construction can endure just so many legislative revisitations, and *Reid*'s presumption that Congress means an agency law definition for "employee" unless it clearly indicates otherwise signaled our abandonment of *Silk*'s emphasis on construing that term "'in the light of the mischief to be corrected and the end to be attained.'" [503 U.S. at 324–325 (footnote and citations omitted).]

Accordingly, the inescapable conclusion to be drawn from the Taft-Hartley legislation repudiating the *Hearst* opinion is that Congress must have intended that common-law agency principles, rather than the majority's much more expansive policy-based economic realities and statutory purpose approach, here govern the definition of employer as well as employee under the Act. Even if Congress had not been so clear, "it is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless a statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)). Thus, the majority's new joint-employer test is invalid if it does not comport with the common-law agency principles.

Nevertheless, our colleagues now expand the definition of employer by redefining the joint-employer doctrine in unstated—but unmistakable—reliance on the rationale of *Hearst* that was repudiated by Congress.[29]

[26] 322 U.S. at 128–129. See also *United States v. Silk*, 331 U.S. 704 (1947), applying the same economic realities and statutory purpose theories to the definition of employee under the Social Security Act.

[27] *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). See also *Boire v. Greyhound*, supra, 376 U.S. at 481 fn. 10, and *Nationwide Mutual Insurance Co. v. Darden*, supra, 503 U.S. at 324.

[28] See, e.g., *Allied Chemical Workers Local Union 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971).

[29] An unacknowledged antecedent for the joint-employer theory adopted here is the concurring opinion of then-Member Liebman in *Airborne Express*, supra, 338 NLRB at 597–599, who contended that "[g]iven business trends driven by accelerating competition, highlighted by this case, the Board's joint-employer doctrine may no longer fit economic realities." See also *AM Property Holding Co.*, supra, 350 NLRB at 1012 (Member Liebman, concurring in part and dissenting in part).

Our colleagues are motivated by a policy concern that an imbalance of leverage reflected in commercial dealings between the undisputed employer and third-party entities prevents "meaningful bargaining" over each term and condition of employment and is therefore in conflict with the statutory policy of encouraging collective bargaining. This approach reflects a desire to ensure that third parties that have "deep pockets," compared to the immediate employer, become participants in existing or new bargaining relationships, and that they will also be directly exposed to strikes, boycotts and other economic weapons, based on the most limited and indirect signs of potential control.[30] Whether this is good or bad policy—and we think it is bad for numerous reasons discussed below—this fundamental balancing of interests has already been done by Congress. And the simple fact is that Congress has forbidden the Board from applying an economic realities or statutory purpose rationale in defining employer and joint-employer status under the Act.

B. The Majority's New Test does not Comport with Common-Law Agency Principles

Our colleagues do not acknowledge the Congressional rejection of *Hearst*'s economic realities theory for defining "employee" and "employer" under the Act. Neither do they acknowledge their implicit reliance on this theory in announcing a new joint-employer test. Instead, they attempt, as they must, to persuade that their test of joint-employer status is consistent with common-law agency's master-servant doctrine. The attempt fails.

The "touchstone" at common law is whether the putative employer sufficiently controls or has the right to control putative employees. See *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448–449 (2003); Restatement (Second) of Agency §§ 2, 220 (1958). Without attribution, our colleagues state that the common law considers as potentially dispositive not only direct control, but also indirect control and even "reserved" control that has never been exercised. They would accordingly jettison the joint-employer test's requirement of evidence that the putative employer's control be "direct and immediate." As explained below, however, "control" under the common-law principles requires some direct-and-immediate control even where indirect control factors are deemed probative. The Act, and its incorporation of the common law, does not allow the Board to broaden the standard to include indirect control or an inchoate right to exercise control, *standing alone*, as a dispositive factor, which the majority does today.

Long before Congress anchored "employer" in the common law, courts applying those principles focused on discerning whether the putative master had control over the details of the work (master) or only the results to be achieved (not master). See, e.g., *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 522 (1889) ("[T]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'" (quoting *New Orleans, M&CR Co. v. Hanning*, 82 U.S. 649, 657 (1872).) Further, the Supreme Court has for over a century adhered to the proposition that "under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services."[31] Lower courts as well implicitly limited their analysis to looking for direct-and-immediate control. See, e.g., *Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan*, 179 F.2d 882 (8th Cir. 1950) (not attaching any importance to indirect control in finding real estate agents were not employees), cert. denied 340 U.S. 823 (1950); *Glenn v. Standard Oil Co.*, 148 F.2d 51 (6th Cir. 1945) (not attaching any importance to indirect control in finding operators of Standard Oil's bulk distribution plants were not employees); *Spillson v. Smith*, 147 F.2d 727 (7th Cir. 1945) (not attaching any importance to indirect control in finding the musicians of an orchestra were the

We note as well that the General Counsel relies on *Hearst* and economic reality theory in his amicus brief. The majority expressly rejects the General Counsel's argument, but implicitly relies on much of it. While we disagree with the General Counsel as to the need and basis for overruling the existing joint-employer test, we respect his efforts to address these important issues, which have broad ramifications that extend well beyond this particular case. We also commend his substantial public outreach efforts regarding these important proposed changes.

[30] See Michael Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 Boston College L. Rev. 329, 348 (1998) ("[I]f workers are to be assured the opportunity to utilize collective bargaining leverage to extract a greater share of the returns from their labor, they must be able to bargain with the firms that provide the capital."); see also Craig Becker, *Labor Law Outside the Employment Relation*, 74 Texas L. Rev. 1527 (1996) ("At bottom, my intent is to inquire how the principles of labor law might be freed from the limits of outmoded definitions of the employment relationship. That effort involves questioning the sanctity of the doctrine of privity of contract *as well as departing from the common-law paradigm of master-servant as foundations for rights and duties in the workplace.* Above all, it requires rethinking the nature of power at stake in labor relations so as to bring legal doctrine in line with contemporary economic realities.") (Emphasis added).

[31] *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963), citing and applying the analysis in *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909). See also *Kelly v. Southern Pacific Co.*, 419 U.S. 318, 329–330 (1974), cited with approval in *Community for Creative Non-Violence v. Reid*, 490 U.S. at 739–740, and in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 323.

employees of its leader and not the restaurant where they played).

As courts undoubtedly realized, anyone contracting for services, master or not, inevitably will exert and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain. For example, Judge Learned Hand wrote, in a case applying common-law principles to decide a production company was not the employer of the entertainers in vaudeville acts under the Social Security Act, that

> [i]n the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. By far the greater part of [the putative employer's] intervention in the 'acts' was no more than this. It is true, as we have shown, that to a very limited extent he went further, but these interventions were trivial in amount and in character; certainly not enough to color the whole relation.

Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717–718 (2d Cir. 1943).

The Supreme Court subsequently addressed the same point in construing the coverage of the Act's prohibition of coercive secondary activity against neutral construction employers by unions:

> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor *or make the employees of one the employees of the other*. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.[32]

To aid in applying this well-established common law for employer-employee relationships, the Supreme Court largely adopted the Restatement (Second) of Agency § 220's nonexhaustive list of factors to be considered. *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751–752; see also *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 323–324. The *Reid* Court wrote:

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

Reid, 490 U.S. at 751–752. The inquiry remains the same. The factors provide useful indicia of the putative employer's direct-and-immediate control, or its right to such control.

The comments to Section 220 of the Restatement clarify that the listed factors are not looking to indirect control. Comment j, on the duration of the relationship, provides: "If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him."[33] Comment k, on the source of the instrumentalities and tools, states it is understandable that the owner would regulate such instrumentalities because "if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the direction of the owner in their use." The same should hold true where one employer establishes rules for the use of its property. Comment *l*, on the location of work, informs that although the putative employer's controlling the location of work usually raises an inference of employer status, "[i]f, however, the rules are made only for the general policing of the premises, as where a number of separate groups of workmen are employed in erecting a building, mere conformity to such regulations does not indicate that the workmen are" employees.

Recently, courts applying the common law have continued to make it unmistakably clear that the employer standard requires sufficient proof of direct-and-immediate control. In finding that the New York State Education Department was not the employer of teachers under Title VII, the United States Court of Appeals for

[32] *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 689–690 (emphasis added).

[33] We note here that Leadpoint is not supposed to keep its employees assigned long term to the BFI project.

the Second Circuit wrote: "[The common-law standard] focuses largely on the extent to which the alleged master has 'control' over the day-to-day activities of the alleged 'servant.' The *Reid* factors countenance a relationship where the level of control is direct, obvious, and concrete, *not merely indirect or abstract*. . . . Plaintiffs in this case could not establish a master-servant relationship under the *Reid* test. [The State Education Department] does have some control over New York City school teachers—e.g., it controls basic curriculum and credentialing requirements—but SED does not exercise the workaday supervision necessary to an employment relationship." *Gulino v. N.Y. State Education Department*, 460 F.3d 361, 379 (2d Cir. 2006) (emphasis added), cert. denied 554 U.S. 917 (2008). Similarly, the United States Court of Appeals for the Ninth Circuit found, applying common-law principles, that Wal-Mart was not the joint employer of its suppliers' employees where Wal-Mart did not have the right to an "immediate level of 'day-to-day' control." *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682–683 (9th Cir. 2009) (quoting *Vernon v. State*, 10 Cal. Rptr. 3d 121 (Cal. Ct. App. 2004)). A few years later, the Supreme Court of California used the same language in finding a franchisor not liable under the California Fair Employment and Housing Act for a franchisee supervisor's harassment of an employee: "[T]raditional common law principles of agency and respondeat superior supply the proper analytical framework . . . . This standard requires 'a comprehensive and immediate level of 'day-to-day' authority' over matters such as hiring, firing, direction, supervision, and discipline of the employee." *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 740 (Cal. 2014) (quoting *Vernon*, supra).[34]

Contrary to our colleagues' characterization, the above-quoted language from *Gulino* and *Wal-Mart* cannot be dismissed as meaningless statements made "in cases where there was little if any relevant evidence of control of any sort." This begs the question why either court felt the need to specifically mention the absence of immediate control. As for *Patterson*, the majority states (as do we) that the case was decided under a California statute, but they fail to acknowledge that the court's opinion is founded on "traditional common law principles of agency and respondeat superior."[35] The salient point is that the cases we cite do indicate that evidence of direct and immediate control is essential to a finding of joint-employer status under the common law. By contrast, the majority does not and cannot cite a single judicial opinion that even implicitly affirms its concededly novel two-step version of an alternative common-law test or the proposition that a finding of a joint employer relationship under the common law can be based solely on indirect control.

In re *Enterprise Rent-A-Car Wage & Employment Practices Litigation*, 683 F.3d 462, 468–469 (3d Cir. 2012), provides a useful contrast between the common-law test of joint-employer status and the economic realities test that Congress expressly authorized by the unique language of the Fair Labor Standards Act (FLSA), but rejected in the Taft-Hartley Amendments of our Act. With respect to the economic realities test, the Third Circuit stated:

> When determining whether someone is an employee under the FLSA, "economic reality rather than technical concepts is to be the test of employment." *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) (internal quotation marks omitted). Under this theory, the FLSA defines employer "expansively," *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), and with "striking breadth." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947). The Supreme

[34] In *TLI*, supra, 271 NLRB at 798, the Board stated that "there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." We read that passage to provide a nonexclusive list of direct-and-immediate control factors to consider, and hereafter we discuss cases decided after *TLI* that did examine factors other than those enumerated in that case. However, evidence of control over the specific factors referred to in *TLI* is usually most relevant to the joint-employer analysis. It is no coincidence that the Supreme Court of California used a similar list in *Patterson*, as did the Ninth Circuit in *EEOC v. Pacific Maritime Assn.*, 351 F.3d 1270 (9th Cir. 2003). Discussing the Supreme Court's *Clackamas* decision in this Title VII case, the Court stated:

> The Supreme Court seems to suggest that the sine qua non of determining whether one is an employer is that an "employer can hire and fire employees, can assign tasks to employees and supervise their performance." Logically, before a person or entity can be a joint employer, it must possess the attributes of an employer to some degree. Numerous courts have considered the key to joint employment to be the right to hire, supervise and fire employees.

Id. at 1277. The Board's task is to weigh all of the incidents of the relationship to determine the sufficiency of the control, and that analysis necessarily includes qualitative assessments of the general significance of specific factors. The new test discards this safeguard against overinclusion in favor of finding any sporadic evidence or tangential effect on working conditions to be potentially sufficient to prove joint-employer status.

[35] The majority also distinguishes *Patterson* on the ground that it involves "the particularized features of franchisor/franchisee relationships, none of which are applicable here." As we state elsewhere in this opinion, the Board has heretofore maintained a unitary joint-employer test for all types of employer relationships. The suggestion that the test will vary from one type of relationship to another is unprecedented, and certainly has no foundation in the common law.

> Court has even gone so far as to acknowledge that the FLSA's definition of an employer is "the broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n. 3, 65 S.Ct. 295, 89 L.Ed. 301 (1945).[36]

The issue in *Enterprise* was whether the district court below erred in granting summary judgment against the plaintiff employees' claim that the parent company of their wholly owned rental car subsidiary was their joint employer with shared liability for alleged overtime wage violations. The district court had relied on a traditional common-law test developed under the ADEA and Title VII. However, the Third Circuit opined that

> [b]ecause of the uniqueness of the FLSA, a determination of joint employment "must be based on a consideration of the total employment situation and the economic realities of the work relationship." A simple application of the [district court's] test would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient *indirect* control as well. We therefore conclude that while the factors outlined today in [that test] are instructive they cannot, without amplification, serve as the test for determining joint employment under the FLSA.[37]

It is readily apparent from the distinctions underscored by the *Enterprise* court that the new joint-employer test announced by our colleagues is rooted in economic reality and statutory purpose theory, not in the "technical concepts" of common-law agency. Indeed, their new definition of employer equals or exceeds the "striking breadth" of the FLSA standard, and it cannot stand in the face of express Congressional disapproval.

The majority's explication of its new joint-employer test erases any doubt that the test is the analytical stepchild of *Hearst*, rather than being founded in common law. Our colleagues posit that as a first step they must determine whether an employment relationship exists at all between the alleged joint employer and an employee. Here, the majority does no more than acknowledge the obvious: an entity with no control whatsoever over a person performing services in that entity's affairs cannot be that person's employer. But the majority incorrectly sets this "zero control" state as the *outer limit* of common law master-servant agency, that is, if there is *some* control over *any* aspect of the performance of services, then common law would allegedly permit finding an employment relationship. Of course, if that were true, it would obliterate the common-law concept of an independent contractor and erase the distinction at common law between servant and nonemployee agent. The majority seems vaguely to recognize this, but as far as deciding whether it should find that a separate business is a joint employer with an undisputed employer of an undisputed employee, the majority nevertheless looks to whether it would serve the purposes of the Act to expand the joint-employer definition to serve the Act's policy of "encouraging the practice and procedure of collective bargaining" (in the words of Sec. 1). In their view, it is necessary to do so because the current test's "requirements—which serve to significantly and unjustifiably narrow the circumstances where a joint employment relationship can be found—leave the Board's joint employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes."

Compare the majority's reasoning to the following passages from *Hearst* concerning the test for determining whether newsboys were employees or independent contractors under the Wagner Act:

> Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment. . . . Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight, . . . Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the

[36] Id. at 467–468.

[37] Id. at 469. The court nevertheless affirmed the grant of summary judgment, finding insufficient proof that the parent company was a joint employer even under the expansive FLSA standard. It is not clear whether the same evidence considered under the majority's test here would lead to the same result.

> evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.

322 U.S. 124–127 (fns. omitted). The only significant difference between the majority's reasoning here and the Court's reasoning in *Hearst* is that the Court at least candidly recognized the "intermediate region" into which it extended the Wagner Act's definition of covered employees was *beyond* the scope of common law, while the majority blandly and disingenuously assures that the intermediate region into which they extend the definition of joint employer stays well within the limits of that law. Clearly it does not. Contrary to our colleagues, we believe the Board's traditional joint-employer test accurately reflects common law, and we disagree with any suggestion that their new test constitutes an appropriate way under common law to advance the statutory goal of promoting collective bargaining. Indeed, as we discuss below in section V, we find their test is more likely to destabilize collective bargaining than to promote it.

IV. EVEN IF THE NEW TEST WERE PERMISSIBLE, THE MAJORITY FAILS TO IDENTIFY SUFFICIENT REASONS TO OVERRULE PRECEDENT AND ADOPT A NEW JOINT-EMPLOYER TEST

A. The Majority's Alleged Return to the Alleged "Traditional Standard" Relies on a Selective Misreading of Precedent Before and After TLI and Laerco

The majority states that the *TLI* and *Laerco* decisions "significantly and unjustifiably" narrowed the Board's "traditional" joint-employer standard. This standard allegedly encompassed far more factors, including those related to indirect control and reserved contractual control, and more comprehensively analyzed employment relationships to determine whether an entity was a joint employer. However, in selecting only the few cases allegedly supporting this view of traditional practice, the majority has neglected others where the Board found no joint-employer relationship, despite the presence of the "traditional" or "indirect control" factors that the majority claims justify a finding of such a relationship. Contrary to the majority, the Board's prior cases did not manifest an intention to apply a broad analytical framework in which indirect control played a determinative role in joint-employer cases. We agree with the majority that the Board has traditionally carried out a fact-intensive assessment of whether a putative employer exercised sufficient control over, or retained the right to control, the employees at issue. We disagree, however, with the notion that prior to *TLI* and *Laerco* the Board, as a rule, gave much probative weight to evidence of "indirect control," or that such evidence, standing alone, was routinely determinative.[38] We will now turn to a discussion of these factors of "indirect control."

This sentence is emblematic of the majority's attempt to prove too much by the citation of the older cases:

> Thus, the Board's joint-employer decisions found it probative that employers retained the contractual power to reject or terminate workers; set wage rates; set working hours; approve overtime; dictate the number of workers to be supplied; determine "the manner and method of work performance"; "inspect and approve work," and terminate the contractual agreement itself at will. [Footnotes omitted.]

The foregoing statement includes footnote citations to precedent that allegedly shows that "the Board typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status. The Board did not require that this right be exercised, or that it be exercised in any particular manner." The majority fails to mention that in many of the cited cases there was evidence that the contractual rights *were exercised*, and there was other evidence of direct control over employees' work. The majority's statement also fails to account for all the Board cases that reach the contrary result with similar contractual provisions. Thus, we can paraphrase the majority's statement, with appropriate citations, that during the period preceding *TLI* and *Laerco*, the Board found *no* joint-employer status where putative "employers retained the contractual power to reject or terminate workers;[39] set wage rates;[40] set working hours;[41] approve overtime;[42] determine 'the manner and method of work performance';[43] 'inspect and approve work,'[44] and terminate the contractual agreement itself at will."[45] Additionally, prior to *TLI* and *Laerco* the Board found that employers who conferred over the

[38] Apart from our disagreement with the majority's characterization of the joint-employer tests that existed prior to 1984, we note that in one major respect *TLI* and *Laerco* undisputedly broadened the circumstances in which a joint-employer relationship could be found. That is, by adopting the Third Circuit's *Browning-Ferris* joint-employer test, the Board made clear that the more restrictive single-employer test, requiring a showing of less than an arms-length relationship between employers, did not apply.

[39] *Cabot Corp.*, 223 NLRB 1388, 1390 fn. 10 (1976), affd. sub nom. *Chemical Workers Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977); *Hychem Constructors, Inc.*, 169 NLRB 274, 276 (1968); *Westinghouse Electric Corp.*, 163 NLRB 914 (1967); *Space Services International Corp.*, 156 NLRB 1227, 1232 (1966).

[40] *Cabot*, supra; *Hychem*, supra at fn. 4; *Fidelity Maintenance & Construction Co.*, 173 NLRB 1032, 1037 (1968).

[41] *S. G., Tilden, Inc.*, 172 NLRB 752 (1968).

[42] *Hychem*, supra at 276.

[43] *S. G., Tilden, Inc.*, supra.

[44] *Cabot*, supra at 1392; *Westinghouse*, supra at 915.

[45] *Space Services*, supra at fn. 23.

number of employees needed and the hours to be worked were not joint employers.[46]

The majority also states that prior to *TLI* and *Laerco* "the Board gave weight to a putative joint employer's 'indirect' exercise of control over workers' terms and conditions of employment," citing *Floyd Epperson*, 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974). However, it is readily apparent that, while the Board noted anecdotal evidence of the employer's indirect control over wages and discipline in that case, its joint-employer finding was primarily based on evidence of direct and immediate supervision of the employees involved.[47] Accordingly, in *Fidelity Maintenance & Construction Co.*, supra, 173 NLRB at 1037, the Board emphasized *direct control*, saying that "the determinative factor in an owner contractor situation is whether the owner exercises or has the right to exercise sufficient *direct control* over the labor relations policies of the contractor, or over the wages, hours and working conditions" (emphasis added). Likewise, in *The John Breuner Co.*, supra, 248 NLRB at 989, the Board affirmed without comment the administrative law judge's observation that in prior truck delivery cases where the Board found joint-employer status, "there have always been supporting findings that the retailer or distributor by its supervisors, *directly supervised and controlled* the employees of his trucking contractor in the performance of their work" (emphasis added). Thus, contrary to the majority, *Epperson* and like precedent support the proposition that findings of joint-employer status in cases prior to *TLI* and *Laerco* that mention evidence of indirect control nevertheless turn on sufficient proof of direct control.

The majority also contends that "[c]ontractual arrangements under which the user employer reimbursed the supplier for workers' wages or imposed limits on wages were also viewed as tending to show joint-employer status," citing *Hamburg Industries*, 193 NLRB 67 (1971). *Hamburg* concerned a typical cost-plus contract where the user employer reimbursed the supplier employer for wages and then paid an additional fee. The Board has cited this factor in cases where the Board found joint-employer status. However, the Board has also found that this factor did not establish joint-employer status.[48] In any event, as explained in a subsequent case, the facts in *Hamburg* clearly demonstrated significant direct and immediate control of essential terms was exercised by the disputed employer. Specifically, "one employer, a manpower supplier, furnished another employer's entire work force, including first-level supervisors. That work force was subject to virtually complete control of the second employer. The second employer determined which tasks were to be performed and how they were to be performed. He also, in practice, set the wage rates."[49] Again, before *TLI* and *Laerco*, there was no established rule that cost-plus contracts should be given determinative weight in finding joint-employer status.

In sum, the precedent cited by the majority falls well short of showing that prior to *TLI* and *Laerco* there was a consistently applied "traditional joint-employer test" remotely equivalent to the one they announce today. The indirect control factors cited by the majority existed in many cases where the Board refused to find joint-employer status and thus were not frequently, much less routinely, determinative of joint-employer status. Evidence of direct and immediate control was far more often referenced as determinative in finding such status.[50] The interpretive key to different outcomes in this precedent is not due to a markedly different legal test; it is simply that "minor differences in the underlying facts might justify different findings on the joint-employer issue." *North American Soccer League v. NLRB (NASL)*, 613 F.2d 1379, 1382 (5th Cir. 1980), cert. denied 449 U.S. 899 (1980); see also *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 fn. 1 (6th Cir. 1985) (distinguishing *TLI* and *Laerco* by noting that a slight difference between two cases can tilt one toward a joint-employer finding, and the court was not deciding those other cases).

B. There Is No Judicial Precedent Adverse to the Board's Current Joint-Employer Standard or Supportive of the Majority's New Standard

It is reasonable to assume that if *TLI*, *Laerco*, and progeny departed abruptly from Board precedent without

[46] *The John Breuner Co.*, 248 NLRB 983, 989 (1980); *Furniture Distribution Center*, 234 NLRB 751, 751–752 (1978).

[47] Id. ("United establishes the work schedule of the drivers, has the authority to make changes in the drivers' assignments, selects routes for the drivers, and generally supervises the drivers in the course of their employment.").

[48] See *Hychem*, supra at 276 (referring to controls under a cost-plus contract as a "right to police reimbursable expenses under its cost-plus contract and do not warrant the conclusion that [user] has hereby forged an employment relationship"); *Westinghouse*, supra at 915 (cost-plus contract and no joint-employer finding); *Space Services*, supra at 1232 (cost-plus and no joint-employer finding); *Cabot*, supra at 1389 ("[C]ost plus contracts merely insured that Cabot obtain a satisfactory work product at cost and protected it against unnecessary charges being incurred."); *International House*, supra at 914 (cost-plus "purely arms length dealing"); *John Breuner*, supra at 988 (cost-plus insufficient to find joint employer).

[49] *Cabot*, supra, 223 NLRB at 1391 fn. 11.

[50] We recognize that dictum in *Airborne Freight* stated that "approximately 20 years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative joint employer's *indirect* control over matters relating to the employment relationship." 338 NLRB at 597 fn. 1. For the reasons just stated, we find this dictum to be a mistaken characterization of general precedent.

explanation, reviewing courts would by now have had the opportunity to criticize those decisions and would certainly have done so. After all, the Supreme Court and various appellate courts have warned the Board against such unexplained changes. See *Allentown Mack Sales & Services v. NLRB*, 522 U.S. 359, 375 (1998) ("The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application . . . and effective review of the law by the courts."); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 799 (1990) (Blackmun, J., dissenting) (finding the Board had departed from prior standard "without explanation"); *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) (stating that when "the Board has not been consistent in its choice of standard, as explained above . . . . the Board is not entitled to the normal deference we owe it"); *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) ("Requiring an adequate explanation of apparent departures from precedent thus not only serves the purpose of ensuring like treatment under like circumstances, but also facilitates judicial review of agency action in a manner that protects the agency's predominant role in applying the authority delegated to it by Congress."). As *LeMoyne* noted, courts are *duty-bound* to strike down Board decisions that lack explanation or are otherwise arbitrary and capricious in their exercise of statutory authority.

In this context, the Board's direct and immediate control standard has held up well over the last 30 years. While some courts may vary from the Board as to the particulars of a joint-employer test, others have expressly approved or applied the Board's test, and none have directly criticized that test or reversed a Board decision based on application of that test.

Significantly, two of the four Board decisions expressly overruled by the majority today were reviewed by a court of appeals, and both decisions were upheld. The decision in *TLI* was reviewed by a panel of the Third Circuit, the original *Browning-Ferris* circuit, and summarily affirmed in an unpublished decision.[51] Likewise, the decision in *AM Property* was reviewed and affirmed by a panel of the Second Circuit.[52] In accord with its own precedents, which date to before the issuance of *TLI* and *Laerco*, the court expressly endorsed the Board's standard requiring that "'an essential element' of any joint-employer determination is 'sufficient evidence of immediate control over the employees.'"[53] The court specifically supported the Board's finding that "limited and routine" supervision is insufficient to establish joint-employer status.

> The cases the Board relied on broadly support the proposition that 'limited and routine' supervision, *G. Wes Ltd.*, 309 NLRB at 226, consisting of 'directions of where to do a job rather than how to do the job and the manner in which to perform the work,' *Island Creek Coal*, 279 NLRB at 864, is typically insufficient to create a joint employer relationship. See also *Local 254, Serv. Emps. Intern. Union, AFL–CIO*, 324 N.L.R.B. 743, 746–49 (1997) (no joint employer relationship where employer regularly directed maintenance employees to perform specific tasks at particular times but did not instruct employees how to perform their work); *S. Cal. Gas Co.*, 302 N.L.R.B. 456, 461–62 (1991) (employer's direction of porters and janitors insufficient to establish joint employer relationship where employer did not, inter alia, affect wages or benefits, or hire or fire employees).

Id. at 443.

Thus, the Second Circuit has explicitly endorsed the Board's joint-employer standard. Further, as noted in an earlier case from the same circuit, other courts of appeals have varying standards for determining joint-employer status, but "[w]e see no need to select among these approaches or to devise an alternative test, because we find that an essential element under any determination of joint-employer status in a sub-contracting case is distinctly lacking in the instant case—*some evidence of immediate supervision or control of the employees.*"[54]

It is most noteworthy that, in addition to the absence of any circuit court precedent in conflict with the Board's current legal test of joint-employer status, there also is no circuit court precedent in support of the new two-step legal test articulated by our colleagues. That test, without any requirement that an alleged joint employer's control over those terms be significant or substantial, much less direct and immediate, most closely resembles a single Board decision's bizarre distortion of dictum from an Eighth Circuit opinion in *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (1954).

In *New Madrid*, the court denied enforcement of a Board order to the extent that it relied on finding that a company selling its business to an individual remained a coemployer with him. Finding no substantial evidence to

[51] *Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985).

[52] *Service Employees, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011), aff. in relevant part, enf. in part and denying in part on other grounds 350 NLRB 998.

[53] Id. at 443 (quoting *Clinton's Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir.1985)).

[54] *International House v. NLRB*, 676 F.2d 906, 913 (2d Cir. 1982) (emphasis added).

support the Board's contrary finding, the court reasoned, inter alia, that provisions in the contract of sale did not demonstrate a retention of control over the successor's operations. In particular, the court stated that the contract did not "either expressly or by implication, purport to give New Madrid any voice whatsoever in the selecting or discharging of Jones' employees, in the fixing of wages for such employees, or in any other element of labor relations, conditions and policies in the plant purchaser's business." Id. at 913.

Thereafter, in *Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966), a Board panel affirmed an administrative law judge's finding that a cement company and a company leasing trucks and drivers to it were joint employers. In doing so, the Board focused on the lessee's controls in the parties' lease and operating agreements. In a footnote citation to *New Madrid*, the Board converted the aforementioned dictum from negative to positive, incorrectly claiming that the court's test of co-ownership was whether a contract gave the disputed employer "any voice whatsoever" over terms and conditions of employment.[55] This was not then and is not now the joint-employer test of the Eighth Circuit[56] or any other court of appeals. It was not then the Board's joint-employer test, and has not thereafter been the test. Until now, that is.

Of course, the Board is free to go its own way and determine its own standards, but only within the statutory framework and with adequate explanation of the reasons for departing from long-established precedent. The majority claims that 30 years ago the Board departed without explanation from prior precedent by drastically restricting its test in a way that denies many workers their Section 7 rights. However, the absence of any judicial criticism of the legal test consistently applied since then undermines this claim. It is simply impossible that all the courts of appeals would have missed this train wreck. In any event, it remains the majority's burden to rationalize its new test.

[55] Id. at 1493 fn. 2.

[56] The Eighth Circuit uses a four-factor test similar to a single-employer analysis. E.g., *Industrial Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981).

V. THE MAJORITY'S NEW JOINT-EMPLOYER TEST IS IMPERMISSIBLY VAGUE AND OVERBROAD AND WILL HAVE SUBSTANTIAL ADVERSE CONSEQUENCES

A. The New Test Is Fatally Ambiguous, Providing No Guidance as to When and How Parties May Contract for the Performance of Work Without Being Viewed as Joint Employers

Multifactor tests, like the common-law agency standard that we must apply here, are vulnerable to an analysis that can be impermissibly unpredictable and results-oriented. As then-Judge Roberts remarked about the standard for determining whether college faculty are managerial employees under the Act:

> The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication. The open-ended rough-and-tumble of factors on which *Yeshiva* launched the Board and higher education can lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why. . . . In the absence of an explanation, the totality of the circumstances can become simply a cloak for agency whim—or worse.[57]

Our colleagues' new multifactor test, in which any degree of indirect or reserved control over a single term is probative and may suffice to establish joint-employer status, is woefully lacking the required explanation of "which factors are significant and which less so, and why." They provide no meaningful guidelines as to the test's future application. Further, they acknowledge no legitimate grounds for parties in a business relationship to insulate themselves from joint-employer status under the Act.

The new test stands in marked contrast to the current test's focus on evidence of direct-and-immediate control of essential terms of employment, thereby establishing a discernible and rational line between what does and does not constitute a joint-employer relationship under the Act. The current longstanding test thereby recognizes that "[s]ignificant limits . . . exist upon what actions by an employer count as control over the means and manner of performance. Most important, employer efforts to monitor, evaluate, and improve the results or ends of the worker's performances do not make the worker an employee. Such global oversight, as opposed to control over the manner and means of performance (and especially the details of that performance), is fully compatible

[57] *LeMoyne-Owen College v. NLRB*, supra, 357 F.3d at 61 (citations and quotations omitted).

with the relationship between a company and an independent contractor."[58]

By comparison, our colleagues reference as probative all evidence of indirect control for such factors as the place of work, defining the work and how quickly it will need to be done, prescribing the hours when work will need to be performed, setting minimum qualifications for the individuals that the contractor provides and reserving the right to reject an individual (even though the contractor may assign its employee to a different job), inspecting the contractor's work, giving results-oriented feedback to the contractor that the contractor's supervisors use in their directions to the contractor's employees, agreeing to a price for the services that happens to be in the form of a cost-plus formula, and reserving the right to cancel the arrangement. *Under the majority's test, the homeowner hiring a plumbing company for bathroom renovations could well have all of that indirect control over a company employee!* By adopting such an overbroad, all-encompassing and highly variable test, our colleagues extend the Act's definition of "employer" well beyond its common-law meaning, and beyond its ordinary meaning as well. Cf. *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, supra, 404 U.S. at 168 (1971) (admonishing the Board for extending "employee" in the Act beyond its ordinary meaning by attempting to include retired employees in its scope).

The expansive nature of the new test is demonstrated by the evidence relied upon by the majority to find joint-employer status in this case, which involves a "cost-plus" arrangement that is common in user-supplier contracts between separate employers.[59] The sum total of this evidence is (1) a few contract provisions that indirectly affect the otherwise unfettered right of Leadpoint (the supplier-employer) to hire its own employees; (2) reports made by BFI representatives to Leadpoint of two incidents—one where a Leadpoint employee was observed passing a "pint of whiskey" at the jobsite, and another where a Leadpoint employee "destroyed" a drop box—that understandably resulted in discipline; (3) one contractually-established pay rate ceiling restriction for Leadpoint employees (obviously stemming from the cost-plus nature of the contract); (4) BFI's control of its own facility's hours and production lines; (5) a record-keeping requirement for Leadpoint employee hours (again, obviously stemming from the cost-plus nature of the contract); (6) a sole preshift meeting to advise Leadpoint supervisors of what lines will be running and what tasks they are supposed to do on those lines; (7) monitoring of productivity; (8) establishment of one type of generally applicable production assignment scheme for Leadpoint; and (9) "on occasion," addressing Leadpoint employees about productivity directly. That is all there is, and the Regional Director correctly decided under extant law that it was not enough to show BFI was the joint employer of Leadpoint employees.[60]

The majority's evidence amounts to a collection of general contract terms or business practices that are common to most contracting employers (discussed below), plus a few extremely limited BFI actions that had some routine impact on Leadpoint employees. It would be hard to find any two entities engaged in an arm's-length contractual relationship involving work performed on the client's premises that lack this type of interaction. Again, we suppose that our colleagues do not intend that every business relationship necessarily entails joint-employer status, but the facts relied upon here demonstrate the expansive, near-limitless nature of the majority's new standard.

There is a further fundamental problem with the new joint-employer test. The majority states that its goal is to reach a large number of employees that they feel have

[58] *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) (citations omitted).

[59] The Board and the courts have uniformly concluded that cost-plus arrangements do not automatically render the contracting client an "employer" of the vendor's employees. Therefore, our colleagues concede (as they must) that a cost-plus "arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship." Indeed, the Board and the courts have uniformly concluded that nothing in cost-plus arrangements necessarily renders the contracting client an "employer" of the vendor's employees. In *Fibreboard*, for example, the contracting client (Fibreboard) arranged for employees of the contractor (Fluor) "to do the same [maintenance] work under similar conditions of employment," where Fibreboard was committed to pay the "costs of the operation plus a fixed fee." 379 U.S. at 206–207. As noted previously (see fn. 6, supra), Fibreboard was clearly treated as a distinct "employer" (having no employment relationship with the subcontractor's employees), even though the reasons underlying the subcontracting decision were almost *exclusively* based on employment-related considerations. Indeed, the Supreme Court noted that Fibreboard "was induced to contract out the work by assurances from independent contractors that *economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments*." Id. at 213 (emphasis added).

The majority nevertheless attempts to distinguish the instant case because there was an "apparent requirement of BFI approval over employee pay increases." In this respect, *the majority potentially confers "employer" status on every client/user company that enters into a cost-plus arrangement*, because few, if any, clients will give a blank check to supplier-employers regarding wages when the full cost will be charged to the client. This is but one illustration of the multitude of ways that our colleagues fail to appreciate the "complexities of industrial life," which is one of the Board's most important functions and responsibilities. *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960).

[60] Although we might differ from the Regional Director as to the weight assigned to certain evidence, we find no need to do so where we agree with his ultimate finding. We note that the majority does not argue that the Regional Director erred in making this finding.

been left unprotected by Section 7 because they work on a contingent or temporary basis. According to the majority, the number of workers so employed has dramatically risen since *TLI* and *Laerco* were decided and will predictably continue to rise. Further, the majority asserts that "[t]he Board's current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers' terms and conditions of employment of the user."

Thus, not only is the majority's *legal* justification for a new joint-employer test impermissibly based on economic reality theory, as previously discussed, but its *factual* justification is flawed as well. The majority focuses on facts limited to a particular type of business model—the user/supplier relationship involving the use of contingent employees—but they rely on these facts to justify a change in the statutory definition of employer, or joint employer, for all forms of business relationships between two or more entities.

The number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited:

- Insurance companies that require employers to take certain actions with employees in order to comply with policy requirements for safety, security, health, etc.;
- Franchisors (see below);
- Banks or other lenders whose financing terms may require certain performance measurements;
- Any company that negotiates specific quality or product requirements;
- Any company that grants access to its facilities for a contractor to perform services there, and then continuously regulates the contractor's access to the property for the duration of the contract;
- Any company that is concerned about the quality of the contracted services;
- Consumers or small businesses who dictate times, manner, and some methods of performance of contractors.

Our point is not that the majority intends to make all players in the economy, no matter how small, necessary parties at the bargaining table (although as discussed below, they may well become targets of economic protest in support of bargaining or other union causes), but that the majority's new standard foreshadows the extension of obligations under the Act to a substantial group of business entities without any reliable limitations.[61] This kind of overbroad and ambiguous government regulation is necessarily arbitrary and capricious. "In the absence of an explanation, the 'totality of the circumstances' can become simply a cloak for agency whim—or worse." *LeMoyne-Owen College v. NLRB*, supra, 357 F.3d at 61.

Our colleagues make this sweeping change in the law without any substantive discussion whatsoever of significant adverse consequences raised by BFI, Leadpoint, and amici. Indeed, they profess to limit themselves to the issue of joint bargaining obligations in the user-supplier context, with a disclaimer that their decision "does not modify any other legal doctrine or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act." However, such a disclaimer cannot possibly be valid, because applying different tests in other circumstances would mark an unprecedented and unwarranted break from the unitary joint-employer test under our Act that has applied to *all* types of business relationships, each of which is affected by changing the basic joint-employer test. We therefore believe it is necessary to specifically address these consequences, and we do so below.

B. The New Test Will Cause Grave Instability in Bargaining Relationships, Contrary to One of the Board's Primary Responsibilities Under the Act

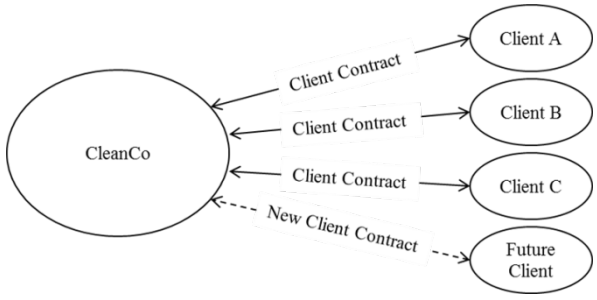
Our colleagues greatly expand the joint-employer test without grappling with its practical implications for real-world collective-bargaining relationships. They purport to be following the command in Section 1 of the Act to "encourag[e] the practice and procedure of collective bargaining." Congress did not mean, however, to blindly expand collective-bargaining obligations whether or not they are appropriate. The Act aims to "achiev[e] industrial peace by promoting *stable* collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (emphasis added). Indeed, one of the Board's primary responsibilities under the Act is to foster labor relations stability. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."). And the Supreme Court has stressed the need to provide "certainty beforehand" to employers and unions alike. Employers must

[61] The majority correctly states that "the annals of Board precedent contain no cases that implicate the consumer services purchased by unsuspecting homeowners or lenders." We hope that continues to be the case, but there is no guarantee that what is past is prologue under their new and impermissibly expansive test.

have the ability to "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and a union similarly must be able to discern "*the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board*." *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 678–679, 684–686 (emphasis added).

Collective bargaining was intended by Congress to be a process that could conceivably produce agreements. One of the key analytical problems in widening the net of "who must bargain" is that, at some point, agreements predictably will *not* be achievable because different parties involuntarily thrown together as the "bargainers" under the majority's new test will predictably have widely divergent interests. Today's marked expansion of bargaining obligations to other business entities threatens to destabilize existing bargaining relationships and complicate new ones. Even if one takes an extremely simplistic user-supplier scenario, the new standard's conferral of joint-employer status—making many clients an "employer" of contractor employees, while making contractors an "employer" jointly with the clients—will produce bargaining relationships and problems unlike any that have existed in the Board's entire 80-year history, which clearly were never contemplated or intended by Congress.

Consider the following diagram, which depicts a single cleaning company named "CleanCo," which has cleaning contracts with three clients. CleanCo employees work at each client's facilities in circumstances similar to the instant case, and CleanCo periodically adds future clients.



Assuming circumstances like those presented here, the majority would find that CleanCo and Client A are a "joint employer" at the Client A location; CleanCo and Client B are a "joint employer" at the Client B location; and CleanCo and Client C are a "joint employer" at the Client C location. Such a situation—involving a single vendor and only three clients, each with only one location—creates all of the following problems under the majority's test:

1. **Union Organizing Directed at CleanCo.** If CleanCo employees are currently unrepresented and a union seeks to organize them, this gives rise to the following issues and problems:

- *What Bargaining Unit(s)?* Although CleanCo directly controls all traditional indicia of employer status, the new majority test establishes that three different entities—Clients A, B, and C—have distinct "employer" relationships with discrete and potentially overlapping groups of different CleanCo employees. It is unclear whether a single bargaining unit consisting of all CleanCo employees could be considered appropriate, given the distinct role that the new majority test requires each client to play in bargaining.
- *What "Employer" Participates in NLRB Election Proceedings?* If the union files a representation petition with the Board, the Act requires the Board to afford "due notice" and to conduct an "appropriate hearing" for the "employer." Sec. 9(c)(1). Currently, the Board has no means of identifying—much less providing "due notice" and affording the right of participation to—"employer" entities like Clients A, B, and C, even though they would inherit bargaining obligations if CleanCo employees select the union.
- *Who Does the Bargaining?* If the union wins an election involving all CleanCo employees, the majority test would require participation in bargaining by CleanCo *and* Clients A, B, and C. Here, the majority test provides that each party "will be required to bargain only with respect to *such terms and conditions which it possesses the authority to control*" (emphasis added). However, because the majority's standard is so broad—spanning "direct control," "indirect control" and the "right to control" (even if never exercised in fact)—nobody could ever reasonably know who is responsible for bargaining what.[62]
- *CleanCo-Client Bargaining Disagreements.* The majority standard throws into disarray the manner in which "employers" such as CleanCo and Clients A, B, and C can formulate coherent proposals and provide meaningful responses to union demands, when they will undoubtedly disagree among themselves regarding many, if not most, matters that are the subject of negotiation. Here, the majority disregards the fact that CleanCo's client contract will most often have resulted from equally difficult negotiations with Clients A, B, and C. Therefore, the "joint" bar-

[62] We discuss this aspect of the "authority problem" in more detail below.

gaining contemplated by the majority will involve significant disagreements between each of the employer entities (i.e., Clean Co and Clients A, B, and C) with no available process for resolving such disputes.[63]

- *CleanCo "Confidential" Information—Forced Disclosure to Clients.* The most contentious issue between CleanCo and Clients A, B, and C is likely to involve the amounts charged by CleanCo, which predictably could vary substantially between Clients A, B, and C, depending on their respective leverage, the need for CleanCo's services, the duration of their respective client contracts (i.e., whether short-term or long-term), and other factors. If a union successfully organizes all CleanCo employees, the resulting bargaining—since the majority test requires participation by Clients A, B, and C—will almost certainly require the disclosure of sensitive CleanCo financial information to Clients A, B, and C, which is likely to enmesh the parties in an array of disagreements with one another, separate from the bargaining between the union and the "employer" entities.

- We have already found, in many prior cases, that this information is sensitive and is not necessary to employees' exercise of rights under the Act. See, e.g., *Flex Frac Logistics*, 360 NLRB No. 120 (2014) (detailing disruption occurring when contractor, which "was particularly concerned to maintain the confidentiality of the rates it charges its clients," had rates disclosed to clients by employee). The majority's new standard basically guarantees such economic disruption for no legitimate purpose.

- *How Many Labor Contracts?* If a single union organizes all CleanCo employees, the above problems might be avoided if CleanCo engages in three separate sets of bargaining—each devoted to Client A, Client B, and Client C, respectively—resulting in three separate labor contracts. However, this would be inconsistent with the CleanCo bargaining unit if it encompassed all CleanCo employees, and CleanCo would violate the Act if it insisted on changing the scope of the bargaining unit, which under well-established Board law is a nonmandatory subject of bargaining.

- *What Contract Duration(s)?* If a union represented all CleanCo employees, and if the Board certified each client location as a separate bargaining unit, then there presumably would be separate negotiations—and separate resulting CBAs—covering the CleanCo employees assigned to Client A, Client B, and Client C, respectively. In this case, however, the duration of each CBA might vary, depending on each side's bargaining leverage, and a further complication would arise where CBA termination dates differ from the termination dates set forth in the various CleanCo client contracts.

- *Do Client Contracts Control CBAs, or Do CBAs Control Client Contracts?* Regardless of whether the CleanCo CBA(s) have termination dates that coincide with the expiration of the CleanCo client contracts, the majority's new test leaves unanswered whether CleanCo and Clients A, B, and C could renegotiate their client contracts, or whether the "joint" bargaining obligations—and the CBA(s)—would effectively trump any potential client contract renegotiations, even though this would be contrary to the Supreme Court's indication that Congress, in adopting the NLRA, "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." *First National Maintenance*, supra, 452 U.S. at 676. Likewise, similar to what the majority held in *CNN* (see discussion infra), the majority would impose its new joint-employer bargaining obligations on Clients A, B, and C, even where the client contracts explicitly identified CleanCo as the only "employer" and stated that CleanCo had sole and exclusive responsibility for collective bargaining.

- *New Clients (Possibly With Their Own Union Obligations).* If a union represented all CleanCo employees, and if (under the majority's new test) all CleanCo clients were deemed joint employers with CleanCo, what happens when Clean Co obtains new clients that previously had cleaning work performed by in-house employees or a predecessor contractor, and those in-house or contractor employees were unrepresented or represented by a different union? If, based on CleanCo's existing union commitments, CleanCo refused to consider hiring or retaining the employees who formerly did the new client's cleaning work, the refusal could constitute antiunion discrimination in violation of Sec. 8(a)(3). If CleanCo hired the new client's former employees (or the former employees of a predecessor contractor), then CleanCo could run afoul of its existing union obligations. See *Whitewood Maintenance Co.*, 292 NLRB 1159, 1168–1169 (1989), enfd. 928 F.2d 1426 (5th

[63] We also discuss this aspect of the "authority problem" in more detail below.

Cir. 1991). Alternatively, this situation could require further Board proceedings for resolution.[64]

- *Non-Consensual Multiemployer Bargaining.* The Board has held that employees solely employed by a supplier employer combined with employees jointly employed by the supplier employer and a single user employer (e.g., CleanCo and either Clients A, B, or C) must be considered inappropriate as a matter of law, absent the consent of the parties. *Oakwood Care Center*, 343 NLRB 659, 661–663 (2004). A unit consisting of employees jointly employed by the supplier employer and multiple user employers (e.g., CleanCo and Clients A, B, and C) would likewise be inappropriate absent consent, unless the majority is overruling *(sub silentio)* the *Oakwood* consent requirement.
- *Potential Board Jurisdiction Over Some Entities and Not Others.* The Board does not have jurisdiction over governmental employers and employees, over railways or airlines that are subject to the Railway Labor Act, or—in a variety of circumstances—religiously-affiliated educational institutions or certain enterprises operated by Indian tribes. If CleanCo is subject to the NLRA, but Clients A, B, or C fall within one or more of the exempt categories identified above, the majority's new standard will create complex questions about whether the Board may lack jurisdiction over particular "joint" employer(s).

2. **Union Organizing Directed at Client(s).** If two different unions, rather than targeting CleanCo, engage in organizing directed at Client A and Client B, respectively, with Client C remaining nonunion, this gives rise to additional issues and problems:

- *All of the Above Issues/Problems.* If the CleanCo employees at Client A are organized by one union, and if the CleanCo employees at Client B are organized by a different union, then the majority test would make CleanCo and Client A the "joint employer" of the CleanCo/Client A employees, and CleanCo and Client B the "joint employer" of the CleanCo/Client B employees. In both cases, the "joint employer" status would give rise to *all* of the above problems and issues, in addition to those described below.
- *Employee Interchange and Multilocation Assignments.* If different unions represent the employees of CleanCo/Client A and CleanCo/Client B, and if CleanCo/Client C employees were nonunion, this would create substantial potential problems and potential conflicting liabilities regarding CleanCo employees assigned to work at all three client locations or transferred from one client's facility to another. This is a common situation, arising, for example, where one CleanCo client simply was unhappy with the productivity or attitude of the assigned employee.[65]
- *Strikes and Picketing—"Neutral" Secondary Boycott Protection Eliminated.* Sections 8(b)(4) and 8(e) of the Act protect neutral parties from being subjected to "secondary" picketing and other threats, coercion and restraint that have an object of forcing one employer to cease doing business with another. Therefore, if the CleanCo/Client A and CleanCo/Client B employees were involved in a labor dispute, under the Board's traditional joint-employer standard Clients A and B (as non-employers) would be neutral parties protected from "secondary" union activity. Under the majority's standard, however, Clients A and B would be employers right along with CleanCo and thus subject to picketing.
- *Renegotiating or Terminating Client Contracts.* It is well established that "an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees."[66] However, to the extent that CleanCo and Clients A, B, and C are joint employers, then any client's termination of CleanCo's services based on potential union-related considera-

[64] Such a resolution might result, for example, from a unit clarification petition seeking to add the new employees to the bargaining unit without an election under the Board's accretion doctrine, or jurisdictional dispute proceedings pursuant to Sec. 10(k) of the Act.

[65] The potential problems caused by multilocation assignments or employee interchange between locations could arise, for example, from CBA provisions restricting such assignments or transfers, from union-security provisions in different CBAs requiring dues payments based on a person's employment without regard to where they were employed, or from conflicting wage rates and benefits applicable at each location. Although these issues might depend on what particular CBA or other policies were in effect, they would obviously cause significant burdens and potential confusion for the employees and each entity considered a joint employer under the majority's new standards.

[66] *Plumbers Local 447 (Malbaff Landscape Construction)*, 172 NLRB 128, 129 (1968). See also *Computer Associates International, Inc.*, 324 NLRB 285, 286 (1997) ("[F]inding a violation of Section 8(a)(3) on the basis of an employer's decision to substitute one independent contractor for another because of the union or nonunion status of the latter's employees is inconsistent with both the language of Section 8(a)(3) . . . and with legislative policies underlying Section 8(b) of the Act aimed at protecting the autonomy of employers in their selection of independent contractors with whom to do business.").

tions would create a risk that the Board would find—as it did in *CNN*, supra—that the contract termination constituted antiunion discrimination in violation of Sec. 8(a)(3). *CNN*, supra, slip op. at 40–42 (Member Miscimarra, dissenting).

3. **Existing CleanCo-Union and/or Existing Client-Union Relationships.** Additional issues and problems result from the impact of the majority's new joint-employer test on existing union relationships and CBAs:

- *All of the Above Issues/Problems.* It is clear, under the majority's test, that existing collective-bargaining agreements and union relationships involving CleanCo, with no mention of Clients A or B, do not prevent Clients A and B from having joint-employer status with CleanCo, which would give rise to all of the issues and problems described above. Again, in *CNN*, discussed infra, the Board majority found that the client (CNN) was a joint employer, even though any bargaining between CNN and the unions representing employees of contractor TVS would have departed from applicable labor contracts, prior Board certifications, the services agreements between CNN and its vendor (TVS), and 20 years of bargaining history in which the employer-party was always TVS (or its predecessor contractors), and not CNN.
- *Existing CleanCo CBA: Prospective Four-Party Bargaining.* If CleanCo was party to an existing company-wide collective-bargaining agreement, in which CleanCo was identified as the only "employer," the majority's new test clearly imposes an obligation to engage in bargaining on *all* joint-employer entities—i.e., CleanCo and Clients A, B, and C—even though such bargaining would depart from explicit CBA language and the past practice of CleanCo and the union.
- *"Mandatory" Arbitration, Yet Never Agreed To?* If CleanCo had an existing company-wide CBA, the majority's imposition of "employer" status on Clients A, B, and C would not necessarily bind them to the terms of the existing CleanCo CBA. This would mean that, even though a particular grievance may pertain to essential employment terms that, in the majority's view, Clients A, B, and C have the right to "share or codetermine," the CBA's grievance arbitration procedure would not necessarily bind Clients A, B, and C, since they had never agreed to submit to the procedure.[67]
- *Benefit Fund Contributions and Liabilities—Who Pays?* Many existing collective-bargaining agreements contain extensive provisions regarding benefit fund contributions and benefit liabilities. If such provisions were contained in the CleanCo CBA, then Clients A, B, and C—when participating in the new four-way bargaining described above—would predictably be confronted with demands to assume liability for such provisions. Although the majority test suggests that Clients A, B, and C "will be required to bargain only with respect to such terms and conditions which it possesses the authority to control," it appears clear that they would face economic demands and potentially be subject to a strike based on a refusal to agree to such demands.
- *Joint Bargaining Versus "Add-On" CBAs.* If CleanCo employees assigned to Clients A, B, or C were organized for the first time by one or more unions, the majority clearly imposes a new mandatory bargaining obligation on all joint employer entities. Although an existing collective-bargaining agreement generally suspends a party's obligation to bargain for the agreement's term, the majority's new test, as noted above, imposes an independent duty to bargain on *every* joint employer "with respect to such terms and conditions which it possesses the authority to control," which may result in separate sets of negotiations and potential "add-on" CBAs that deviate from the existing union agreements.

The foregoing is only a selection of the complications that may arise. And the example is obviously simplistic because it relates only to *one* service company, which has only *three* clients—and in the real world, by comparison, (i) many businesses, large and small, rely on services provided by large numbers of separate vendors, and (ii) many service companies have dozens or hundreds of separate clients. Time will no doubt reveal more as employers and unions attempt to apply the limitless joint-employer standard to even more complicated settings than the above example. The only thing that is clear at present is that the new standard does not promote stable collective-bargaining relationships. There is no way that it could, and simple mathematics shows us why.

On its face, the majority's broad test can find up to 18 "joint" employers per work force. How? The majority finds that there are at least six essential terms and conditions of employment (wages, hours, hiring, firing, discipline, and direction of work). According to the majority,

[67] *AT&T Technologies Inc. v. CWA*, 475 U.S. 643, 648 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582; *Steelworkers v. American Mfg. Co.*, 363 U.S. at 570–571; *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374 (1974).

an "employer" is an entity that exercises—even on a limited and routine basis—any one of three forms of putative control (direct control, indirect control, or potential control) over any one of these terms. Six times 3 is 18, which leaves us with *a model where there could be up to 18 employers for a single workforce*. See Appendix A ("Why There Are At Least 18 Potential Employers"). In truth, the test can find *more than 18* employers because the majority has not limited itself to the specified 6 supposedly essential terms, and the majority has not unqualifiedly represented that there can be only one controller per category of control, e.g., there could be two "indirect controllers," for example. We do not know the exact limit to the multiplicity of putative employers arising from the majority's new joint-employer test. But it is surely common sense that placing 18 different cooks involuntarily in a single kitchen will lead to a terrible meal. That is the recipe for dyspeptic collective bargaining that the majority has cooked up.

The majority states that "a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control." This does not temper the impact of the new standard; it only makes matters worse. The majority assumes these bargaining issues are severable, as if the resolution of one issue is not dependent on the resolution of another. This is not how contract negotiations work. And underscoring the irrationality of the majority's rule here, the Board has traditionally denounced this type of segmented issue-by-issue negotiating, when unilaterally undertaken by a party, as unlawful "fragmented bargaining."[68]

Moreover, how exactly are joint user and supplier employers to divvy up the bargaining responsibilities for a single term of employment that they will be deemed under the new standard to codetermine, one by direct control and the other by indirect control? How does one know who has authority at all over a term and condition of employment, under the majority's vague formulation? What if two putative employer entities get into a dispute over whether one has authority over a certain term or condition of employment? What if the putative employers are competitors? Taking the diagram above, what if Client A and Client B are competitors and have no real economic interest in the other client coming to a good-faith agreement with CleanCo on how much it pays employees working for that other client? Does it make sense for the law to attempt to create such an interest? What if there are too many entities to come to an agreement? How does bargaining work in this circumstance? Further, this purported division of bargaining responsibility creates conflicts between alleged violations of Section 8(a)(5), which *requires* employers to bargain in good faith with a certified or recognized union, and Section 8(a)(2), which makes such bargaining *unlawful* if the union lacks majority support among the entity's employees.[69] If multiple entities arguably constitute a "joint employer," and one entity is alleged to have unlawfully failed to bargain over particular terms of employment, the majority's standard effectively places the burden of proof on the respondent-employer to establish that it did not control those particular employment terms.[70] So questions exist as to (i) which entities are the "employer," (ii) which entities must (or must not) engage in bargaining over particular employment terms, and even (iii) what party—the respondent(s) versus the General Counsel—bears the burden of proof regarding this assortment of issues.

This scenario is made all the worse by the need for years of Board litigation before third parties will actually learn whether (i) they unlawfully failed to participate in

[68] See, e.g., *E.I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 fn. 1 (1991) ("What we find unlawful in the Respondent's conduct was its adamant insistence throughout the entire course of negotiations that its site service operator and technical assistant proposals were not part of the overall contract negotiations, and, therefore, had to be bargained about totally separately not only from each other but from all the other collective bargaining agreement proposals. We find this evinced fragmented bargaining in contravention of the Respondents duty to bargain in good faith."); see also *NLRB v. Patent Trader*, 415 F.2d 190, 198 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (2d Cir. 1970) (When a party "removes from the area of bargaining . . . [the] most fundamental terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.)," it has "reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises with the result of rigidly and unreasonably fragmenting the negotiations.").

[69] The conflict between Sec. 8(a)(5) and Sec. 8(a)(2) results from the Hobson's Choice that confronts multiple entities that control different aspects of employment for one or more different employee groups. Potential joint-employer entities risk violating Sec. 8(a)(5) if they fail or refuse to bargain over certain matters because Sec. 8(a)(5) obligations apply generally to "wages, hours, and other terms and conditions of employment." See Sec. 8(d) (defining the phrase "to bargain collectively," which is required under Sec. 8(a)(5)). Conversely, potential joint-employer entities risk violating Sec. 8(a)(2), which makes it unlawful for an employer to bargain with a union that does not validly represent its employees, if the Board determines that the entities engaged in bargaining when, in fact, they were not an "employer" as to employment terms not within their control. In other words, not only does the majority's standard promise to create confusion about who is an "employer," but the majority's patchwork allocation making different entities responsible for different issues creates confusion about which "employer" entity may or must bargain over what particular employment terms. As with other aspects of the majority's new standard, definitive answers will be available only after years of Board and court litigation.

[70] See, e.g., *Hobbs & Oberg Mining Co.*, 297 NLRB 575, 586 (1990) (General Counsel's burden to prove joint-employer status), enfd. 940 F.2d 1538 (10th Cir. 1991), cert. denied 503 U.S. 959 (1992).

bargaining between another employer and its union(s), or (ii) the third parties unlawfully injected themselves into such bargaining when their commercial relationship was insufficient to make them a joint employer. Nor is the Board permitted to engage in the economic analysis needed to sort out the plethora of arm's-length company-to-company relationships affected by the majority's new joint-employer test. The Board's Division of Economic Research was abolished 75 years ago, and Section 4(a) of the Act—adopted by Congress in 1947—prohibits the Board from having any agency personnel engage in "economic analysis."[71] Additionally, we note that the Board lacks the authority to impose labor contract terms on parties,[72] and nothing in the Act authorizes the Board to impose requirements on companies regarding how they must arrange or rearrange themselves.

The majority even acknowledges some turmoil will result from its decision, but largely dismisses it as being outweighed by the need to protect contingent workers' Section 7 rights.

> Certainly any doctrinal change in this area will modify the legal landscape for employers with respect to the National Labor Relations Act. However, given the centrality of collective bargaining under the Act, we must ensure that the prospect of collective bargaining is not foreclosed by business relationships that effectively deny employees' right to bargain with employers that share control over essential terms and conditions of their employment. [(Footnote omitted.)]

Contrary to our colleagues' assertion, we are not slavish defenders of the status quo. 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. The majority cites no evidence, and none has been presented, showing that employees in contingent or any comparable employment situations have been unable to bargain with their undisputed employer. The majority uses the phrase "meaningful bargaining" numerous times, but the majority's premise is that bargaining fails to be "meaningful" whenever the employer's business relationships influence the matters under negotiation. Our colleagues on this front simply cite the large number of employees whose terms and conditions of employment might be affected in some way by a user employer and Board cases finding no duty to bargain with these user employers, and assert that rights have been denied. How do we know that employees have been unable to engage in "meaningful bargaining" with the supplier employer? Under the majority's test, it is possible to find that "meaningful bargaining" cannot take place with a supplier employer alone if it lacks meaningful control over even a single "essential" facet of employment. Such a definition of meaningful bargaining has never been the law, and it cannot be reconciled with business practices that have been in existence since before the Act.

It is difficult, if not impossible, to reconcile this reasoning with the Board's rationale in *Management Training*, 317 NLRB 1355 (1995), addressing whether to assert discretionary jurisdiction over a private employer contracting for business with an exempt governmental entity. The Board there modified prior caselaw and held that it would no longer decline to assert jurisdiction in circumstances where the private employer lacked control of what had been deemed essential terms of employment. It reasoned that "[b]ecause of commercial relationships with other parties, an inability to pay due to financial constraints, and competitive considerations which circumscribe the ability of the employer to grant particular demands, the fact is that employers are frequently confronted with demands concerning matters *which they cannot control as a practical matter or because they have made a contractual relationship with private parties* or public entities." Id. at 1359 (emphasis added). Quite obviously, under *Management Training*, the Board believes that employees and their exclusive bargaining representative can still engage in meaningful bargaining under the Act even with an employer who lacks control over a substantial number of essential terms of employment.

C. The New Test Will Dramatically Change Labor Law Sales and Successorship Principles, and Will Discourage Efforts to Rescue Failing Companies and Preserve Employment

Expanding the definition of employer will also alter the landscape of successorship law under the Act. It is well established that successor employers,[73] although they must recognize and bargain with the union representing the predecessor's employees in certain circum-

[71] Sec. 4(a) states in part: "Nothing in this Act shall be construed to authorize the Board to appoint individuals . . . for economic analysis." This language was added to the NLRA as part of the Labor Management Relations Act (LMRA), 61 Stat. 136, Sec. 101 (amending NLRA Sec. 4(a)) (1947). The enactment of Sec. 4(a) occurred after the Board abolished its Division of Economic Research in 1940. See 93 Cong. Rec. 6661, reprinted in 2 LMRA Hist. 1577 (June 6, 1947) (analysis of H.R. 3020). See generally John E. Higgins, Jr., *Labor Czars–Commissars–Keeping Women in the Kitchen–The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941, 951–952 (1998).

[72] Sec. 8(d); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

[73] An employer is a successor of its predecessor under the Act when there is a "substantial continuity between the enterprises," the successor hired a majority of its predecessor's employees, and the unit is still appropriate. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–52 (1987).

stances, are not obligated to adopt the preexisting collective-bargaining agreement and have the right to unilaterally set different initial terms and conditions of employment.[74] *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287–288, 294–295 (1972). This rule "careful[ly] safeguards the rightful prerogative of owners independently to rearrange their businesses." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987) (internal quotations omitted). But the policy concerns behind the rule are even deeper than that:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

Burns, 406 U.S. at 287–288.

Under the majority's expansive joint-employer standard, many user employers will now be considered joint employers of their supplier employers' employees. Rebidding contracts has been a common feature of the user—and supplier—employer market. Going forward, it may be less common because deeming the user employer to be a joint employer will make terminating or rebidding the contract with the supplier employer much more difficult. The user employer will often have a duty to bargain the decision to lay off the employees or to subcontract those jobs to another supplier employer. See *Fibreboard Corp. v. NLRB*, supra, 379 U.S. at 215 (1964); *CNN*, supra, 361 NLRB 439, 455. Assuming the user employer does contract with a new supplier employer that would otherwise be a *Burns* successor able to set its own terms, the user employer, under the broadened standard, will likely be deemed a joint employer with the new supplier employer as well. That user employer's ongoing bargaining obligation spanning the two supplier employers prevents the new supplier employer from setting different terms and conditions of employment than its predecessor had. See *Whitewood Maintenance Co.*, supra, 292 NLRB at 1168–1169 (contractor that substituted one subcontractor for another jointly employed both the old and new subcontractors' employees, so the new subcontractor could not set its own initial terms), enfd. 928 F.2d 1426 (5th Cir. 1991).

Similarly, when a predecessor's union-represented employees apply for employment with a successor, the successor cannot lawfully extend recognition unless and until it has hired a "substantial and representative complement" of employees and has received a demand for recognition from the predecessor union(s).[75] In *CNN*, supra, two unions already represented employees of CNN's contractor, TVS, as part of a 20-year history in which unionized contractors supplied technical employees to CNN, where only the contractor—and not CNN—was considered the "employer." When CNN decided to terminate its use of contractor employees and directly hire its own technical workforce, CNN as a successor would have violated the Act if it engaged in bargaining with the TVS unions before it hired a "substantial and representative complement" of its own employees. However, the majority's expansive joint-employer finding converted CNN into an "employer" before it hired *any* of its own technical employees. And, based on its expansive joint-employer finding, the Board majority determined that CNN—even before it decided to terminate the TVS relationship (and before it notified TVS)—was required to notify the TVS *unions* and engage in bargaining with them over *whether* CNN might terminate the TVS relationship and hire its own work force.

Member Miscimarra stated, in his *CNN* dissent, that employer status "does not arise as the result of spontaneous combustion," and he explained that the expansive joint-employer finding—applied to CNN before it hired its own workforce—was irreconcilable with the parties' understandings and existing agreements:

> Nothing in such a scenario would promote stable bargaining relationships. Rather, CNN's actions—taken as an "employer" of the TVS technical personnel—

[74] There is a limited exception to this general rule when "'it is perfectly clear that the new employer plans to retain all of the employees in the unit,'" unless the successor "clearly announce[s] its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974) (quoting *Burns*, 406 U.S. at 294–295), enfd. 529 F.2d 516 (4th Cir. 1975). However, a so-called "perfectly clear" successor employer is still not bound by the predecessor contract itself. It must only adhere to terms established by the contract while negotiating new terms with the incumbent union.

[75] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 47–48.

> would have directly contradicted the then-existing TVS-NABET collective-bargaining agreements (which identified TVS, not CNN, as the employer). CNN's actions would have violated the CNN-TVS Agreements, which stated . . . that TVS employees "are not employees of [CNN], and shall not be so treated at any time". . . . Finally, CNN's actions would have exhibited a total disregard for the elaborate body of law regarding "successorship" and related business changes that has been the subject of nearly a dozen Supreme Court cases and innumerable Board decisions.[76]

The inability of user employers to freely terminate or rebid client contracts and of new supplier employers to set different initial terms will inhibit our economy and lead to labor strife. The new standard sends a message to user employers to *never contract with unionized firms in the first place* to avoid being trapped in "permanent" client contracts that cannot be terminated without bargaining to agreement or impasse. On the other side, the supplier-employer market will become uncompetitive as potential bidders for contracts where the incumbent supplier employer is unionized will be unable to compete with the incumbent employer on labor costs, as the new supplier employer will likely be beholden to the same terms. The Act is being applied in a manner Congress could not conceivably have intended.

D. The New Test Threatens Existing Franchising Arrangements in Contravention of Board Precedent and Trademark Law Requirements

Of the thousands of business entities with different contracting arrangements that may suddenly find themselves to be joint employers, franchisors stand out. According to amicus International Franchise Association (IFA), "in 2012 there were 750,000 franchise establishments in the United States employing 8.1 million workers, generating a direct economic output of $769 billion. These businesses account for approximately 3.4 percent of America's gross domestic product."[77]

For many years, the Board has generally not held franchisors to be joint employers with franchisees, regardless of the degree of indirect control retained.[78] The majority does not mention, much less discuss, the potential impact of its new standard on franchising relations, but it will almost certainly be momentous and hugely disruptive. Indeed, absent any discussion, we are left to ponder whether the majority even agrees with the statement of the General Counsel in his amicus brief that "[t]he 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. *See, e.g., Love's Barbeque Rest.*, 245 NLRB 78, 120 (1978) (no joint-employer finding where franchisees were required to prepare and cook food a certain way because, *inter alia*, the franchisor established the requirements to 'keep the quality and good will of [the franchisor's] name from being eroded' (internal quotations and citations omitted), *enforced in rel. part*, 640 F.2d 1094 (9th Cir. 1981)." (Amicus Br. at 15–16 fn. 32). Given the breadth of the majority's test and rationale, we are concerned that the majority effectively finds that a franchisor even with this type of indirect control would be deemed a joint employer.

The majority's new test appears to require specific analysis of whether the franchisor shares or codetermines "the manner and method of performing the work." However, in many if not most instances, franchisor operational control has nothing to do with labor policy but rather compliance with federal statutory requirements to maintain trademark protections. "It is required that the owner of the mark should set up the standards or conditions which must be met before another is permitted to use the certification mark and the owner should permit the use of the mark by others only when they meet those standards or conditions." *State of Fla. v. Real Juices, Inc.*, 330 F. Supp. 428, 432 (M.D. Fla. 1971). As one court explained:

> Without the requirement of control, the right of a trademark owner to license his mark separately from the business in connection with which it has been used would create the danger that products bearing the same trademark might be of diverse qualities. If the licensor is not compelled to take some reasonable steps to prevent misuses of his trademark in the hands of others the public will be deprived of its most effective protection against misleading uses of a trademark. The public is hardly in a position to uncover deceptive uses of a trademark before they occur and will be at best slow to detect them after they happen. Thus, unless the licensor exercises supervision and control over the operations of its licensees the risk that the public will be unwittingly deceived will be increased and this is precise-

[76] *CNN*, supra, slip op. at 38–39 (Member Miscimarra, dissenting) (footnote and emphasis omitted).

[77] Br. of IFA at 1.

[78] See, e.g., *Speedee 7-Eleven*, 170 NLRB 1332 (1968) (franchisor not a joint employer despite a policy manual that described "in meticulous detail virtually every action to be taken by the franchisee in the conduct of his store"), and *Tilden, S. G., Inc.*, 172 NLRB 752 (1968) (franchisor not a joint employer, even though the franchise agreement dictated "many elements of the business relationship," because the franchisor did not "exercise direct control over the labor relations of [the franchisee]").

> ly what the Act is in part designed to prevent. Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees.

Stanfield v. Osborne Indus., Inc., 839 F. Supp. 1499, 1504 (D. Kan. 1993), affd. 52 F.3d 867 (10th Cir. 1995), abrogated on other grounds by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014). If a franchisor fails to maintain sufficient control over its marks, it is considered to have engaged in "naked franchising" and thereby abandoned the mark.[79] "The critical question in determining whether a licensing program is controlled sufficiently by the licensor to protect his mark is whether the licensees' operations are policed adequately to guarantee the quality of the products sold under the mark." *General Motors Corp. v. Gibson Chem. & Oil Corp.*, 786 F.2d 105, 110 (2d Cir. 1986). The necessity of the franchisor to police the "manner and method" of the franchisee is paramount. "'The purpose of the Lanham Act . . . is to ensure the integrity of registered trademarks, not to create a federal law of agency.' The scope of a licensor's duty of supervision of a licensee who has been granted use of a trademark must be commensurate with this limited goal." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018 (9th Cir. 1985) (quoting *Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1327 (7th Cir. 1979)).

These cases demonstrate that one important aspect of the franchising relationship is the franchisee's ability to reap the benefits of manifesting to the customer the appearance of a seamless enterprise through the use and maintenance of the franchisor's trademark. Federal franchise law recognizes this benefit and requires that the franchisor maintain the mark by maintaining enough control over the franchisee to protect consumers. However, even while franchise law requires some degree of oversight and interaction, it was never the intent of Congress, by that interaction, to make a franchisee the agent of its franchisor for any purpose. Thus, the new joint-employer standard portends unintended consequences for a franchisor's compliance with the requirements of another Federal act that are totally unrelated to labor relations. The Board has been repeatedly reminded that it "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that [we] may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). Rather than providing a "careful accommodation of one statutory scheme to another," the majority's new standard places "excessive emphasis upon [the Board's] immediate task." Id.

E. The New Test Undermines the Parent-Subsidiary Relationship in Contravention of Board Precedent

In most areas of the law, it is widely recognized that parent and subsidiary corporations are indeed separate entities. The Board, which has developed whole legal doctrines devoted to detecting ostensibly separate companies that are in truth either created to evade obligations under the Act (the alter ego doctrine) or so integrated that they function as one (the single employer doctrine), has recognized this principle repeatedly. For example, in *Dow Chemical*, 326 NLRB 288 (1998), a bipartisan Board majority reaffirmed the longstanding rule under the single employer doctrine that typical parents and subsidiaries are not considered a sole "employer" for bargaining purposes. See also, e.g., *Western Union*, 224 NLRB 274 (1976), affd. sub nom. *United Telegraph Workers v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978), cert. denied 439 U.S. 827 (1978). Indeed, the presumption of separateness for purposes of the Act is so strong that it extends also to unincorporated divisions that are operated independently from the company as a whole. See, e.g., *Los Angeles Newspaper Guild, Local 69 (Hearst Corp.)*, 185 NLRB 303, 304 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971). And here, the Board's honoring of corporate separateness occurs even as the Board simultaneously recognizes that a subsidiary is, of course, under the potential control of its parent. In other words, potential control is not enough to find that a parent is the same employer with its subsidiary for purposes of labor law:

> Common ownership by itself indicates only *potential* control over the subsidiary by the parent entity; a single-employer relationship will be found only if one of the companies exercises *actual* or *active* control over the day-to-day operations or labor relations of the other.

Dow, 326 NLRB at 288 (emphasis in original). The majority now turns this principle on its head, and its wholesale adoption of the "potential control" standard would treat parents and subsidiaries as joint-employing entities for pur-

[79] Id.; see 15 U.S.C. § 1064(5)(A). See also *Barcamerica International USA Trust v. Tyfiled Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002) ("It is well-established that '[a] trademark owner may grant a license and remain protected provided quality control of the goods and services sold under the trademark by the licensee is maintained.' *Moore Bus. Forms, Inc. v. Ryu*, 960 F.2d 486, 489 (5th Cir.1992). But '[u]ncontrolled or "naked" licensing may result in the trademark ceasing to function as a symbol of quality and controlled source.' *McCarthy on Trademarks and Unfair Competition* § 18:48, at 18–79 (4th ed. 2001). Consequently, where the licensor fails to exercise adequate quality control over the licensee, 'a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark.' *Moore*, 960 F.2d at 489.").

poses of labor law. To our reckoning, no Board has ever taken this leap before. Indeed, the majority's new test—which applies to admittedly separate and independent companies—applies a more onerous "control" standard than the one that the Board uses to find control where a company is *actually integrated* with another. This makes no sense.

Whatever the contradiction in the majority's logic, the result is serious. The upshot is that the majority's new test threatens to automatically sweep every parent or affiliate company in America into being the "employer" of a subsidiary's employees, with the concomitant bargaining obligations, the loss of secondary-employer protection from union strikes discussed below, and all the other deleterious results mentioned above. If this is the outcome intended, upending decades of precedent of labor law and probably centuries of precedent in corporate law, we need a mandate from Congress before we purport to "find" it in our decisional case law. The majority here identifies no such mandate, and its test should be invalidated on this basis alone. If Congress had wanted us to turn the world of corporate identity upside down, it would have expressly told us so.

VI. THE NEW TEST CONFLICTS WITH CONGRESSIONAL INTENT TO INSULATE NEUTRAL EMPLOYERS FROM SECONDARY ECONOMIC COERCION

Not only does the majority's new test impermissibly expand and confuse bargaining obligations under Sections 8(a)(5) and 8(d), it also does violence to other provisions of the Act that depend on the "employer" definition. Chief among them is the Section 8(b)(4)(ii)(B) prohibition on secondary economic protest activity such as strikes, boycotts, and picketing. That section "prohibits labor organizations from threatening, coercing, or restraining a neutral employer with the object of forcing a cessation of business between the neutral employer and the employer with whom a union has a dispute," but it does not prohibit striking or picketing the primary employer, i.e., the employer with whom the union has the dispute. *Teamsters Local 560 (County Concrete)*, 360 NLRB 1067, 1067 (2014). Congress intended to "preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and . . . [to] shield[] unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692.

An entity that is a joint employer with the employer subject to a labor dispute is equally subject to economic protest. See *Teamsters Local 688 (Fair Mercantile)*, 211 NLRB 496, 496–497 (1974) (union's picketing of a retailer did not violate Section 8(b)(4)(ii)(B) because it was the joint employer of a delivery contractor's employees). To put this in a practical terms, before today's decision at least, a union in a labor dispute with a supplier employer typically could not picket a user employer urging clients to cease doing business with that user employer—the object there being that the user employer would in turn cease doing business with the supplier employer.[80] Likewise, a union with a labor dispute with one franchisee typically could not picket the franchisor and all of its other franchisees.

Today's expansion of the joint-employer doctrine will sweep many more entities into primary-employer status as to labor disputes that are not directly their own. Unions will be able to freely picket or apply other coercive pressure to either or both of the joint employers as they choose. This limits the Act's secondary-boycott prohibitions in a manner Congress did not intend. The targeted joint employer may not have direct control or even any control over the particular terms or conditions of employment that are the genesis of the labor dispute. Here, the economic consequences are far reaching. For example, a union could picket all of the user employer's facilities even though the supplier employer only provides services at one. Further, assuming that a franchisor exerts similar indirect control over each franchisee, as the majority here may often find to be the case, a union could picket the franchisor and all franchisees even though its dispute only involves the employees of one.[81]

It does not end there. As previously stated, numerous provisions relied upon by the majority are typically included in a residential renovation contract— i.e., the contractor's employees cannot start work before a certain hour, they must finish work by a certain hour, they cannot use the bathrooms in the house, they have to park their vehicles in certain locations. Suppose that the annual revenues of the company with whom the homeowners contract meet the Board's discretionary standard for asserting jurisdiction, not an unlikely possibility. Then suppose that a union initiates an area standards wage protest against this contractor. One day, the homeowners open their front door to discover pickets patrolling the sidewalk in front of their house. In the new joint-

[80] Of course, the user- and supplier-employer scenario often raises common situs issues as addressed in *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950), and its progeny, but explicitly targeting the secondary employer is blatantly unlawful.

[81] Going back to the CleanCo diagram above for an example, Client A likely has no control over what goes on upon the premises of Client C. More importantly, there is no underlying economic relationship between the two that could supply even a remotely rational foundation for the Act to allow economic weapons like strikes, picketing, etc. at Client A to convince it to use its obviously nonexistent "power" over Client C in a labor dispute involving CleanCo employees posted at Client C.

employer world, they are a lawful target for this protest activity. Unions may not have any interest in bringing them into any bargaining process, but they may be more than eager to maximize economic injury to the primary employer by expanding the cease-doing-business pressure to as many clients as possible. Congress did not intend that every entity with some degree of economic relationship with the employer-disputant be thrown into its labor dispute. The Act is supposed to encourage labor peace, and to this end Congress enacted Sections 8(b)(4) and 8(e), demonstrating its intent to avoid limitless economic warfare based on dealings between employers and other persons.

The majority's expansive definition of joint-employer status poses particular questions about its applicability to common situs work in the construction industry. As previously stated, the Supreme Court has expressly held that the fact "the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other."[82] We presume that our colleagues do not intend to act in direct contravention of an express holding of the Supreme Court, but the breadth of their test and their emphasis on contractual control as probative of joint-employer status seems to pose a dilemma: either they must articulate an exception to a statutory definition that seems to require uniform treatment of employers in all industries, or they must place limits on their test they obviously wish to avoid.[83]

VII. CONCLUSION

The Board is not Congress. It can only exercise the authority Congress has given it. In this instance, our colleagues have announced a new test of joint-employer status based on policy and economic interests that Congress has expressly prohibited the Board from considering. That alone is reason enough why the new test should not stand. Even more troubling from an institutional perspective, however, is the nature of the new test. The negative consequences flowing from the majority's new test are substantial. It creates uncertainty where certainty is needed. It provides no real standard for determining in advance when entities in a business relationship will be viewed as independent and when they will be viewed as joint employers.

Moreover, as noted previously, the resulting confusion will cause damage both ways: (i) too many parties will discover after the fact, following years of litigation, they were unlawfully absent from negotiations in which they were legally required to be participants; and (ii) countless other parties will discover they unlawfully injected themselves into collective bargaining involving another entity and its union(s), based on a relationship that was insufficient, after all, to result in joint-employer status. The majority essentially says that the Board will look at every aspect of a relationship on a case-by-case basis, in litigation, and then decide the limited issue presented. We owe a greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that "we'll see how it floats."

Accordingly, we here defend a standard that serves labor law and collective bargaining well, a standard that is understandable and rooted in the real world. It recognizes joint-employer status in circumstances that make sense and would foster stable bargaining relationships. Indeed, in the Board's history of applying this traditional joint-employer test, there have been many cases where two or more employers were found to exercise sufficient control over a common group of employees to warrant joint bargaining obligations and shared liability for unfair labor practices.[84] Our quarrel with the majority stems not

[82] *Denver Building Trades*, 341 U.S. at 692.

[83] There is a further question. *Denver Building Trades* involved a situation in which a subcontractor was the primary employer target of protest, and the general contractor was the neutral employer. In *Markwell & Hartz*, the Board applied the same principles of separateness and neutrality when the general contractor was the primary employer in a labor dispute, thereby finding all subcontractors at the common situs to be neutrals. *Building & Construction Trades Council (Markwell & Hartz)*, 155 NLRB 319 (1965), enfd. 387 F.2d 79 (5th Cir. 1967). The breadth of our colleagues' test raises a genuine concern that they might use it to undermine this decision.

[84] Our colleagues fault us for making "no real effort to address" the issues they have asserted. But today's legal framework for bargaining (which they dismissively refer to as "the current status quo") already supplies the answer. That is, economic interdependence and indirect influence *work both ways*. Current law offers unions great flexibility when dealing with employers that happen to be interdependent with another entity. As long as the union respects secondary boycott principles, leverage applied to the immediate "employer" is all the more likely to affect suppliers, vendors, and other parties having closely aligned economic interests, which predictably may lead to meaningful discussions and changes across the various entities. Such discussions are likely to occur even "without the intervention of the Board enforcing a statutory requirement to bargain," and there is an "important difference" between such discussions being "permitted" as opposed to making them "mandatory." *First National Maintenance v. NLRB*, 452 U.S. 666, 681 fn. 19, 683 (1981). Here, if the Union organizes Leadpoint, then, depending on its actual bargaining strength, it can engage in activities that lead to modifications in BFI's contract with Leadpoint to accommodate those Union demands. And the Board's successorship case law permits the Union to remain on the scene even if BFI attempts to switch contractors. The flaw with our colleagues' approach is that, regardless of the strength of the union, it gives that union an artificial place at the table where there is *any* interdependency between the employer and other entities. See *H. K. Porter Co.*, 397 U.S. at 107–108 ("It is implicit in the entire structure of the Act that the Board acts to

from any disagreement about the concept of joint employment status but rather from their imposition of a test that we firmly believe cannot be reconciled with the common-law agency standard the Board is compelled to apply, based on a statute the Board is duty-bound to enforce.

The Supreme Court has recently cautioned that a federal agency must explain itself when departing from interpretation of well-established rules that have governed business practices for long periods, *even when the rules are of the agency's own making*. In *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012), the Court reviewed the Department of Labor's (DOL) new interpretation that pharmaceutical sales representatives would no longer be considered outside salesmen exempt from the FLSA's overtime provisions. The Court emphasized that its usual deference to such an agency action was not warranted because of the "potentially massive" economic implications of the new interpretation "for conduct that occurred well before that interpretation was announced,"[85] and because deference "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[86] The Court also noted that DOL's "longstanding practice" of exempting detailers went back to the beginning of the FLSA, and that there were currently 90,000 detailers working for pharmaceutical companies with the understanding that they were exempt outside sales reps.[87]

Because DOL's new interpretation would be so disruptive to the regulated industry, the Court could not simply defer to it:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.
>
> Accordingly, whatever the general merits of . . . deference, it is unwarranted here. We instead accord the Department's interpretation a measure of deference proportional to the "'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).[88]

What the majority has done here is far broader in scope than DOL's invalidated interpretive change. Instead of overturning one discrete longstanding agency interpretation that affects a statutory exemption for a single category of employer, the Board has substantially altered its interpretation of joint-employer status across the spectrum of private business relationships subject to our jurisdiction. Despite the majority opinion's description, this case is not merely about whether the Board should overturn 30 years of precedent based on the *TLI* and *Laerco* decisions. That would be serious enough.

Our greater concern is the impact of the majority's reformulation on a much broader body of law, affecting multiple doctrines central to the Act that have been developed and refined through decades of work by bipartisan Boards, the courts, and Congress. As in *Christopher*, the majority here gives insufficient consideration to the "potentially massive" economic implications of its new joint-employer standard, and it requires innumerable parties to "divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding." We believe that the Board should adhere to the "joint-employer" test that has existed for 30 years without a single note of judicial criticism. In our view, the Regional Director correctly applied that test in concluding that Leadpoint was the sole employer of employees in the petitioned-for unit.

Accordingly, we respectfully dissent.

oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.")

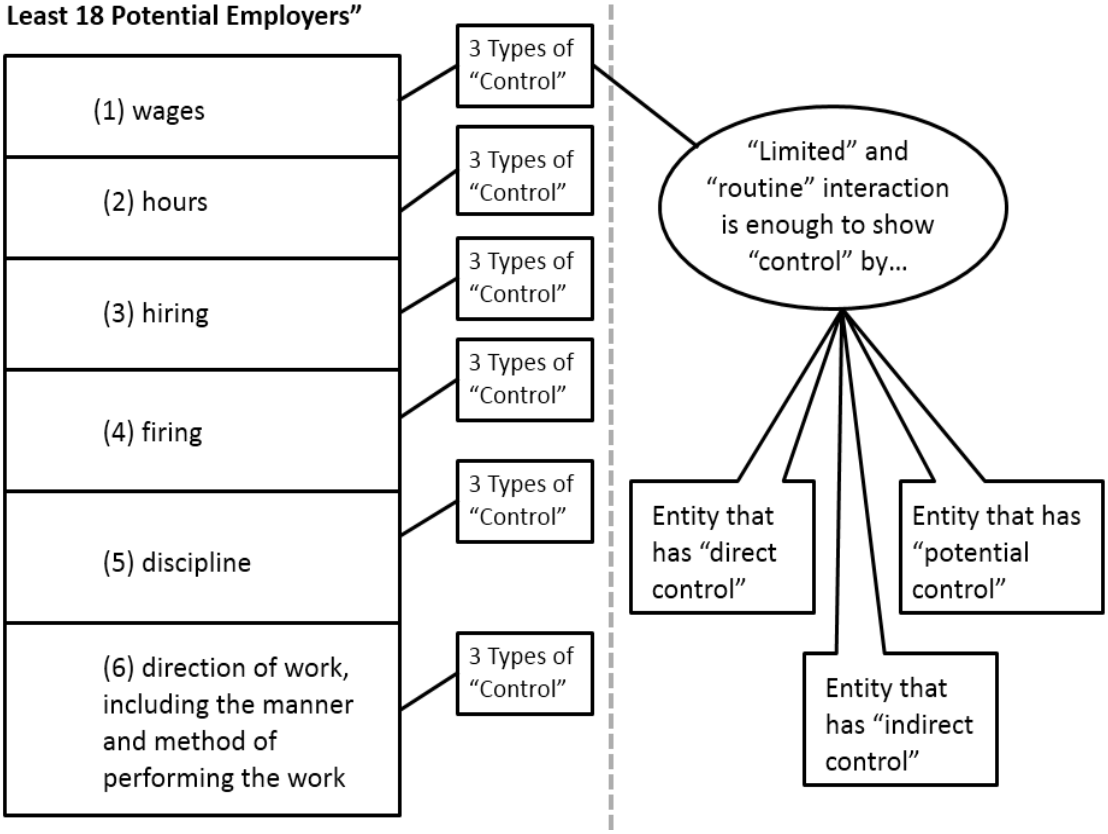
[85] Id. at 2167.

[86] Id. (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

[87] Id. at 2167–2168.

[88] Id. at 2168–2169.

Appendix A: "Why There Are At Least 18 Potential Employers"



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 9, 2017 Decided December 28, 2018

No. 16-1028

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., DOING BUSINESS AS BFI NEWBY ISLAND RECYCLING,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

TEAMSTERS LOCAL 350,
INTERVENOR

Consolidated with 16-1063, 16-1064

On Petition for Review and Cross-Application and
Application for Enforcement of an Order of
the National Labor Relations Board

Joshua L. Ditelberg argued the cause for petitioner. With him on the briefs was *Stuart Newman*.

Greg Abbott, Governor, Office of the Governor for the State of Texas, and *Adam W. Aston*, Deputy General Counsel at the time the brief was filed, Office of the Attorney General

for the State of Texas, were on the brief for *amicus curiae* the Governor of Texas in support of petitioner.

Linda E. Kelly, *Peter Kirsanow*, *Maynard A. Buck*, and *Richard Hepp* were on the brief for *amici curiae* National Association of Manufacturers, *et al.* in support of petitioner.

Robert M. Loeb, *Naomi Mower*, *Jeremy Peterman*, and *Tom Burt* were on the brief for *amici curiae* Microsoft Corporation and HR Policy Association in support of petitioner.

Ronald Meisburg, *Andrea R. Calem*, and *Kurt G. Larkin* were on the brief for *amici curiae* Associated Builders and Contractors, *et al.* in support of petitioner.

Richard A. Samp was on the brief for *amicus curiae* Washington Legal Foundation in support of petitioner.

Adam G. Unikowsky, *Kathryn Comerford Todd*, *Steven P. Lehotsky*, and *Warren Postman* were on the brief for *amici curiae* The Chamber of Commerce of the United States of America and The Retail Litigation Center, Inc. in support of petitioner.

Joel A. Heller, Attorney, National Labor Relations Board, was on the brief for respondent. With him on the brief were *Richard F. Griffin*, *Jr.*, General Counsel at the time the brief was filed, *John H. Ferguson*, Associate General Counsel at the time the brief was filed, *Linda Dreeben*, Deputy Associate General Counsel, and *Jill A. Griffin*, Supervisory Attorney.

Harold Craig Becker argued the cause for intervenor. With him on the brief were *James B. Coppess*, *Maneesh Sharma*, *Teague P. Paterson*, and *Susan K. Garea*.

P. David Lopez, General Counsel at the time the brief was filed, *Jennifer S. Goldstein* and *Gail S. Coleman*, Attorneys, Equal Employment Opportunity Commission, were on the brief for *amicus curiae* Equal Employment Opportunity Commission in support of respondent.

Before: MILLETT and WILKINS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

Dissenting opinion filed by *Senior Judge* RANDOLPH.

MILLETT, *Circuit Judge*: Browning-Ferris Industries of California, Inc. operates one of the largest recycling plants in the world. To operate its plant, Browning-Ferris contracts with Leadpoint Business Services to provide workers to sort through the incoming material, clear jams that occur in the sorting process, and keep the sorting areas clean. In 2013, a local union petitioned to represent those workers as a bargaining unit under the National Labor Relations Act, *see* 29 U.S.C. § 159(a), designating Browning-Ferris and Leadpoint as "joint employers" of the workers.

In concluding that Browning-Ferris and Leadpoint were joint employers of the workers in the petitioned-for unit, the National Labor Relations Board ruled that it would consider a putative joint employer's reserved right to control the workers at issue, as well as any indirect control exercised over the workers, as among a number of factors relevant to

determining joint-employer status. Browning-Ferris challenges both of those aspects of the Board's test.

We hold that the right-to-control element of the Board's joint-employer standard has deep roots in the common law. The common law also permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment. Accordingly, we affirm the Board's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment. But because the Board did not confine its consideration of indirect control consistently with common-law limitations, we grant the petition for review in part, deny the cross-application for enforcement, dismiss without prejudice the application for enforcement as to Leadpoint, and remand for further proceedings consistent with this opinion.

I

A

Congress enacted the National Labor Relations Act of 1935, 29 U.S.C. § 151 *et seq.*, to "protect the right of workers to act together to better their working conditions," *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962), and to "promot[e] stable collective-bargaining relationships," *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). To that end, the Act mediates the relationship between "employees" and "employers" by, among other things, conferring upon employees a right to unionize, 29 U.S.C. § 157, prohibiting employers from engaging in specified unfair labor practices, *id.* § 158(a), and imposing obligations on employers to collectively bargain with representatives of

employees, *id.* § 158(d). The National Labor Relations Board is charged with administering the Act. *Id.* § 153; *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 937 (2017).

But how do those statutory obligations on employers work when an employee has more than one putative employer? After all, a Board order that an employer bargain with a union over the terms and conditions of employment may well be futile if another entity, not subject to an order to bargain, exercises the final say over a working condition or has the power to override a choice negotiated in a collective-bargaining agreement. *See Herbert Harvey, Inc. v. NLRB*, 385 F.2d 684, 686 (D.C. Cir. 1967) (discussing such a situation). To address that not-uncommon scenario, the Board has long recognized that two entities may be joint employers in the eyes of the National Labor Relations Act. *See, e.g.*, *Franklin Simon & Co.*, 94 N.L.R.B. 576, 579 (1951). This case involves the standard that the Board applies in making that joint-employer determination.

On this point, the National Labor Relations Act gives no direct guidance. The Act provides no relevant definition of "employer," let alone of "joint employer." *See* 29 U.S.C. § 152(2) (providing only that the term "employer" "includes any person acting as an agent of an employer, directly or indirectly" and excluding listed entities not relevant here).

The Supreme Court, meanwhile, has addressed the question of joint-employer status under the Act only once. In *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), the Court held that a putative joint employer must "possess[] sufficient control over the work of the employees to qualify as a joint employer," *id.* at 481. That inquiry, the Court stressed, is essentially "factual," and is not controlled by the fact that one putative employer is an independent contractor of another. *See id.*

In the years that followed, the test that courts and the National Labor Relations Board applied to determine joint-employer status resisted consistency or reliable delineation. *Compare, e.g.*, *Springfield Ret. Residence*, 235 N.L.R.B. 884, 891 (1978) (finding joint-employer status where employer had the power to hire and fire), *with, e.g.*, *Mobil Oil Corp.*, 219 N.L.R.B. 511, 515–516 (1975) (finding joint-employer status where employer had the power to set working conditions and make personnel decisions).

Almost twenty years later, the Third Circuit articulated a standard around which both the Board and courts began to coalesce. In *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), the Third Circuit ruled that separate business entities are joint employers if they each "exert significant control over the same employees" in that they "share or co-determine those matters governing essential terms and conditions of employment," *id.* at 1124; *see also id.* at 1123. The Board soon adopted that same articulation of the test. *See TLI, Inc.*, 271 N.L.R.B. 798, 798 (1984); *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325 (1984).

This court's test for joint-employer status, like that of a number of other circuits, echoes the Third Circuit's standard, holding that "[t]wo separate entities may be joint employers of 'a single * * * [work force] if they share or co-determine those matters governing [the] essential terms and conditions of employment,'" *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 440 (D.C. Cir. 2004) (quoting *Aldworth Co.*, 338 N.L.R.B. 137, 139 (2002)). *See also 3750 Orange Place Ltd. P'ship v. NLRB*, 333 F.3d 646, 660 (6th Cir. 2003); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993).

Following *Laerco* and *TLI*, however, the Board added additional requirements that constricted the joint-employer test. For one thing, the Board said that a joint-employer relationship depends on evidence of the actual exercise of control by each employer, not merely a reserved right to control. *See AM Property Holding Corp.*, 350 N.L.R.B. 998, 1000 (2007) (Board "does not rely merely on the existence of * * * contractual provisions" to determine whether a joint-employer relationship exists, but "rather looks to the actual practice of the parties"). In addition, the Board held that "[t]he essential element in [the] analysis is whether a putative joint employer's control over employment matters is direct and immediate." *In re Airborne Freight Co.*, 338 N.L.R.B. 597, 597 n.1 (2002). For several years, then, the Board would rely in analyzing joint-employer claims only on evidence of (i) actual control, as opposed to the right to control, and (ii) direct and immediate control, not indirect control. *See NLRB v. CNN America, Inc.*, 865 F.3d 740, 748–749 (D.C. Cir. 2017).

The Board's decision in this case changed both of those factors by making the right to control and indirect control relevant considerations in determining joint employer status.

B

Browning-Ferris operates the Newby Island Recyclery in Milpitas, California. As one of the largest recycling facilities in the world, Newby Island receives approximately 1,200 tons of mixed materials, waste, and recyclables every day. Inside the facility, four conveyor belts—called "sort lines" or "material streams"—carry different categories of materials that must be sorted so that the remaining portion may be recycled.

This case involves three groups of Newby Island workers: sorters, screen cleaners, and housekeepers. Sorters, as the title suggests, remove and sort non-recyclable materials from the stream lines coming into the facility. Screen cleaners clear jams in the sort lines. Housekeepers clean the areas around the sort lines.

Browning-Ferris, by itself, employs approximately sixty workers at Newby Island. Most of those individuals work outside of the facility as loader operators, equipment operators, forklift operators, and sort-line equipment operators. One of those Browning-Ferris employees, however, is a sorter. Browning-Ferris also has supervisors who oversee and manage the operations of its employees. While Browning-Ferris employs the one sorter, it does not by itself employ the other sorters, or any screen cleaners or housekeepers. Instead, Browning-Ferris contracts with a staffing agency to provide those workers.

In 2009, Browning-Ferris entered into an exclusive service contract with Leadpoint, known as the Temporary Labor Services Agreement ("Agreement"), to staff Newby Island's sorting, screen cleaning, and housekeeping positions. Leadpoint provides approximately 240 workers for Browning-Ferris's Newby Island plant, most of whom fill the sorting, screen cleaning, and housekeeping positions. In addition, Leadpoint employs its own onsite managers and supervisors who oversee the sorters, screen cleaners, and housekeepers.

Under the Agreement, Leadpoint handles the hiring of workers from start to finish, but must ensure that the sorters, screen cleaners, and housekeepers at Newby Island meet certain conditions and qualifications required by Browning-Ferris in the Agreement. Those conditions include passing a "five-panel urinalysis drug screen" or equivalent drug

test, and "hav[ing] the appropriate qualifications * * *, consistent with all applicable laws and instructions from [Browning-Ferris], to perform the general duties of the assigned position." J.A. 19. The Agreement further provides that Leadpoint workers cannot be assigned to Newby Island for more than six months at a time. But evidence in the record indicates that the time limit is not consistently enforced and some Leadpoint workers have continued working for more than six months.

Leadpoint "has the sole responsibility to counsel, discipline, review, evaluate, determine pay rates, and terminate" the workers that it provides to Browning-Ferris. J.A. 20. Browning-Ferris "reserves the right to ensure that" personnel from Leadpoint work "free from the effects of alcohol and illegal drug use." *Id.* Browning-Ferris also "may reject" or "discontinue the use of" a worker at its facility "for any or no reason." J.A. 21.

Leadpoint is responsible for paying the workers, as well as providing their benefits and unemployment insurance. Leadpoint determines the wages the workers will be paid, and it sends Browning-Ferris weekly invoices documenting the services performed and the total hours clocked by the workers. While Browning-Ferris generally has no direct input on the wages that Leadpoint pays, a March 2013 increase in the local minimum wage prompted Leadpoint and Browning-Ferris to amend the Agreement's wage schedule to comply with the new law. In addition, the Agreement provides that Leadpoint workers may not, without approval from Browning-Ferris, earn a higher wage than that earned by any Browning-Ferris worker performing similar tasks. The lone Browning-Ferris sorter earns approximately five dollars more per hour than all of the Leadpoint sorters.

For all workers at Newby Island, Browning-Ferris has determined that there will be three shifts per day, and it sets the hours for those shifts. Each shift lasts approximately eight hours, but may occasionally run into overtime. In addition, Browning-Ferris supervisors decide daily which of the four sort lines will run and provide Leadpoint supervisors with a target headcount of how many workers will be needed to operate those lines. Browning-Ferris does not decide which workers will work on which sort lines or during which shifts; Leadpoint makes that call. If Browning-Ferris supervisors determine that a sort line will run overtime, they convey that information to Leadpoint supervisors, who then make the necessary staffing arrangements.

The Board found inconsistencies in the frequency and nature of Browning-Ferris supervisors' communications with the workers. Some Browning-Ferris supervisors testified that their only direct communication with the workers involved referring the workers and any problems they raised to Leadpoint supervisors. According to those Browning-Ferris supervisors, they did not directly or specifically instruct those workers on how to perform their jobs. Instead, if they spotted something untoward, they would just tell Leadpoint supervisors "that there's a problem." J.A. 141. For example, the sorting lines are designed with an emergency stop switch to halt the flow of materials. One Browning-Ferris supervisor explained that he and his colleagues generally instruct Leadpoint supervisors, not the workers, on when the emergency stop switch can be used. They left it up to the Leadpoint supervisors to convey that information to the sorters.

Some workers at the Newby facility had different experiences. They testified that Browning-Ferris supervisors would occasionally direct the workers' removal of materials from the sort lines or their cleaning of certain areas, and would

also warn them against pressing the emergency stop switch too frequently. In addition, a Browning-Ferris supervisor admitted that he had at times held informal meetings with sorters to teach them how to differentiate between organic and inorganic material on the sort lines.

Although the Agreement makes Leadpoint ultimately responsible for disciplining the workers it provides, Browning-Ferris has, on occasion, alerted Leadpoint supervisors to incidents that Browning-Ferris believed warranted disciplinary action. For example, in June 2013, a Browning-Ferris supervisor, Paul Keck, sent an email "request[ing] the[] immediate dismissal" of a worker seen passing a bottle of alcohol and the worker to whom it was passed. J.A. 34. A Leadpoint supervisor questioned both workers and sent them to a clinic for drug and alcohol testing. Based on the results of the testing, one of the workers was terminated from Leadpoint's employ, and the other continued to work for Leadpoint, but was reassigned to another company's facility. Keck later testified that he did not know what action Leadpoint had taken with respect to those two workers, although he noticed that one was no longer at Newby and was unsure about the other.

In that same e-mail, Keck informed the Leadpoint supervisor that he had reviewed video surveillance tapes showing a Leadpoint worker damaging a wall mount. Keck closed the e-mail by stating: "I hope you'll agree [that] this Leadpoint employee should be immediately dismissed." J.A. 34. Following the e-mail, Leadpoint supervisors first suspended and then terminated the worker involved for destroying or defacing property. Keck again testified that he did not follow up to learn what happened to that employee.

On another occasion, Keck advised a Leadpoint supervisor that the size of a pre-sort line should be reduced by two workers per shift, and that two other workers on the pre-sort line should be repositioned. The e-mail closed with: "This staffing change is effective Monday, August 5, 2013." J.A. 32.

C

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In July 2013, the International Brotherhood of Teamsters Local 350 ("Union") filed a petition with the Board seeking to represent a new bargaining unit consisting of "full time and regular part-time employees" that were "employed by [Leadpoint] and [Browning-Ferris], joint employers," at Newby Island. J.A. 344. As relevant here, the petitioned-for unit included Leadpoint sorters, housekeepers, and screen cleaners, but not Leadpoint supervisors. At the time, the Union already represented a separate bargaining unit consisting of the sixty workers at Newby Island directly employed by Browning-Ferris, including the sole Browning-Ferris sorter.

After an evidentiary hearing, the Acting Regional Director concluded that Browning-Ferris and Leadpoint were not joint employers of the workers in the petitioned-for bargaining unit. Instead, the Director concluded that employees of Leadpoint alone composed the appropriate bargaining unit, and directed that an election be held for that unit. In the Director's view, the evidence was insufficient to establish that Browning-Ferris controlled or co-determined those matters governing the essential terms and conditions of the workers' employment, such as wages, benefits, hiring, discipline, termination, daily work responsibilities, and shift schedules.

The Union filed a petition for review, and the Board solicited briefing from the parties and any interested *amici* on whether the joint-employer test should be updated and how it should apply in this case. On August 27, 2015, the Board issued a decision concluding that Browning-Ferris and Leadpoint are joint employers of the workers in the petitioned-for bargaining unit. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, at 2 (Aug. 27, 2015). In so ruling, the Board "restate[d]" and "reaffirm[ed]" its longstanding joint-employer standard, adopted from the Third Circuit's *Browning-Ferris* decision, under which "two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.'" *Id.* (citation omitted).

In applying that test, the Board announced for the first time that it would subdivide the inquiry, asking first "whether there is a common-law employment relationship with the employees in question." *Browning-Ferris*, 362 N.L.R.B. No. 186, at 2. If so, the Board would ask secondly "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." *Id.* In applying both prongs of that test, the Board announced that it would "no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority." *Id.* Nor would the Board anymore demand that "a statutory employer's control * * * be exercised directly and immediately" "to be relevant to the joint-employer inquiry." *Id.* Instead, the Board would consider both reserved control and indirect control as potentially "probative" in the joint-employer analysis. *See id.* at 2, 13, 16, 17 n.94.

Applying that test, the Board concluded that Browning-Ferris and Leadpoint were joint employers of the workers in the petitioned-for bargaining unit. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 20. Among the evidence the Board viewed as demonstrating Browning-Ferris's control were Keck's reports of misconduct by workers and requests for their discipline and removal; Browning-Ferris's control over the speed of the sort lines, including direct admonitions to workers to sort faster, work smarter, and not stop the sort lines; and the contractual condition that workers earn no more than Browning-Ferris employees performing similar work. *Id.* at 18–20.

Two members of the Board dissented. In their view, the requirements that control actually be exercised and that it be direct and immediate were required by the common law of agency. *See Browning-Ferris*, 362 N.L.R.B. No. 186, at 28–32 (Members Miscimarra & Johnson, dissenting). The dissent also expressed concern that retroactive application of the new aspects of the test would disrupt the longstanding expectations of parties who had structured their labor relationships based on the Board's previous joint-employer standard. *See id.* at 22–23.

Browning-Ferris timely petitioned for review of the Board's order, while the Board cross-applied for enforcement of the order against Browning-Ferris and separately applied for enforcement of the order against Leadpoint.[1]

[1] Although Leadpoint participated in the proceedings before the Board, Leadpoint did not petition for review of the Board's order or enter an appearance before this court in this case. Leadpoint accordingly has forfeited any challenges of its own to the Board's order. But because the relief ordered by the Board is inextricably

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While this case was pending, the Board again changed course on the joint-employer question. In *Hy-Brand Industrial Contractors, Ltd.*, 365 N.L.R.B. No. 156 (Dec. 14, 2017) (later *overruled by Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B. No. 26 (Feb. 26 2018)), the Board expressly overruled its *Browning-Ferris* decision and announced that "a finding of joint-employer status" would require (1) "proof that the alleged joint-employer entities have actually *exercised* joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control)," (2) the control exercised "must be 'direct and immediate' (rather than indirect)," and (3) "joint-employer status will not result from control that is 'limited and routine.'" *Id.* at 35.

Following the *Hy-Brand* decision, the Board moved this court to remand Browning-Ferris's case to the agency for further consideration. We granted that motion on December 22, 2017.

While that remand was still pending before the Board, an investigation conducted by the Board's Inspector General uncovered that one of the Board members that decided the *Hy-Brand* case was a shareholder in the law firm that represented Leadpoint before the Board in *Browning-Ferris*. On that basis, the Inspector General concluded that the Member's participation in the *Hy-Brand* decision amounted to "a serious and flagrant problem and/or deficiency in the

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bound up in Leadpoint's joint-employer status with Browning-Ferris, we dismiss the application for enforcement as to Leadpoint without prejudice.

Board's administration of its deliberative process." Memorandum of NLRB Inspector General David P. Berry (Feb. 9, 2018), *available at* https://www.nlrb.gov/who-we-are/inspector-general. The Inspector General explained that "the practical effect of the *Hy-Brand* deliberative process was a 'do over' for the *Browning-Ferris* parties," and so that Member should have recused himself. *Id.* at 2, 5.

In light of the Inspector General's report, the Board unanimously vacated its *Hy-Brand* decision and announced that "the overruling of the *Browning-Ferris* decision is of no force or effect." *Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B. No. 26 (Feb. 26, 2018). The Board then moved this court to recall its remand mandate and asked this court to proceed with resolving Browning-Ferris's petition for review and the Board's cross-application for enforcement. We granted that motion on April 6, 2018, and recalled our mandate, but held the case in abeyance pending the Board's disposition of Hy-Brand's motion for reconsideration. The Board denied reconsideration two months later. *Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B. No. 93 (June 6, 2018).

On May 9, 2018, the Board announced its plan to undertake a rulemaking on the standard for joint-employer status. The Board was explicit that any new rule that might result from that process would be prospective only. Browning-Ferris Mot. to Remand at 9, 12 (June 13, 2018).

In June 2018, the Board specifically requested that this court proceed to decide the case, notwithstanding the pending rulemaking. *See* Board Opp. to Mot. to Remand (June 15, 2018); *see also* Board Mot. to Govern Future Proceedings (June 13, 2018); Tr. of Oral Argument at 13 (July 3, 2018).

On September 14, 2018, the Board published its notice of proposed rulemaking that suggested reinstating its prior "direct and immediate control" test for joint-employer status. "[T]o be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine." 83 Fed. Reg. 46681, 46686 (Sept. 14, 2018).

Since issuing its proposed rule, the Board has reiterated its request that this court resolve the pending petitions for review in this case. *See* Letter from Linda Dreeben, Deputy Associate General Counsel, National Labor Relations Board to Mark J. Langer, Clerk of Court, U.S. Court of Appeals for the District of Columbia Circuit (September 19, 2018).

II

We start with the question of what, if any, deference is owed to the Board's adjustments to the joint-employer standard. The Board claims that its "reasonable" judgment merits "considerable deference." *See* Board Br. 16 (citations omitted); *cf. Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842–844 (1984) (courts defer to an agency's "reasonable interpretation" of ambiguous terms in a statute administered by the agency). Browning-Ferris says that the Board gets no deference. We hold that, to the extent that the Board's joint-employer standard is predicated on interpreting the common law, Browning-Ferris is correct. The content and meaning of the common law is a pure question of law that we review *de novo* without deference to the Board.

Under Supreme Court and circuit precedent, the National Labor Relations Act's test for joint-employer status is

determined by the common law of agency. The Supreme Court has often held that, when Congress leaves undefined statutory terms like "employee" and "employer" that have longstanding common-law meanings, courts should presume that Congress intended to incorporate those meanings, unless the statute, directs otherwise. *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 103 (2011) ("Where Congress uses terms that have accumulated settled meaning under * * * the common law, [we] must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms.") (alterations in original) (quoting *Neder v. United States*, 527 U.S. 1, 21 (1999)); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–740 (1989) ("[W]hen Congress has used the term 'employee' without defining it, * * * Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."); *id.* (citing additional cases holding that "employee," "employer," and "scope of employment" must be interpreted in light of agency law).

That presumption applies with full force to the employer-employee relationship under the National Labor Relations Act. In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Supreme Court bypassed the common-law meaning of "employee" in favor of a definition that potentially swept in independent contractors, reasoning that the latter definition better advanced the policies underlying the National Labor Relations Act, *see id.* at 131–132. Congress promptly and emphatically rejected that approach, amending the Act to specifically exclude "independent contractors" from the Act's definition of "employees." *See* Labor Management Relations Act of 1947, Pub. L. 80–101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–197) ("Taft-Hartley Amendments"). "The obvious purpose" of the Taft-Hartley Amendments, the Supreme Court later ruled, "was to have the Board and the

courts apply general [common-law] agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324–325 (1992) (explaining the congressional reaction to *Hearst*).

For purposes of determining our standard of review, the lesson from the Taft-Hartley Amendments and *United Insurance* is that Congress delegated to the Board the authority to make tough calls on matters concerning labor relations, but not the power to recast traditional common-law principles of agency in identifying covered employees and employers. Instead, the inquiry into the content and meaning of the common law is a "pure" question of law, and its resolution requires "no special administrative expertise that a court does not possess." *United Insurance*, 390 U.S. at 260.

For that reason, we review the Board's interpretation of the common law *de novo*. *See FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1128 (D.C. Cir. 2017) ("[T]his particular question [regarding who is an employee or independent contractor] under the Act is not one to which we grant the Board *Chevron* deference[.]"); *cf. International Longshoremen's Ass'n v. NLRB*, 56 F.3d 205, 212 (D.C. Cir. 1995) (because the term "agent" in the Act "incorporat[es] common law agency principles," courts do not "defer to the agency's judgment as we normally might under [*Chevron*]").

That no-deference rule applies just as much to the common-law meaning of "employer" under the Act as it does to that of "employee." That is because both inquiries turn on pure questions of law about the scope of traditional common-

law agency principles. *Cf. Community for Creative Non-Violence*, 490 U.S. at 739–740.[2]

The Board argues that, even if its articulation of the common law does not get full-fledged *Chevron* deference, the proper standard of review is still not *de novo*. Citing language in *Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310 (D.C. Cir. 2012), and *International Longshoremen's Association*, 56 F.3d at 212, the Board argues that we must accept its understanding of the common law so long as it reflects a choice between "two fairly conflicting views." Board Br. 16 (citation omitted).

That is not correct. The "two fairly conflicting views" standard applies to the Board's application of the common law to the facts of a particular case—which is a mixed question of law and fact. It does not extend to the Board's articulation of the common law, which is a pure question of law. *See FedEx*, 849 F.3d at 1128; *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75 (D.C. Cir. 1990) ("[D]eference would only be extended to the Board's determination of employee status—an 'application

[2] The Supreme Court's grant of deference to the Board in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), does not apply here. That case involved the very narrow question of whether a worker should be excluded from the Act's protections because of his status as an undocumented foreign worker. *Id.* at 891. The deference accorded to the Board thus was not to its understanding of the common-law meaning of "employee," but to broader policy questions about promoting effective collective bargaining and balancing the rights of both undocumented workers and their legally resident coworkers. *See id.* at 891–892. Nor does *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995), help the Board. That case presented "no * * * question" about the scope of the applicable common law, and, in any event, the Board's interpretation was entirely "consistent with the common law." *Id.* at 94.

of law to fact'—insofar as [the Board] made a 'choice between two fairly conflicting views' in a particular case.") (quoting *United Insurance*, 390 U.S. at 260). Our decisions in *Atrium of Princeton* and *International Longshoremen's Association* are of the same mind. *See Atrium of Princeton*, 684 F.3d at 1315–1316 (rejecting the Board's formulation of the relevant common-law agency standard and effectively applying *de novo* analysis of the common law); *International Longshoremen's Ass'n*, 56 F.3d at 213 (finding no dispute as to the "fundamental principle of hornbook agency law" that governed, and applying the "two fairly conflicting views" standard only to the Board's application of the law to the facts). We also note that the Board's decision in *Hy-Brand* agreed that courts owe its interpretation of the common law no deference. *Hy-Brand*, 365 N.L.R.B. No. 156 at 4.

For those reasons, we review *de novo* whether the Board's joint-employer test comports with traditional common-law principles of agency.

Finally, it is precisely because Congress has tasked the courts, and not the Board, with defining the common-law scope of "employer" that this court accepts the Board's repeated request that we resolve this case notwithstanding the pending rulemaking. The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary. That presumably is why the Board has thrice asked this court to dispose of the petitions in this case during its rulemaking process. Like the Board, and unlike the dissenting opinion (at pp. 4–8), we see no point to waiting for the Board to take the first bite of an apple that is outside of its orchard.

III

The Board was certainly correct that, for roughly the last 25 years, the governing framework for the joint-employer inquiry has been whether both employers "exert significant control over the same employees" in that they "share or co-determine those matters governing the essential terms and conditions of employment." *Browning-Ferris*, 691 F.2d at 1124. This court so held in *Dunkin' Donuts*, 363 F.3d at 440.

The question in this case is whether the common-law analysis of joint-employer status can factor in both (i) an employer's authorized but unexercised forms of control, and (ii) an employer's indirect control over employees' terms and conditions of employment. *See Browning-Ferris*, 362 N.L.R.B. No. 186, at 2. In answering that question, we look first and foremost to the "established" common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947, *Microsoft*, 564 U.S. at 103 (citation omitted). *See Field v. Mans*, 516 U.S. 59, 70 (1995) ("look[ing] to the [common-law] concept of 'actual fraud' as it was understood in 1978 when that language was added to [the statute]").

We conclude that the Board's right-to-control standard is an established aspect of the common law of agency. The Board also correctly determined that the common-law inquiry is not woodenly confined to indicia of direct and immediate control; an employer's indirect control over employees can be a relevant consideration. The Board in *Hy-Brand*, in fact, agreed that both reserved and indirect control are relevant considerations recognized in the common law. *See Hy-Brand,* 365 N.L.R.B. No 156 at 4. In applying the indirect-control factor in this case, however, the Board failed to confine it to indirect control over the essential terms and conditions of the workers' employment. We accordingly remand that aspect of the decision to the Board for it to explain and apply its test in a manner that hews to the common law of agency.

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The Board's conclusion that joint-employer status considers not only the control an employer actually exercises over workers, but also the employer's reserved but unexercised right to control the workers and their essential terms and conditions of employment, finds extensive support in the common law of agency.

First, this court has already squarely addressed that common-law question. In *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977), this court was explicit that "[w]hether [two entities are] joint employers" under the National Labor Relations Act "depends upon the amount of actual *and potential control* that" the putative joint employer "ha[s] over the * * * employees," *id.* at 255 (emphasis added). That inquiry, we added, "depend[s] upon the amount of and nature of control that [the putative employer] exercise[s] *and* [*is*] *authorized to exercise* under the contract." *Id.* (emphasis added). This court's decision in *International Chemical Workers* is, of course, binding on this panel. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc).

The rule established in *International Chemical Workers* also makes great sense. Retained but unexercised control has long been a relevant factor in assessing the common-law master-servant relationship. The Supreme Court has held that the reserved right to control certain aspects of the work underpins the common-law master-servant dynamic. *See Chicago, Rock Island & Pac. Ry. Co. v. Bond*, 240 U.S. 449, 456 (1916) (worker held not to be an employee because the company "did not *retain the right* to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not *retain control* not only of what should be done, but how it should be done") (emphases added); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889) ("[T]he relation of master and servant exists whenever the employer *retains the right to direct* the manner in which the

business shall be done, as well as the result to be accomplished[.]") (emphasis added).[3]

State-court decisions applying the common law of agency are equally clear that unexercised control bears on employer status. That was the common-law rule at the time of the National Labor Relations Act's passage in 1935.[4] That was

[3] *See also Little v. Hackett*, 116 U.S. 366, 376 (1886) ("[I]t is th[e] *right to control* the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant.") (emphasis added) (quoting *Bennett v. New Jersey R.R. & Transp. Co.*, 36 N.J.L. 225, 227 (N.J. 1873)).

[4] *See, e.g.*, *Norwood Hosp. v. Brown*, 122 So. 411, 413 (Ala. 1929) ("[T]he ultimate question in this connection is not whether the employer actually exercised control, but whether it had a right to control."); *Van Watermeullen v. Industrial Comm'n*, 174 N.E. 846, 847–848 (Ill. 1931) ("One of the principal factors which determine whether a worker is an employee or an independent worker is the matter of the right to control the manner of doing the work, not the actual exercise of that right."); *Tuttle v. Embury-Martin Lumber Co.*, 158 N.W. 875, 879 (Mich. 1916) ("[T]he test of the [employee] relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent."); *Odom v. Sanford & Treadway*, 299 S.W. 1045, 1046 (Tenn. 1927) ("[T]he ultimate question is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control.") (citation omitted).

also the common-law rule at the time of the Taft-Hartley Amendments in 1947.[5] And, for what it is worth, it is still the common-law rule today.[6]

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[5] *See, e.g.*, *S.A. Gerrard Co. v. Industrial Accident Comm'n*, 110 P.2d 377, 378 (Cal. 1941) ("[T]he right to control, rather than the amount of control which was exercised, is the determinative factor.") (citing cases); *Bush v. Wilson & Co.*, 138 P.2d 457, 457 (Kan. 1943) ("Under [the] 'right to control rule,' whether a person is an 'employee' of another depends upon whether [the] person who is claimed to be an employer had right to control [the] manner in which work was done * * * but it is not necessary to show actual exercise of control."); *Bobik v. Industrial Comm'n*, 64 N.E.2d 829, 832 (Ohio 1946) ("[I]t is not * * * the actual exercise of the right by interfering with the work but rather the right to control which constitutes the test.") (citation omitted); *Green Valley Coop. Dairy Co. v. Industrial Comm'n*, 27 N.W.2d 454, 457 (Wis. 1947) ("It is quite immaterial whether the right to control is exercised by the master so long as he has the right to exercise such control.") (citation omitted); *Employers Mutual Liability Ins. Co. v. Industrial Comm'n*, 284 N.W. 548, 551 (Wis. 1939) (same) (citing additional cases).

[6] *See, e.g.*, *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 172 (Cal. 2014) ("[W]hat matters under the common law is not how much control a hirer *exercises*, but how much control the hirer *retains the right to exercise*.") (emphases added); *Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 423 (D.C. 2006) ("[T]he right to control means 'the right to control an employee in the performance of a task and in its result, and not the actual exercise of control or supervision.'") (citation omitted); *Mallory v. Brigham Young Univ.*, 332 P.3d 922, 928–929 (Utah 2014) ("If the principal has the right to control the agent's method and manner of performance, that agent is a servant *whether or not the right is specifically exercised*.") (emphasis added).

In addition, the "right to control" runs like a *leitmotif* through the Restatement (Second) of Agency. It starts right out of the box with the definitional provision of the master-servant relationship: a "master" "controls *or has the right to control* the physical conduct of [another] in the performance of [a] service," RESTATEMENT (SECOND) OF AGENCY § 2(1), at 12 (AM. LAW INST. 1958) (emphasis added), while a "servant" likewise "is controlled *or is subject to the right to control* by the master," *id.* § 2(2), at 12 (emphasis added). And that refrain keeps repeating. *See id.* § 14 cmt. a, at 60 ("The extent of the right to control the physical acts of the agent is an important factor in determining whether or not a master-servant relationship between them exists."); *id.* § 220(1), at 485; *id.* § 250 cmt. a, at 550 (identifying the "right to control physical details as to the manner of performance" as "characteristic of the relation of master and servant").

In short, "[a]t common law the relevant factors defining the master-servant relationship focus on the master's *control* over the servant," whether that means the servant "'is controlled or *is subject to the right to control* by the master,'" and so that "common-law element of control is the principal guidepost" in determining whether an entity is an employer of another. *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 448 (2003) (emphases added) (quoting RESTATEMENT (SECOND) OF AGENCY § 2(2)).

Indeed, precedent is so clear on this point that Browning-Ferris admitted at oral argument that the Board "can consider" unexercised control as a relevant factor in the joint-employer determination. Oral Arg. Tr. at 11:2. The Board's subsequent decision in *Hy-Brand* agreed as well that reserved control may be one "indicia" that is "probative of

joint-employer status" under the common law. *Hy-Brand*, 365 N.L.R.B. No. 156 at 4.

Second, consideration of unexercised control accords with the common law's analogous "dual master doctrine": the concept that "[a] person may," under certain circumstances, "be the servant of two masters * * * at one time as to one act," as long as "the service to one [master] does not involve abandonment of the service to the other," RESTATEMENT (SECOND) OF AGENCY § 226, at 498, and "the act is within the scope of his employment for both," *id.* § 226 cmt. a, at 499. In the comments to Section 226, the Restatement (Second) specifically notes that the "*right* of the [putative] master[s] to control the conduct of the servant" is determinative of whether the servant has two masters at the same time. *Id.* § 226 cmt. a, at 498 (emphasis added).

To be sure, Section 226 addresses situations in which an individual is a "servant of two masters, *not joint employers*." RESTATEMENT (SECOND) OF AGENCY § 226, at 498 (emphasis added). But if unexercised control is relevant to identifying two distinct employers, that consideration logically applies to identifying simultaneous joint employers as well. Indeed, the Supreme Court has, in the context of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, identified the dual master doctrine as a "common-law" "method[] by which [an individual] can establish his 'employment' with [one entity] even while he is nominally employed by another." *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 324 (1974).

2

Browning-Ferris argues that the "most important" component of the employee-or-independent-contractor inquiry is the "extent of the actual supervision exercised." Browning-Ferris Br. 27 (emphases omitted) (quoting *Aurora Packing*, 904 F.2d at 76). Considering the independent-contractor inquiry to be "essentially the same" as the joint-employer inquiry, *id.* 31, Browning-Ferris tells us that we should import the same focus here. Both steps of that argument fail.

a

For starters, the common law's analysis of independent contractor status, if anything, has long agreed that "the *right* of control and not [merely] the exercise of that right * * * is relevant" to establishing that a worker is an employee rather than an independent contractor. *Local 814, Int'l Bhd. of Teamsters v. NLRB*, 512 F.2d 564, 571 n.13 (D.C. Cir. 1975) (emphasis added); *see, e.g.*, *Construction, Bldg. Material, Ice & Coal Drivers, Helpers & Inside Employees Union, Local No. 221 v. NLRB*, 899 F.2d 1238, 1242 (D.C. Cir. 1990) (R.B. Ginsburg, J.) ("The *right to control* the 'means and manner' of job performance * * * is * * * recurrent in the cases in point" addressing employee versus independent-contractor status) (emphasis added); *Dovell v. Arundel Supply Corp.*, 361 F.2d 543, 544 (D.C. Cir. 1966) ("The decisive test in determining whether the relation of master and servant exists is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done. It will be noted from the above, it is not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is his right to do so that is important."); *Grace*

v. Magruder, 148 F.2d 679, 681 (D.C. Cir. 1945) ("The vital element which negatives such independence, in the relation between employer and employee, is the right to control the employee, not only as to the final result, but in the performance of the task itself. And, it is the right to control, not control or supervision itself, which is most important."); RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (defining an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other *nor subject to the other's right to control* with respect to his physical conduct in the performance of the undertaking.") (emphasis added); *cf. Logue v. United States*, 412 U.S. 521, 527 (1973) ("[T]he modern common law as reflected in the Restatement of Agency * * * make[s] the distinction between the servant or agent relationship and that of independent contractor turn on *the absence of authority* in the principal to control the physical conduct of the contractor in performance of the contract.") (emphasis added).[7]

[7] *See also City Cab Co. of Orlando v. NLRB*, 628 F.2d 261, 265–266 (D.C. Cir. 1980) ("In this case, * * * the company effectively retains control over the manner in which its [workers] perform their duties. * * * [W]e think the record adequately supports the Board's finding that these [workers] were employees."); *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322, 1327 (D.C. Cir. 1971) (A worker "may be deemed an employee, rather than an independent contractor, if the principal explicitly or implicitly reserves the right to supervise the details of his work."); H.G. Wood, *A Treatise on the Law of Master and Servant* (1877) ("The simple test is, who has the general control over the work? Who has the right to direct what shall be done, and how to do it? And if the person employed reserves this power to himself, his relation to the employer is independent, and he is a contractor; but if it is *reserved to the employer* or his agents, relation is that of master and servant.") (emphasis added).

Lastly, the parties and *amici* dispute the appropriateness of relying on the Restatement (Second) of Agency as a relevant source of common law. Some *amici* argue that the Restatement (Second)'s primary focus is on assigning liability for specific tortious conduct or breaches of contracts, not on determining the relationship between a putative employer and employee. Chamber of Commerce *et al.* Br. 22–23. Nevertheless, the Supreme Court has repeatedly relied on the Restatement (Second) to answer questions of employment under the common law of agency. *See, e.g.*, *Community for Creative Non-Violence*, 490 U.S. at 752 & n.31 ("In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement [(Second)] of Agency."); *Town & Country*, 516 U.S. at 94–95; *Darden*, 503 U.S. at 324.

This court too has relied specifically on Section 220 of the Restatement (Second) of Agency to determine whether a worker is an employee or independent contractor under traditional common-law principles in National Labor Relations Act cases. *E.g.*, *FedEx*, 849 F.3d at 1125; *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 565–566 (D.C. Cir. 2016); *North American Van Lines v. NLRB*, 869 F.2d 596, 599–600 (D.C. Cir. 1989). Accordingly, controlling precedent makes the Restatement (Second) of Agency a relevant source of traditional common-law agency standards in the National Labor Relations Act context.

In any event, both the first Restatement of Agency and the Restatement (Third) of Agency also identify the "right to control" as a relevant factor in establishing a master-servant or employment relationship. RESTATEMENT OF AGENCY § 2(1)–(2), at 11 (AM. LAW INST. 1933) (A "master" "controls or has the right to control the physical conduct of the other in the

performance of [a] service," while a "servant" "is controlled or is subject to the right to control by the master[.]"); 2 RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a), at 198 (AM. LAW INST. 2006) ("For purposes of this section, * * * an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work[.]").

In sum, the Board's conclusion that an employer's authorized or reserved right to control is relevant evidence of a joint-employer relationship wholly accords with traditional common-law principles of agency. And because the Board relied on evidence that Browning-Ferris both had a "right to control" and had "exercised that control," *Browning-Ferris*, 362 N.L.R.B. No. 186, at 18, this case does not present the question whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship.

b

Beyond all that, Browning-Ferris's contention that the joint-employer and independent-contractor tests are virtually identical lacks any precedential grounding. Browning-Ferris cites no case in which we have applied an employee-or-independent-contractor test to resolve a question of joint employment, and we have found none. *Cf. Redd v. Summers*, 232 F.3d 933, 938 (D.C. Cir. 2000) (noting in the Title VII context that "[t]his court has never invoked" the independent-contractor test "to resolve an issue of joint employment," but avoiding the issue).[8]

[8] *Al-Saffy v. Vilsack*, 827 F.3d 85 (D.C. Cir. 2016), likewise avoided whether the Title VII independent-contractor test was

That lack of precedent is understandable because, at bottom, the independent-contractor and joint-employer tests ask different questions. The independent-contractor test considers who, if anyone, controls the worker other than the worker herself. *See Lancaster Symphony Orchestra*, 822 F.3d at 566. The joint-employer test, by contrast, asks how many employers control individuals who are unquestionably superintended.

In this case, there is no question that the workers Leadpoint provides are employees of (at least) Leadpoint, not independent contractors. *See* Browning-Ferris Br. 31 n.14 ("It is undisputed that the persons in the petitioned-for bargaining unit are employees, not independent contractors."). Indeed, there is nothing independent at all about those employees' work lives.

In addition, an important aspect of the independent-contractor inquiry is whether the workers in question are operating their own independent businesses. *See United Insurance*, 390 U.S. at 258–259 (listing whether workers "operate their own independent businesses" as a "decisive factor[]" in the employee-or-independent-contractor inquiry); RESTATEMENT (SECOND) OF AGENCY § 220(2)(b), at 485 (listing "whether or not the [worker] is engaged in a distinct occupation or business" as a factor in the employee-or-independent-contractor inquiry). That consideration is of no help to the joint-employer inquiry.

Similarly, under the Restatement (Second) of Agency, several of the factors that guide the employee-or-independent-

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identical to the joint-employer test, but noted that the two tests had in common "the touchstone [of] control," *id.* at 97.

contractor determination are aimed at characterizing the nature of the work performed. *See*, *e.g.*, RESTATEMENT (SECOND) OF AGENCY § 220(2)(c), at 485 (considering "the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision"); *id.* § 220(2)(d), at 485 (considering "the skill required in the particular occupation"). Those factors shed no meaningful light on the question of Browning-Ferris's status here.

To be sure, as Browning-Ferris notes, both tests ultimately probe the existence of a common-law master-servant relationship.[9] And central to establishing a master-servant relationship—whether for purposes of the independent-contractor inquiry or the joint-employer inquiry—is the nature and extent of a putative master's control.[10] Accordingly, employee-or-independent-contractor cases can still be instructive in the joint-employer inquiry to the extent

[9] *See* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. c, at 486–487 (explaining that the employee-or-independent-contractor factors listed in Section 220(2) are all to be considered in determining whether "[t]he relation of master and servant" exists); *Boire*, 376 U.S. at 481 (equating "whether [the putative joint employer] * * * possessed sufficient control over the work of the employees to qualify as a *joint employer*" with "whether [the putative joint employer] possessed sufficient indicia of control to be an '*employer*'") (emphases added).

[10] *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(a), at 485 (specifying "the extent of control which, by the agreement, the master may exercise over the details of the work" as a factor in the employee-or-independent-contractor determination); *Boire*, 376 U.S. at 481 ("[W]hether [a putative joint employer] * * * qualif[ies] as a joint employer" depends on whether the putative joint employer "possesse[s] sufficient control over the work of the employees[.]").

that they elaborate on the nature and extent of control necessary to establish a common-law employment relationship. Beyond that, a rigid focus on independent-contractor analysis omits the vital second step in joint-employer cases, which asks, once control over the workers is found, *who* is exercising that control, *when*, and *how*.

In short, using the independent-contractor test exclusively to answer the joint-employer question would be rather like using a hammer to drive in a screw: it only roughly assists the task because the hammer is designed for a different purpose.

c

The dissenting opinion is of the view that Leadpoint's purported status as an independent contractor *per se* resolves the issue before us, reasoning that employees of an independent contractor cannot be employees of the company that hired the contractor. *See* Dissent Op. 9. Controlling precedent says otherwise.

In *Boire v. Greyhound Corp.*, the only Supreme Court case to address the question of joint employer status, the Court was explicit that the joint employer inquiry is "*unaffected* by any possible determination" that one employer is an independent contractor of another employer. 376 U.S. at 481 (emphasis added); *id*. ("Greyhound has never suggested that the employees [of the independent contractor] themselves occupy an independent contractor status.").

This court's precedent is of the same view. In *Herbert Harvey v. NLRB*, the World Bank hired Herbert Harvey Inc.—an independent contractor providing building repair services. 385 F.2d at 684–685; *see Herbert Harvey, Inc. v. NLRB*, 424

F.2d 770, 775 (D.C. Cir. 1969) (noting that it was "plain" to the Board that the World Bank and Herbert Harvey contracted for "a completely independent relationship"). We nevertheless held that, as to Herbert Harvey's employees, the "record clearly shows a basis for finding that Harvey and the Bank are joint employers[.]" *Id.*; *see also International Chem. Workers Union Local 483 v. NLRB*, 561 F.2d 253, 256 (D.C. Cir. 1977) (explaining that an employer' status as an independent contractor is "not determinative" of the other putative employer's control over the employees at issue).

The dissenting opinion dismisses *Boire* as a decision about "jurisdiction." Dissenting Op. 12 n.3. True. But in resolving the question of jurisdiction in *Boire*, the Supreme Court was explicit that the statutory carve-out from the National Labor Relations Act for independent contractors—and, importantly, a related jurisdictional exception—did not apply because the Board's jurisdiction was "unaffected" by Floors' independent-contractor status. *Boire*, 376 U.S. at 481. The Supreme Court's analysis of why the independent contractor's status did not solve Greyhound's jurisdictional problem, accordingly, was necessary to the decision. "When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996).

So we take the Supreme Court at its word, as did the Fifth Circuit on remand in *Boire*, *NLRB v. Greyhound Corp.*, 368 F.2d 778, 780–781 (5th Cir. 1966) (applying the Supreme Court's standard to hold that Greyhound and the independent contractor were joint employers), and the Third Circuit in its watershed joint-employer decision, *Browning-Ferris*, 691 F.2d at 1122–1123. *See also id.* at 1123 (noting that, under *Boire,* Greyhound's status as a joint employer "is unaffected by any

possible determination as to Floors' status as an independent contractor") (quoting *Boire*, 376 U.S. at 481).

Lastly, the dissenting opinion cites to the 1925 edition of *Corpus Juris* for the proposition that:

> An independent contractor is not the servant of his employer. The relation of master and servant does not exist between an employer and the servants of an independent contractor, nor between an independent contractor and the servant of a subcontractor, and he is not responsible as a master, either to or for them.

Dissenting Op. 10–11 (quoting 39 C.J. *Master and Servant* § 8, at 37–38 (1925)) (emphasis omitted).

As between Supreme Court precedent and *Corpus Juris*, we hew to the former. But as it turns out, we need not make that choice here because the cited passage does not stop where the dissenting opinion does. *Corpus Juris* adds in the very next sentence:

> If, however, the employer *retains* or assumes control over the means and method by which the work of a contractor is to be done, the relation of master and servant exists between him and servants of such a contractor, and the mere fact of nominal employment by an independent contractor will not relieve the master of liability where the servant is in fact in his employ.

39 C.J. *Master and Servant* § 8, at 38 (emphasis added).

B

The Board also ruled that an employer's control need not "be exercised directly and immediately" "to be relevant to the joint-employer inquiry"; indicia of "indirect[]" control can also be considered. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 2. The Board again correctly discerned the content of the common law—indirect control can be a relevant factor in the joint-employer inquiry. But in failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting, the Board overshot the common-law mark.

1

a

Traditional common-law principles of agency do not require that "control * * * be exercised directly and immediately" to be "*relevant* to the joint-employer inquiry." *Browning-Ferris*, 362 N.L.R.B. No. 186, at 2 (emphasis added). In fact, the National Labor Relations Act itself expressly recognizes that agents acting "indirectly" on behalf of an employer could also count as employers. 29 U.S.C. § 152(2) (the term "employer" "includes any person acting as an agent of an employer, directly or indirectly"). The Act thus textually indicates that the statute looks at all probative indicia of employer status, whether exercised "directly or indirectly." *Id*.

Browning-Ferris's proposed rigid distinction between direct and indirect control has no anchor in the common law. Neither Browning-Ferris nor the dissenting opinion cites any case holding that consideration of indirect control is forbidden.

Nor have we found any. To the contrary, common-law decisions have repeatedly recognized that indirect control over matters commonly determined by an employer can, at a minimum, be weighed in determining one's status as an employer or joint employer, especially insofar as indirect control means control exercised "through an intermediary," *id*.

To begin with, courts applying the traditional common law of agency have explicitly considered indirect control as relevant to the existence of a master-servant relationship. *See White v. Morris*, 152 S.E.2d 417, 419 (Ga. Ct. App. 1966) ("[E]vidence and inferences therefrom indicating [a putative employer's] indirect control * * * are relevant for consideration" of "the existence of a master-servant relationship," "because the alleged relationship can exist by virtue of indirect control of the servant's performance as well as by direct control."); *Wallowa Valley Stages, Inc. v. Oregonian Pub. Co.*, 386 P.2d 430, 433 (Or. 1963) (en banc) (finding sufficient evidence "that the [putative master] indirectly exercised some control over the detail of [the putative servant's] operations"), *repudiated on other grounds by Woody v. Waibel*, 554 P.2d 492 (Or. 1976) (en banc).[11]

In particular, the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship. *See, e.g.*, *Nicholson v. Atchison, T. & S. F. Ry. Co.*, 147 P. 1123, 1126 (Kan. 1915) (putative master's use of "branch company" as a "mere

[11] *See also Metzinger v. New Orleans Bd. of Trade*, 44 So. 1007, 1007 (La. 1907) (looking to whether the putative employer exercised "control over [plaintiff], either directly or indirectly"); *City of Wichita Falls v. Travelers Ins. Co.*, 137 S.W.2d 170, 173 (Tex. Civ. App. 1940) (looking to whether the employer exercised "control, directly or indirectly, over the worker") (citation omitted).

instrumentality" "did not break the relation of master and servant existing between the plaintiff and the [putative master]"); 39 C.J. *Master and Servant* § 8, at 38 ("Where an independent contractor is created or is operating as a subterfuge, an employee will be regarded as the servant of the principal employer.").

Our cases too have considered indirect control relevant to employer status. *See, e.g.*, *Dunkin' Donuts*, 363 F.3d at 440 (in addition to direct control, joint employer's warehouse supervisor "reported his opinion about [warehouse applicants'] qualifications, which [contractor] generally followed," and joint employer's transportation manager "prevented hiring of [driver] applicants he did not approve"); *Al-Saffy v. Vilsack*, 827 F.3d 85, 97 (D.C. Cir. 2016) (in Title VII context, this court cited as relevant evidence supporting reversal of summary judgment the fact that officials working for putative employer had recommended plaintiff's dismissal).

In addition, control that is exercised through an intermediary is a defining feature of the subservant doctrine.[12]

[12] *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 5, illus. 6, at 25–26 (A subservant relationship may exist where "P employs miners with the agreement that [the miners] are to employ, pay and control the activities of assistants who, nevertheless, are within the general discipline of the mine and can be discharged at any time for misconduct."); *id.* § 5, illus. 7, at 26 (A subservant relationship may exist where "P operates a series of markets, putting each in charge of a manager who in practice is given full control over selling. Each manager is paid a net commission on the net profits and is allowed to hire whom he will, the store being subject, however, to general supervision by P."); *Southern Exp. Co. v. Brown*, 7 So. 318, 319 (Miss. 1890) ("The fact that there is an intermediate party, in whose general employment the person, whose acts are in question, is

Much as the joint-employer inquiry arises in situations in which an employee has multiple masters at the same time, the subservant doctrine analogously governs arrangements in which an employee has, as simultaneous masters, both "his immediate employer and [his immediate employer's] master." RESTATEMENT (SECOND) OF AGENCY § 226 cmt. a, at 499. Given the central role that indirect control plays in the subservant doctrine, there is no sound reason that the related joint-employer inquiry would give that factor a cold shoulder.

Even the now-vacated Board decision in *Hy-Brand* acknowledged that indirect control can be relevant to the joint employer question. *Hy-Brand*, 365 N.L.R.B. No. 156, at 4 ("Our fundamental disagreement with the *Browning-Ferris* test is not that it treats indicia of indirect, and even potential, control to be probative of joint-employer status, but that it makes such indicia potentially dispositive without any evidence of direct control in even a single area."). There is thus broad agreement that the common law factors indirect control into the analysis of employer status.

Accordingly, the Board's conclusion that it need not avert its eyes from indicia of indirect control—including control that is filtered through an intermediary—is consonant with established common law. And that is the only question before this court. *Hy-Brand*'s concern about whether indirect control can be "dispositive" is not at issue in this case because the Board's decision turned on its finding that Browning-Ferris exercised control "both directly and indirectly." *Browning-*

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engaged, [generally] does not prevent the principal from being held liable for the negligent conduct of his subagent or under-servant[.]").

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Ferris, 362 N.L.R.B. No. 186, at 18; *see also id.* at 19 ("We find that all of these forms of control—both direct and indirect—are indicative of an employer-employee relationship.").

Browning-Ferris's argument that the common law of agency closes its mind to evidence of indirect control is unsupported by law or logic. First, Browning-Ferris points to a passage in the comments to Section 220 of the RESTATEMENT (SECOND), which distinguishes employees from independent contractors, and argues that the relevant factors do "not look[] to indirect control." Browning-Ferris Br. 24 (quoting *Browning-Ferris*, 362 N.L.R.B. No. 186, at 29 (Members Miscimarra & Johnson, dissenting)). In fact, the comments say nothing one way or the other about direct versus indirect control. All they demonstrate is the entirely uncontroversial proposition that the stronger the indicia of control, the clearer the indication of employee rather than independent-contractor status. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 220 cmt. j, at 490 (short period of employment makes worker "less apt" to be subject to sufficient control and "more likely" to be considered an independent contractor); *id.* § 220 cmt. k, at 490 ("fact that a worker supplies his own tools is *some evidence* that he is not a servant") (emphasis added). And, once again, Browning-Ferris's exclusive focus on the independent-contractor test ill fits the joint-employer inquiry into *who* is pulling the strings when it comes to managing and supervising workers who are admittedly employees.

Second, Browning-Ferris points to our decision in *Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978), which contrasted "economic controls" that are insufficient to establish a common-law employment relationship with "the more usual forms of direct

control typical of an employer/employee relationship," *id*. at 873. *See* Browning-Ferris Br. 29. But that statement indicates only that "direct control" is "typical[ly]" or "usual[ly]" present in employment relationships. It does not hold either that indirect control is categorically excluded from the matrix of relevant factors, or that direct control of *all* the essential terms and conditions of employment is the *sine qua non* of employer status under the traditional common-law principles of agency.[13]

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[13] The dissenting members of the Board also highlighted several "recent[]" decisions in other courts as evidence that the common law requires direct-and-immediate control. *See Browning-Ferris*, 362 N.L.R.B. No. 186, at 30–31, 34–35 (Members Miscimarra & Johnson, dissenting). Browning-Ferris, however, does not cite those decisions at all. For good reason. Browning-Ferris maintains that the common-law joint-employer standard is "frozen in time" with the traditional common-law principles of agency. Oral Arg. Tr. 4:20–21; *cf. Field*, 516 U.S. at 70 (looking to the common law at the time of a statute's enactment to inform the established common-law meaning of a statutory term). In any event, not one of those cases holds that indirect control is a forbidden factor in the employer analysis. Nor is Browning-Ferris helped by *Gulino v. New York State Education Department*, 460 F.3d 361 (2d Cir. 2006). In that case, the Second Circuit read the Supreme Court's decision in *Reid* to require control that is "direct, obvious, and concrete," not "merely indirect or abstract," *id.* at 379. But *Reid* does not stand for the principle that the consideration of indirect control is inconsistent with the common law of agency. *Reid* says nothing about whether control must be "direct." In fact, in its "non-exhaustive" list of relevant factors, the Supreme Court includes "the extent of the hired party's discretion over when and how long" the agents work and "the hired party's role in hiring and paying" the agents—both of which not uncommonly take indirect forms. 490 U.S. at 751–752. *Reid*, like the common law, focuses on the extent of control, not on the mechanism for its exercise. *Jane Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009), likewise speaks only to the need for

We should also hesitate to find the common law at war with common sense. A categorical rule against even considering indirect control—no matter how extensively the would-be employer exercises determinative or heavily influential pressure and control over all of a worker's working conditions—would allow manipulated form to flout reality. If, for example, a company entered into a contract with Leadpoint under which that company made all of the decisions about work and working conditions, day in and day out, with Leadpoint supervisors reduced to ferrying orders from the company's supervisors to the workers, the Board could sensibly conclude that the company is a joint employer. This is especially so if that company retains the authority to step in and exercise direct authority any time the company's indirect mandates are not followed. After all, as Justice Scalia commented, "the soul of the law * * * is logic and reason." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 633 (2007) (Scalia, J., concurring in the judgment); *cf. United States v. Bradley*, 35 U.S. (10 Pet.) 343, 364 (1836) (applying rule because "[t]his is not only the dictate of the common law, but of common sense").

2

The problem with the Board's decision is not its recognition that indirect control (and certainly control exercised through an intermediary) can be a relevant consideration in the joint-employer analysis. It is the Board's failure when applying that factor in this case to hew to the relevant common-law boundaries that prevent the Board from

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"immediate" control over "day-to-day" activities, *id.* at 683. It says nothing about whether that control can be exercised through an intermediary.

trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts. To inform the joint-employer analysis, the relevant forms of indirect control must be those that "share or co-determine those matters governing essential terms and conditions of employment." *Dunkin' Donuts*, 363 F.3d at 440 (citation omitted); *see also Browning-Ferris*, 691 F.2d at 1123; *Laerco*, 269 N.L.R.B. at 325. By contrast, those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status.

The Board's analysis of the factual record in this case failed to differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships. For example, the Board treated as equally relevant to employer status (i) evidence that Browning-Ferris supervisors "communicated detailed work directions to employees on the stream," which may well have dictated a term or condition of employment, and (ii) Browning-Ferris's and Leadpoint's use of a "cost-plus contract," a frequent feature of third-party contracting and sub-contracting relationships. *See Browning-Ferris*, 362 N.L.R.B. No. 186, at 18–20.

In addition, the Board provided no blueprint for what counts as "indirect" control. At some points, the Board indicated that indirect control means control that is conveyed "through an intermediary." *Browning-Ferris*, 362 N.L.R.B. No. 186, at 2. Such use of an intermediary either to transmit Browning-Ferris directions to a Leadpoint sorter, *see* Oral Arg. Tr. 39, 41–42, or to implement Browning-Ferris-influenced disciplinary measures, J.A. 32, may well be found to implicate the essential terms and conditions of work. On the other hand, routine contractual terms, such as a very generalized cap on

contract costs, or an advance description of the tasks to be performed under the contract, would seem far too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis. *Cf. NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 689–690 (1951) ("[T]hat the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other.").

The Board's employment of the indirect-control factor, in other words, requires it to erect some legal scaffolding that keeps the inquiry within traditional common-law bounds and recognizes that "[s]ome such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees." *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 718 (2d Cir. 1943) (L. Hand, J.). After all, "global oversight" is a routine feature of independent contracts. *See North American Van Lines*, 869 F.2d at 599 ("[G]lobal oversight * * * is fully compatible with the relationship between a company and an independent contractor.").[14] Wielding direct and indirect control over the "essential terms and conditions" of employees' work lives is not. *Dunkin' Donuts*, 363 F.3d at 440 (citation omitted). The Board's decision obscures that line.

The Board's assurance that "'influence' is not enough * * * if it does not amount to control" misses the point that not every aspect of control counts. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 13 n.68. The critical question is *what* is

[14] *See also Standard Oil Co. v. Anderson*, 212 U.S. 215, 226 (1909) (finding that mere "co-operation and co-ordination," without more, are insufficient to establish a master-servant relationship between a principal and the servants of an independent contractor).

being controlled. Whether Browning-Ferris influences or controls the basic contours of a contracted-for service—such as requiring four lines' worth of sorters plus supporting screen cleaners and housekeepers—would not count under the common law.

Counsel for the Board assured the court at oral argument that the Board will determine the boundaries of the indirect-control element as it proceeds, on a case-by-case basis. *See* Oral Arg. Tr. 61–62. In principle, there is nothing wrong with the Board fleshing out the operation of a legal test that Congress has delegated to the Board to administer through case-by-case adjudication. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 574–575 (1978) ("[T]he 'nature of the problem, as revealed by unfolding variant situations,' requires 'an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.'") (quoting *Local 761, Int'l Union of Electric, Radio & Machine Workers v. NLRB*, 366 U.S. 667, 674 (1961)).

But the Board's decision here is one of those cases—the one in which the Board first applied that indirect-control factor, and did so at times in a manner that appears to have pushed beyond the common-law's bounds. Because the Board has no administrative expertise when it comes to discerning the traditional common-law meaning of "employer," *see United Insurance*, 390 U.S. at 260, that step-by-step approach depends on the Board starting with a correct articulation of the governing common-law test. Here, that legal standard is the common-law principle that a joint employer's control—whether direct or indirect, exercised or reserved—must bear on the "essential terms and conditions of employment," *Dunkin' Donuts*, 363 F.3d at 440 (citation omitted), and not on the routine components of a company-to-company contract.

Because we cannot tell from this record what facts proved dispositive in the Board's determination that Browning-Ferris is a joint employer, and we are concerned that some of them veered beyond the orbit of the common law, we remand for further proceedings consistent with this opinion.[15]

C

There is a second half to the Board's new test that bears mention. The Board held that, even if it finds that the common law would deem a business to be a joint employer, the Board will also ask "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining" before finding joint-employer status under the Act. *See Browning-Ferris*, 362 N.L.R.B. No. 186, at 2. "In other words," according to the Board, "the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status [under the Act]." *Id*. at 12.

The Board, however, did not meaningfully apply the second step of its test here. In concluding that Browning-Ferris and Leadpoint were joint employers of the workers in the petitioned-for unit, the Board simply noted that Browning-Ferris's collective-bargaining obligation applies "only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful." *Browning-Ferris*, 362 N.L.R.B. No. 186, at 2 n.7. But the

[15] Because this case decides only whether indirect control can be a relevant factor in identifying a joint employer and because such indirect control also must pertain to the essential terms and conditions of the workers' employment, the dissenting opinion's concern (at 10 n.8) about lawn service companies falls wide of the mark.

Board never delineated what terms and conditions are "essential" to make collective bargaining "meaningful," *id*. at 2, instead declaring that it would adhere to an "inclusive" and "non-exhaustive" approach to the meaning of "essential terms and conditions of employment," *id.* at 15. Nor did the Board clarify what "meaningful collective bargaining" might require in an arrangement like this.

We trust that, if the Board were again to find that Browning-Ferris is a joint employer of the Leadpoint workers under the common law, it would not neglect to (i) apply the second half of its announced test, (ii) explain which terms and conditions are "essential" to permit "meaningful collective bargaining," and (iii) clarify what "meaningful collective bargaining" entails and how it works in this setting.

V

In this case the Board both refined its joint-employer standard and immediately applied it retroactively to conclude that Browning-Ferris and Leadpoint were joint employers of the workers in the petitioned-for unit. Browning-Ferris challenges that retroactive application as manifestly unjust. Because we conclude that the Board insufficiently explained the scope of the indirect-control element's operation and how a properly limited test would apply in this case, it would be premature for us to decide Browning-Ferris's challenge to the Board's retroactive application of its test. We do not know whether, under a properly articulated and cabined test of indirect control, Browning-Ferris will still be found to be a joint employer. In addition, the lawfulness of the retroactive application of a new decision cannot be evaluated reliably without knowing with more precision what that new test is and how far it departs (or does not) from reasonable, settled expectations.

Nevertheless, we note that the Board in this case "carefully examined three decades of its precedents," "concluded that the joint-employer standard they reflected required 'direct and immediate' control," and "[t]hereafter * * * forthrightly overruled those cases and set forth * * * 'a new rule.'" *CNN America*, 865 F.3d at 749–750 (quoting *Browning-Ferris*, 362 N.L.R.B. No. 186, at 3). In rearticulating its joint-employer test on remand, then, the Board should keep in mind that while retroactive application may be "appropriate for new applications of [existing] law," it may be unwarranted or unjust "when there is a substitution of new law for old law that was reasonably clear," and on which employers may have relied in organizing their business relationships. *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (alteration in original; internal quotation marks omitted) (quoting *Public Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)); *cf. American Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 333–334 (D.C. Cir. 2016) (finding retroactive application "not manifestly unjust" where the agency's previous rulings "reflect[ed] a highly fact-specific, case-by-case style of adjudication" that did not establish "a clear rule of law exempting" certain conduct).

* * * * *

In sum, we uphold as fully consistent with the common law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis. We reverse, however, the Board's articulation and application of the indirect-control element in this case to the extent that it failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of

employment. We accordingly grant Browning-Ferris's petition in part, deny the Board's cross-application, dismiss without prejudice the Board's application for enforcement as to Leadpoint, and remand for further proceedings consistent with this opinion.

So ordered.

RANDOLPH, *Senior Circuit Judge*, *dissenting*:

This case presents the question whether, under the National Labor Relations Act, Browning-Ferris is the joint employer of Leadpoint's employees. While the case was pending before our court, the Board's Chairman announced that the Board will conduct a rulemaking to establish standards for determining joint employer status. The Board then published its Notice of Proposed Rulemaking. The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46,681 (Sept. 14, 2018).

In response to the Chairman's announcement, Browning-Ferris moved to remand the case to the Board pending the outcome of the rulemaking. I voted to grant the motion. My colleagues denied it and now release their opinion on the questions the Board is considering in its rulemaking.

I dissent because the majority should not have issued any merits opinion in light of the pending rulemaking proceedings. I dissent as well because the majority opinion misstates the common law, misframes the questions in the case, and adds to the uncertainty the Board's *Browning-Ferris* decision has generated.

I.

The unusual twists and turns in this case need to be recounted in order to appreciate where matters now stand.

In 2015 the Board, with a full complement of 5 Members, issued its 3 to 2 "representation" decision that Leadpoint and Browning-Ferris jointly employed Leadpoint's employees at the Browning-Ferris facility in California, and thus constituted a single bargaining unit. *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015).

This intermediate Board decision overturned decades of settled law. Direct and immediate control of employees, not just indirect control or potential control, had been required before a company could be deemed a joint employer of another company's employees for the purposes of collective bargaining. *See, e.g.*, *Int'l Chem. Workers Union Local 483 v. NLRB*, 561 F.2d 253, 255–57 (D.C. Cir. 1977); *AM Prop. Holding Corp.*, 350 N.L.R.B. 998, 999–1002 (2007), *enforced in relevant part sub nom. Serv. Emps. Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 442–45 (2d Cir. 2011); *Airborne Freight Co.*, 338 N.L.R.B. 597, 597 n.1 (2002); *TLI, Inc.*, 271 N.L.R.B. 798, 798–99 (1984), *aff'd sub nom. Gen. Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985) (unpublished table mem.); *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325–26 (1984).

The implications of the Board's decision were profound and attracted much attention. Statements in its 3-2 opinion affected countless business relationships across the country and, according to a Committee of the House of Representatives, did so almost always in a negative way. *See* H.R. Rep. No. 115-379, at 9–17 (2017); *see also Browning-Ferris*, 362 N.L.R.B. No. 186, at 35–47 (dissenting op. of Members Miscimarra & Johnson). The House Committee held hearings and reported a bill that would overrule the Board's decision and restore the joint employer test the Board had been following for decades. The bill passed the House, but at the time of this writing the Senate had not acted. Save Local Business Act, H.R. 3441, 115th Cong. (as passed by House, July 11, 2017).

In the meantime, the Board in this case ordered an election to implement its representation decision. At the time, Browning-Ferris had 60 employees at the California facility who were represented by a union. That union sought to represent the collective BFI and Leadpoint employees under a single

bargaining unit. In the Board-ordered election, the employees of the combined bargaining unit voted in favor of the union representing them in joint bargaining with Browning-Ferris and Leadpoint. When Browning-Ferris refused to come to the table, the Board issued a bargaining order. *Browning-Ferris Indus. of Cal.*, 363 N.L.R.B. No. 95 (Jan. 12, 2016). Browning-Ferris responded with its petition for judicial review in this court, and the Board cross-petitioned for enforcement.

We heard oral argument in March of 2017. Thereafter the composition of the Board changed. In December 2017, in another 3 to 2 decision, the Board overruled its decision in this case. *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156 (Dec. 14, 2017). At the urging of the Board's General Counsel, we sent the case back to the Board for reconsideration in light of *Hy-Brand*.

Then in February 2018 still another reconstituted Board vacated *Hy-Brand* on the ground that one Member of the three-Member majority should not have participated in the case. *Hy-Brand Indus. Contractors, Ltd.*, 366 N.L.R.B. No. 26 (Feb. 26, 2018). *Hy-Brand* thus reverted to a 2 to 2 tie about whether *Browning-Ferris* should be overruled.

Several months later, the newly-appointed Board Chairman announced that a majority of the Board's Members had decided that "notice-and-comment rulemaking offers the best vehicle to fully consider all views on what the [joint-employer] standard ought to be." Letter from Chairman John F. Ring, NLRB, to Sens. Elizabeth Warren, Kirsten Gillibrand & Bernard Sanders 1 (June 5, 2018) (alteration in original).

In the meantime we had restored to our docket the Browning-Ferris petition for judicial review and the Board's cross-petition for enforcement.

The Board published its notice of proposed rulemaking on September 14, 2018. The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46,681.

II.

Apparently the majority objects to Browning-Ferris's remand request on the ground that any final Board rule would be prospective only.[1] Maj. Op. 17. The thinking must be – why remand the case if the Board's final rule would not change the outcome? That idea is incorrect. There are at least three ways in which the rulemaking could have a significant impact on this case even though the Board's rule will not be retroactive.

First, notice and comment rulemaking can be educational. In the rulemaking on the joint employer question the Board expects many comments. Letter from Chairman John F. Ring 1. One of the advantages of rulemaking over adjudication is this: "Agencies discover [through rulemaking] that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777–78 (1969) (Douglas, J., dissenting).[2]

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[1] Remanding pending completion of the rulemaking would, of course, entail delay. But a final resolution of this case has already been delayed, and the majority's decision sending the case back to the Board for different reasons delays matters even further.

[2]

> [E]very law which extends its influence to great numbers in various relations and circumstances, must produce some consequences that were never foreseen or intended, and is to be censured or applauded as the general advantages or inconveniences are found to preponderate.

On a remand from our court without a merits opinion, the Board could take into account what it learned from the rulemaking, even though it would not directly apply its "new" rule to Browning-Ferris. A thorough historical analysis, for example, might show – contrary to the Board's opinion here – that under the common law indirect control and potential control were never enough to establish joint-employer status. If the case reached us again, either on the company's or the union's petition, the Board's revised judgment could have the "power to persuade" even though on our *de novo* review it lacked "the power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Second, assume that in the rulemaking the Board retains the joint-employer standard it set forth in this case. Even so a question remains. Should the new standard be applied to Browning-Ferris? In the decision now on review the Board rejected the argument of Browning-Ferris that its new joint-employer standard should not be applied retroactively. 362 N.L.R.B. No. 186, at 1–2. On remand and in light of what the Board learned during the rulemaking, the Board might

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XIII *The Works of Samuel Johnson* 308 (1811) (House of Commons, Mar. 10, 1740: comment of Robert Walpole).

Judge Friendly, in *Watchman, What of the Night?*, BENCHMARKS 147 (1967), believed that one of the best statements of the advantages of rulemaking over adjudication, particularly when (as here) the agency is changing settled expectations, is the Federal Trade Commission's statement in Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8365–69 (July 2, 1964). *See also* Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85 (2018).

reconsider that aspect of its decision. Case law in this circuit, set forth in the margin, strongly suggests that it should.[3]

The third reason is the most significant and the most probable. Suppose the final rule flatly disagrees with the Board's *Browning-Ferris* decision and reinstates the standard that had prevailed for decades.[4] That is what the Board's Notice of Proposed Rulemaking suggests. The proposed rule is set forth in the margin.[5]

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[3] "Even though adjudication is by its nature retroactive, we have recognized that 'deny[ing] retroactive effect to a rule announced in an agency adjudication' may be proper where the adjudication 'substitut[es] . . . new law for old law that was reasonably clear' and where doing so is 'necessary . . . to protect the settled expectations of those who had relied on the preexisting rule.'" *See, e.g.*, *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 922 (D.C. Cir. 2013) (alterations in original) (quoting *Williams Nat. Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).

[4] The bill that passed the House of Representatives does just that. *See* H.R. 3441.

[5]

> § 103.40 Joint Employers. An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and

Browning-Ferris moved to remand the case to the Board pending the outcome of the rulemaking. The Board's Deputy Associate General Counsel[6] opposed the motion on the basis that the rulemaking "would not affect this case." That argument was mistaken. Board counsel so confessed in oral argument on the motion. Oral Arg. Tr. 15:9–16:8 (July 3, 2018).

The argument was mistaken for two reasons already mentioned. It was mistaken as well because the Board's application of its proposed rule to Browning-Ferris would not amount to retroactive law giving. Applying the Board's new rule would be reinstating the legal regime existing before the Board's decision in this case discarded it. The upshot is that if the Board applied its proposed "new" rule – actually the old rule – to Browning-Ferris on remand the Board would not be impermissibly attaching "new legal consequences to events completed before [the rule's] enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994). Our decision in *Catholic Health Initiatives* is on point. We held that a rulemaking applying a rule codifying a policy announced in an earlier adjudication did not violate the rule against retroactive rulemaking. 718 F.3d at 920–22.

Like other administrative agencies, the Board may establish standards through rulemaking or adjudication. *See* 29 U.S.C. § 156. Here, after the back and forth recounted above, the Board has determined that the standards for joint employer status

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> conditions of employment in a manner that is not limited and routine.

The Standard for Determining Joint-Employer Status, 83 Fed. Reg. at 46,696–97.

[6] *See infra* note 9.

should be established through rulemaking. *See* The Standard for Determining Joint-Employer Status, 83 Fed. Reg. at 46,686. *Bell Aerospace* requires federal courts to respect the Board's determination to proceed by rulemaking. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294–95 (1974). Yet the majority opinion – without any reasonable explanation – threatens to short-circuit the Board's choice, to control and confine the scope of its rulemaking, and to influence the outcome of that proceeding.[7]

The majority's opinion potentially has this effect because it is rendered *de novo*, a standard of review the Board may not have anticipated. Board Br. 16. On *de novo* review it is the court, not the Board, who decides what will be the test for joint employer status. *De novo* review or not, our court should not be attempting to preempt the Board's forthcoming judgment in the rulemaking proceeding. The Board is not "the repository of ultimate wisdom," and neither are the judges of this court.

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[7] Judicial review of a substantive Board rule begins in federal district court. The district court in this circuit may be an optional venue in such a case; it does not have exclusive jurisdiction. The district courts in the other numbered circuits also have jurisdiction to review Board rules. For example, judicial proceedings contesting the Board rule in *American Hospital Ass'n v. NLRB* began in the United States District Court for the Northern District of Illinois. 499 U.S. 606 (1991).

If the challenge to the final Board rule here were brought in a district court in another circuit, that district court would have no obligation to follow the majority opinion in this case. For this reason the Board, in its rulemaking, may decide to treat the majority's opinion as having no binding effect on the Board. Nonetheless, the potential impact of the majority's opinion is as described in the text.

To sum up, the Board's attorney confessed that the rationale of the Board's General Counsel for opposing remand was in error. The Board's attorney also raised doubt that in opposing a remand, she was expressing the considered judgment of the Members of the Board.[8] Even so, the panel majority has denied the motion to remand the case pending the rulemaking. The majority's rationale is simply this: if Board counsel[9] wants the court to go ahead and decide the merits, the court should do so. In relying solely on the position of Board counsel, the majority acts as if it were dealing with some sort of "waiver," with a known right the Board itself has intentionally relinquished. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). But that is not accurate. The Board has no "right" to relinquish. To treat this controversy as the majority does is not only to ignore the substantial interests of Browning-Ferris, but also to neglect the

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[8] The Board's decision to take up the same question present in this case, through rulemaking rather than adjudication, suggests otherwise.

[9] I put this in terms of "Board counsel" rather than "the Board." When asked at oral argument on the remand motion whether the Board's General Counsel polled or consulted the Members of the Board about the position then being advocated, Board counsel was unable to say. Oral Arg. Tr. 18:25–19:20 (July 3, 2018) (reprinted in the addendum to this opinion). The General Counsel is "an independent official appointed by the President," *Lewis v. NLRB*, 357 U.S. 10, 16 n.10 (1958); is "independent of the Board's supervision and review," *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 118 (1987); and "answers to no officer inferior to the President," *NLRB v. SW Gen., Inc.*, 137 S.Ct. 929, 948 (2017) (Thomas, J., concurring). Indeed, in this case the General Counsel appeared as amicus before the Board and advocated a position that the Board ultimately rejected. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 12–13 n.68.

judiciary's responsibility to avoid interfering with an agency's ongoing rulemaking proceedings.

III.

As to the merits, I rely on the comprehensive opinions of Member Miscimarra and Member Johnson dissenting in this case and of the Board majority in the now-vacated *Hy-Brand* case. Both opinions show how pernicious the Board's decision would be if it were implemented across the American economy. Both opinions also show that the Board majority did not accurately describe the common law of joint employer. And both opinions remain largely unanswered.

Although I cannot improve on what the Board's dissenters said in *Browning-Ferris* or on what the previous Board majority said in *Hy-Brand*, I offer a few comments about the decision of our court. I do so because the decision disregards and contradicts a strong, clear, accepted and well-founded body of common law cases. Instead of clarity it adds another layer of ambiguity. Rather than narrowing the Board's broad pronouncements, the majority opinion endorses and expands them.

A.

The majority's errors about the meaning of the common law may be traced to two sources. The first is its failure to recognize the importance of Leadpoint's clear and undisputed status as an independent contractor.[10] The majority thinks that under the

[10] *See* J.A. 17 (Browning-Ferris–Leadpoint Services Agreement, describing Leadpoint as "an independent contractor of" Browning-Ferris); *Browning-Ferris*, 362 N.L.R.B. No. 186, at 47 (dissenting op. of Members Miscimarra & Johnson) (describing the companies as

common law a company's status as an independent contractor has no bearing on the joint employer question this case presents. Maj. Op. 32. As I will explain, the opposite is true. It seems likely that the Board, in its rulemaking, will come to the same conclusion.

The other source of the majority's errors is its failure to notice that the common law of joint employer may vary according to the nature of the business arrangement between companies, or between consumers and companies.[11] The joint employer issue in franchising arrangements, for example, involves different considerations than those involved in the typical principal-independent contractor arrangement.

"admittedly separate and independent"); Pet'r/Cross-Resp't Br. 3, 11–12, 46 (describing Leadpoint as "an independent business," "a wholly separate business," and an independent service provider); Board Br. 5, 57 n.30 (discussing the "contracted" or "contractual" agreement, without contesting Browning-Ferris's asserted nature of the relationship); Intervenor Br. 2, 32 (same, mentioning "the fact that [Browning-Ferris] entered into a contract with Leadpoint to perform a service"). Furthermore, in the proceedings before the Board, Leadpoint itself characterized its relationships with Browning-Ferris and other waste management companies as those of independent contractors. Opp'n Pet'r's Req. Review, *Browning-Ferris Indus. of Cal., Inc.*, Case No. 32-RC-109684, at 1–2 (Sept. 10, 2013), available at http://apps.nlrb.gov/link/document.aspx/09031d45813fb5e1.

[11] For example suppose I hire a lawn service company. Of course its operations for me are performed on my premises. I direct the company – and thus its employees – to cut my lawn at a certain height, to arrive and depart at a certain time, to use only mulching mowers and so forth. I do not pay the company's employees' wages or benefits but I contract to pay the company at a particular hourly rate for their work. According to the Board and the majority opinion here, what I have just described is evidence indicating that I am the joint employer of the lawn service company's employees.

Browning-Ferris, 362 N.L.R.B. No. 186, at 45–47 (dissenting op). Yet the majority opinion declares that "indirect control" is "relevant" across the broad spectrum of business relationships – about which neither I nor my colleagues have any experience or familiarity.[12]

So I come back to the common law, which is supposed to control our decision and should have controlled the Board's. Under the common law, employees of a true independent contractor cannot be considered employees of the company who hired the contractor (the principal, or in this case Browning-Ferris). Stated in terms of the common law of agency: "An independent contractor is not the servant of his employer. *The relation of master and servant does not exist between an employer and the servants of an independent contractor*, nor between an independent contractor and the servant of a subcontractor, and he is not responsible as a master, either to or for them." 39 C.J. *Master and Servant* § 8 (1925) (emphasis added)[13]; *see also* 30 C.J.S. *Employer-Employee* § 16 (2017) ("The relationship of employer and employee likewise does not

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[12] The result may impact a wide range of business relationships: "*e.g.*, user-supplier, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debitor, lessor-lessee, parent-subsidiary, and contractor-consumer." The Standard for Determining Joint-Employer Status, 83 Fed. Reg. at 46,686.

[13] The majority notes that the next sentence of the *Corpus Juris* allows the employment relationship to exist where the employer controls the "means and methods" of the work of the contractor. *Id.* Of course, in that situation a true independent contractor relationship does not exist. The common law recognized that the subterfuge of employing individuals through essentially a shell entity – "nominal employment by an independent contractor" – would not undermine an employment relationship where it otherwise would exist. *Id.* There is no suggestion that Leadpoint is such a legal fig leaf.

exist between an employer or contractee and the employees of an independent contractor . . ..").

The common law is "the dominant consensus of common-law jurisdictions." *Field v. Mans*, 516 U.S. 59, 70 n.9 (1995).[14] In support of the common-law rule just quoted, 60 common-law cases from across the country over the years are cited, and there are doubtless more.[15] 39 C.J. *Master and Servant* § 8, at 38 n.53. That is indeed a "dominant consensus." In contrast, neither the Board nor the majority opinion here can cite any line of common-law cases going the other way.[16] It follows that

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[14] Unlike statutes passed by legislatures or regulations issued by agencies, the common law is judge-made:

> The common law judge analyzes past judicial decisions, considers the reasons behind the decisions, comes up with a principle to explain the cases, and then applies that principle to a new case.

A. Raymond Randolph, *Before* Roe v. Wade*: Judge Friendly's Draft Abortion Opinion*, 29 Harv. J.L. & Pub. Pol'y 1035, 1044 (2006); *see also* Karl Llewellyn, The Common Law Tradition: Deciding Appeals (1960).

[15] *E.g.*, *Bokoshe Smokeless Coal Co. v. Morehead*, 126 P. 1033 (Okla. 1912), quoted *infra* note 30. A mine worker brought a personal injury suit against the mine owner. The owner had contracted with another company to operate the mine. The question was whether the mine worker was an employee also of the mine owner. The court held that the mine owner was not a joint employer because the mine operator was an independent contractor.

[16] *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), is not to the contrary. The Court did not purport to be determining the common law of joint employment; it cited no common law cases or authorities; the issue in the case was one of jurisdiction; and it was not until four

under the common law Leadpoint's employees may not be considered employees of Browning-Ferris. As the Supreme Court held in *Denver Building*, a contractor's "supervision over the subcontractor's work[] did not eliminate *the status of each as an independent contractor or make the employees of one the employees of the other*." *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689–690 (1951) (emphasis added). "The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so." *Hy-Brand*, 365 N.L.R.B. No. 156, at 11 (quoting *id.* at 690).

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years later that the Court, in *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968), ruled that "we should apply the common-law agency test here in distinguishing an employee from an independent contractor." *See also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

Similarly, *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004), did not examine the relationship between the employers in the case. The evidence also reflected direct control. Additionally, "the Board decision on review in [*Dunkin' Donuts*] predated *Airborne Express*, and no party argued that 'direct and immediate' control was the proper standard." *NLRB v. CNN Am., Inc.*, 865 F.3d 740, 750 n.5 (D.C. Cir. 2017).

And the court in *NLRB v. Browning-Ferris*, 691 F.2d 1117, 1124 (3d Cir. 1982), mistakenly relied on *Greyhound* in concluding that the independent contractor determination was immaterial. But there too, the evidence suggested that there was direct control that may not have supported an independent contractor relationship.

Section 5 of the Restatement (Second) of Agency, from which the majority opinion derives its so-called "indirect control" test,[17] recites the same common law rule as the 1925 treatise quoted above. "In no case are the servants of a non-servant agent the servants of the principal." Restatement (Second) of Agency § 5 ("Subagents and Subservants"), cmt. e (1958). A "servant" is an "employee."[18] An agent who is not an employee – a "non-servant agent" – is an "independent contractor."[19] Thus, "in no case" are the employees of an independent contractor employees of the company who hired the contractor. "In no case," in other words, could Leadpoint's employees also be the employees of Browning-Ferris.

The distinction between employees and independent contractors,[20] which the majority deems inconsequential, is

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[17] Maj. Op. 40 n.12; *Browning-Ferris*, 362 N.L.R.B. No. 186, at 14 n.75. The Restatement's definitions and the accompanying discussion of the employee-independent contractor distinction largely concern imposition of vicarious liability, which is not pertinent in the joint-employer setting where employees already have at least one potentially deep-pocket employer.

[18] *See id.* § 2 ("Master; Servant; Independent Contractor"), cmt. d ("The word 'employee' is commonly used in current statutes to indicate the type of person herein described as servant.").

[19] *See id.* § 2, cmt. b ("An agent who is not a servant is, therefore, an independent contractor . . .."). Think of a real estate broker for homeowners seeking to sell their house.

[20] In a pre-Taft-Hartley-Act discussion of the distinction between employee and independent contractor, Judge Learned Hand pointed out that even if the principal intervenes in the contractor's work, "[s]ome such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees." *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 718 (2d Cir. 1943).

written into the National Labor Relations Act. In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court held that under the Act "newsboys" – adults who distributed newspapers on street corners – were "employees" of the newspaper publishers. "Congress was so incensed with the fanciful construction of its legislative intention in *Hearst* that in 1947 it specifically excluded 'independent contractors' from the coverage of the Act and condemned the Court's rationale in *Hearst Publications* as giving 'far-fetched meanings' to the words Congress has used." *Local 777, Democratic Union Org. Comm. v. NLRB,* 603 F.2d 862, 905 (D.C. Cir. 1978) (on petition for rehearing); *see also* Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, § 101, 61 Stat. 136, 137–38 (amending § 2(3) of the National Labor Relations Act and codified at 29 U.S.C. § 152(3)); Harvey M. Adelstein & Harry T. Edwards, *The Resurrection of* NLRB v. Hearst*: Independent Contractors under the National Labor Relations Act*, 17 U. Kan. L. Rev. 191 (1968). In short, Congress decided that the newspaper distributors in *Hearst* were independent contractors, not employees of the publishers. Those distributors, those independent contractors, had employees of their own. *See* H.R. Rep. No. 80-245, at 18 (1947). Consistent with the common law rule set forth above, the distributors' employees could not be considered employees of the newspaper publishers.[21] If, as our court stated, Congress was "incensed" at the Supreme Court's treatment of the distributors as employees,

[21] The majority opinion invokes "common sense" in support of its views on "indirect control." Maj. Op. 39. But consider this typical scenario. The main company observes an employee of an independent contractor. The employee is underperforming and so the main company asks the independent contractor to replace him. According to the majority, the request could render the main company a joint employer of the underperforming employee. That is not my idea of "common sense," and it is not the common law's either.

one can only imagine Congress's reaction to treating the distributors' employees as employees of the publishers. Yet that is where the majority opinion leads.[22]

B.

A few more observations about the majority opinion are in order.

On page after page, paragraph after paragraph, the majority drags a red herring across the case. It insists that "indirect control," whatever that may encompass, and a potential right to control, are "relevant."[23] This frames the issue as if we were

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[22] The "newsboys" themselves were closely supervised by the publishers:

> The publishers furnish boxes, racks, money change aprons, and placards advertising special features contained in the newspapers . . .. Generally, the newsboy is required to be at his post from the time the newspapers customarily appear on the street to the time settlement is made. The . . . record is 'replete,' with instances in which [the publishers'] district managers have removed, permanently or temporarily, newsboys from their corners or transferred them from one location to another. The record also contains evidence with respect to the extent of the publishers' supervision over the conduct of the newsboys while they are engaged in selling newspapers on the street; the diligence of the newsboys is closely observed by the circulation department.

Hearst Publ'ns, Inc. v. NLRB, 136 F.2d 608, 611 (9th Cir. 1943), *rev'd*, 322 U.S. 111.

[23] "Relevance" is not the issue. The majority in *Hy-Brand* posed

merely dealing with an evidentiary dispute. If only relevancy were at issue, the Federal Rules of Evidence, which the Board has adopted,[24] would control. But as everyone else recognizes, the issues before us are much more serious, and the majority opinion fails to confront them.

Consider the majority opinion on its own terms. Under Rule 401(a) of the Federal Rules of Evidence, evidence is "relevant" if it tends to make a fact of consequence "more or less probable than it would be without the evidence."[25] In any relevancy analysis there is an essential step. The majority's dozens of references to relevancy omit that step. "Relevancy is not an inherent characteristic of any item of evidence . . .." Fed. R. Evid. 401 advisory committee's note. As Professor James explained in a highly-regarded article, to "determine the

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the issue in the case this way:

> Our fundamental disagreement with the *Browning-Ferris* test is not that it treats indicia of indirect, and even potential, control to be probative of joint-employer status, but that it makes such indicia potentially dispositive without any evidence of direct control in even a single area. Under the common law, in our view, evidence of indirect control or contractually-reserved authority is probative only to the extent that it supplements and reinforces evidence of direct control.

365 N.L.R.B. No. 156, at 4.

[24] 29 C.F.R. § 102.39 ("The hearing will, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . ..").

[25] When the majority writes of "relevancy" this must be what it means. No other definition comes to mind.

relevancy of an offered item of evidence one must first discover to what proposition it is supposed to be relevant."[26] The "fact of consequence" made more or less probable must be identified. The majority opinion never identifies what fact it thinks evidence of indirect control makes more (or less) likely. Yet that gets to the heart of this case and is the cause of much of the controversy surrounding it.

Before its decision here, the Board's well-established, easily understood rule was that a company could not be considered a joint employer of another company's employees unless it exercised direct and immediate control or supervision over those employees.[27] Suppose that were still the law.[28] If so, evidence of indirect control would be "relevant" but not in the way the majority thinks. Such evidence would not tend to show that the company was a joint employer as the majority assumes. Just the opposite. The evidence would tend to show that the company was not a joint employer.

Take the evidence in this case. On one day a Browning-Ferris manager observed two Leadpoint employees drinking a bottle of whiskey while on duty. The Browning-Ferris manager notified Leadpoint's supervisor, and the supervisor removed the employees from the plant. The Browning-Ferris manager also

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[26] George F. James, *Relevancy, Probability and the Law*, 29 Calif. L. Rev. 689, 696 n.15 (1941). The Advisory Committee's Note cites and relies on Professor James' work, and Rule 401 adopts the test of relevancy he proposed in 1941.

[27] *Browning-Ferris*, 362 N.L.R.B. No. 186, at 22, 24 (dissenting op.); *Hy-Brand*, 365 N.L.R.B. No. 156, at 5–6; H.R. Rep. No. 115-379, at 6.

[28] I assume it is not, although the majority opinion is unclear about this, perhaps intentionally.

sent an e-mail to Leadpoint's President requesting him to fire these two employees. (Leadpoint eventually discharged one of them.)

What, if anything, should be made of this incident on one day on one shift involving two employees in a workforce of more than two hundred employees? My colleagues think and the Board thought, *Browning-Ferris*, 362 N.L.R.B. No. 186, at 18, it showed that Browning-Ferris jointly employed not only the two drinking employees, but also the entire Leadpoint workforce. That is, they treat the incident as evidence that Browning-Ferris was exercising "indirect control" over Leadpoint's employees and thus was the joint employer of those employees.

The common law and any objective observer would view the majority's and Board's conclusion as nonsense. This single event was trivial in the larger picture of employer-employee-independent relations year-to-year, day-to-day, hour-to-hour at the Browning-Ferris facility. To the extent the incident had any evidentiary value, any bearing on the joint employer issue, it tended to show the opposite of what the majority seems to suppose.

The Regional Director made this point when he evaluated this evidence. He decided that the evidence tended to show that Browning-Ferris did not exercise direct control and therefore was not a joint employer. The Regional Director put it this way: "Surely if BFI had the authority to terminate Leadpoint employees, [BFI's manager] would have done this without having to email Leadpoint's President, located in Arizona, to do

so." *Browning-Ferris Indus. of Cal., Inc.*, Case 32-RC-109684, 2013 WL 8480748, at *9 (N.L.R.B. Aug. 16, 2013).[29]

To sum up, both the Board and the Regional Director considered this example of indirect control to be relevant. To the Board the evidence made it more likely that Browning-Ferris was a joint employer. To the Regional Director the evidence made it less likely.

I have gone into detail about this one item of evidence to illustrate why the majority opinion's mere assertion that evidence of indirect control is "relevant" is not only confused and confusing, but also fails to confront one of the main issues in the case – namely, whether direct and immediate control or supervision is a necessary prerequisite to a finding of joint employer status.[30]

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[29] The incident is described in the majority opinion, see Maj. Op. 11, but missing from that account is the Regional Director's finding quoted in the text.

[30] To suppose that indirect control would suffice to establish joint employer status would be to disregard the common relationship between companies and subcontractors:

> If the right to inspect and exercise a general supervision destroys the independence of the contractor, then it would follow that there would be no such thing as an independent contractor, because no one is going to let a contract without reserving the right to see that it is performed in accordance with the contract, and, if he has no right to supervise, no right to inspect, and no right to reject, then he would not let the contract at all.

Bokoshe, 126 P. at 1036.

One additional point. The Regional Director was surely correct in his assessment of this particular incident. Under the common law "the existence of the power to discharge is essential" to the right of control, and therefore to establish joint employer status. 39 C.J. *Master and Servant* § 4 ("Direction and Control"). Browning-Ferris did not have that power; Leadpoint did. The Board plainly erred in deciding otherwise.

C.

While endorsing "indirect control" as a common law standard for determining joint employer status,[31] the majority confesses that it does not know exactly what the Board had in mind by "indirect control" or how the common law defines those terms in the joint employer context. Maj. Op. 46–47. This revealing admission is hardly surprising. The majority is unable to extract any "indirect control" standard from the common law[32] for an obvious reason. There is no "common law" principle as of 1947 standing for the proposition that "indirect control" could render one company a joint employer of another company's employees, especially if that other company is an independent contractor.

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[31] Maj. Op. 38. *United Insurance*, 390 U.S. at 256, held that under the 1947 Taft-Hartley Act, "there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor."

[32] Although the majority insists that it is exercising *de novo* review, it remands the case because the Board did not adequately explain what it meant by "indirect control." *Id.* at 44–48. It is hard to see why, on *de novo* review, the adequacy of the Board's explanation is at issue. On *de novo* review the court's judgment about the content of the common law displaces whatever the Board has to say on the subject.

The majority cites the illustrations in the 1958 Restatement (Second) of Agency § 5 – the "sub-servant" doctrine – as support. Maj. Op. 40 n.12. The Board did the same. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 14 & n.74. But those illustrations have no bearing on the issue. In the first illustration, the miners – who hired and paid assistants – were employees of the mine operator, not independent contractors like Leadpoint. The same is true of the second illustration of a company operating "markets" (grocery stores?): unlike Leadpoint, the manager of each market was an employee of the market owner.

In other words, those illustrations would be comparable only if Leadpoint were an employee of Browning-Ferris, which it is not. The notes to this Restatement section reinforce the view stated above that under the common law employees of an independent contractor cannot be considered employees of the company that hired the independent contractor. "Except in the case of subservants, it is difficult to see how the subagent can be the principal's servant, since his employer is a nonservant agent not subject to the principal's direction." Restatement (Second) of Agency § 5 reporter's notes, at 33.

The Chamber of Commerce's *amicus* brief points out that the "sub-servant doctrine applies when both the servant and the sub-servant are servants of a single master." Chamber of Commerce Br. 25. In the joint-employer setting, when one of the employers is an independent contractor and not the servant of the other, the doctrine is therefore inapplicable. *Id.* at 26.

In the text of its opinion, the majority also seeks to fortify its view of the common law of joint employers with three state court decisions. Maj. Op. 39. Of course three opinions over more than half a century hardly constitute some "dominant consensus of common-law jurisdictions." *Field*, 516 U.S. at 70

n.9. In any event, the holdings in these cases lend no support to the majority.

The first case, *White v. Morris*, 152 S.E.2d 417 (Ga. Ct. App. 1966), was merely an intermediate appellate decision handed down 19 years after passage of the Taft-Hartley Act. To claim that the case reflects some general common law regarding joint employers in 1947 is untenable. Besides, the case presented no issue regarding joint employer status.[33]

The second case the majority cites, *Wallowa Valley Stages, Inc. v. Oregonian Publ'g Co.*, 386 P.2d 430 (Or. 1963) (en banc), is also inapposite. It too could not represent the dominant consensus as of 1947. The case is a weak reed anyway in light of its later repudiation by the Oregon Supreme Court. *Woody v. Waibel*, 554 P.2d 492, 494 n.3 (Or. 1976) (en banc). Besides, no issue regarding the common law of joint employer was presented.[34]

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[33] The defendant Morris was a servant of General Services Corporation and not directly controlled by Sears, the third party in question. *Id.* at 419. The issue dealt with the nature of the relationship between General Services and Sears. Denying summary judgment, the court found Morris to be a potential servant of Sears based on indirect control, but only because it found General Services and Sears to be in an alleged master-servant relationship. *Id.* The negative inference from the case is that if General Services were Sears's independent contractor, then Morris would *not* have been a servant of Sears and indirect control would not have been that conclusion. This is precisely the setting of this case.

[34] The question in *Wallowa* was whether a newspaper deliverer was an independent contractor, in which event the newspaper publisher would not be liable for a deliverer's negligent operation of his automobile. 386 P.2d at 433. Furthermore, although the *Wallowa* court in one line used the word "indirectly" in referring to the

The third case, *Nicholson v. Atchinson, T. & S. F. Ry.*, 147 P. 1123 (Kan. 1915), is even farther afield. The question was whether the intermediate company was an independent contractor (such as Leadpoint). The court held that it was not because the principal (the Santa Fe Company) "organized, officered, and financed [it] entirely." *Id.* at 1124. It followed that the injured employee working for the intermediate company had a single employer – the Santa Fe Company. *Id.* at 1126.[35]

There are other common law decisions scattered throughout footnotes in the majority opinion. An analysis of these cases reveals that none of them concerned joint employment.[36] Many

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publisher's control, all of the examples the court mentioned amounted to direct control. The majority opinion states that there is no case in which "we have applied an employee-or-independent-contractor test to resolve a question of joint employment." Maj. Op. 32. Ironically, the majority's reliance on *Wallowa* makes this such a case.

[35] The plaintiff was injured while engaged in railroad construction. Santa Fe tried to avoid tort liability on the ground that the plaintiff was not its employee but the employee of another company. The court rejected Santa Fe's argument because Santa Fe created and controlled the other company, which showed that it was not an independent contractor.

[36] *See, e.g.*, *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995); *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318 (1992); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Kelley v. S. Pac. Co.*, 419 U.S. 318 (1974); *Logue v. United States*, 412 U.S. 521 (1973); *United Ins.*, 390 U.S. 254; *Denver Bldg.*, 341 U.S. 675; *Chi., Rock Island & Pac. Ry. v. Bond*, 240 U.S. 449 (1916); *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518 (1889); *Little v. Hackett*, 116 U.S. 366 (1886); *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017); *Al-Saffy v. Vilsack*, 827 F.3d 85 (D.C. Cir. 2016); *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016); *Doe v. Wal-Mart Stores, Inc.*,

dealt with the question whether a tortfeasor was an employee or an independent contractor, an issue not presented in this case.

IV.

In short, the majority should not have released its opinion in the face of the Board's rulemaking. The majority has offered no reason for its rejection of Browning-Ferris's remand request.

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572 F.3d 677 (9th Cir. 2009); *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361 (2d Cir. 2006); *Redd v. Summers*, 232 F.3d 933 (D.C. Cir. 2000); *Aurora Packing Co. v. NLRB*, 904 F.2d 73 (D.C. Cir. 1990); *Constr., Bldg. Material, Ice & Coal Drivers Union, Local No. 221 v. NLRB*, 899 F.2d 1238 (D.C. Cir. 1990); *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596 (D.C. Cir. 1989); *City Cab Co. of Orlando v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980); *Local 777*, 603 F.2d 862; *Local 814, Int'l Bhd. of Teamsters v. NLRB*, 512 F.2d 564 (D.C. Cir. 1975) (per curiam); *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971) (per curiam); *Dovell v. Arundel Supply Corp.*, 361 F.2d 543 (D.C. Cir. 1966); *Grace v. Magruder*, 148 F.2d 679 (D.C. Cir. 1945); *Radio City*, 135 F.2d 715; *Norwood Hosp. v. Brown*, 122 So. 411 (Ala. 1929); *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165 (Cal. 2014); *S. A. Gerrard Co. v. Indus. Accident Comm'n*, 110 P.2d 377 (Cal. 1941); *Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415 (D.C. 2006); *Van Watermeullen v. Indus. Comm'n*, 174 N.E. 846 (Ill. 1931); *Bush v. Wilson & Co.*, 138 P.2d 457 (Kan. 1943); *Metzinger v. New Orleans Bd. of Trade*, 44 So. 1007 (La. 1907); *Tuttle v. Embury-Martin Lumber Co.*, 158 N.W. 875 (Mich. 1916); *S. Exp. Co. v. Brown*, 7 So. 318 (Miss. 1890); *Bobik v. Indus. Comm'n*, 64 N.E.2d 829 (Ohio 1946); *Odom v. Sanford & Treadway*, 299 S.W. 1045 (Tenn. 1927); *City of Wichita Falls v. Travelers Ins.*, 137 S.W.2d 170 (Tex. Civ. App. 1940); *Mallory v. Brigham Young Univ.*, 332 P.3d 922 (Utah 2014); *Green Valley Coop. Dairy Co. v. Indus. Comm'n*, 27 N.W.2d 454 (Wis. 1947); *Emps. Mut. Liab. Ins. v. Indus. Comm'n*, 284 N.W. 548 (Wis. 1939).

That the majority wants to preempt the rulemaking and confine it strikes me as a quite improper rationale. I dissent not only on this procedural ground, but also on the ground that the majority's analysis of the common law is inaccurate. That analysis fails to take into account the common law importance of Leadpoint's status as an independent contractor. The majority deems "indirect control" significant yet is unable to marshal any body of common law cases to support that view. And the majority, by treating this case as if it were some mere evidentiary dispute, sows confusion and ambiguity when what is needed is certainty and predictability.

ADDENDUM

July 3, 2018 Oral Argument
Transcript at 18:5–20:5

BOARD COUNSEL: . . . But I want to make clear, though, that Chairman Ring's letter, although he stated clearly that the majority of the Board is committed to going to rule-making as they're in the process of going through internal preparations to do so, the statements in his letter were his own, and that, but the one statement that is clear is that he's keeping an open mind, and I just wanted to make sure that I have that on the record given your discussion with –

JUDGE RANDOLPH: Are you suggesting that it might not be a rule-making?

COUNSEL: Well, they're committed to rule-making, and they anticipate, as his letter stated they anticipate issuing a notice of proposed rule sometime this summer.

JUDGE RANDOLPH: Okay.

COUNSEL: That statement was made in early June. But I want to emphasize, though, that, to reiterate that the Board really does believe that this Court should proceed to decision on the merits, and there's no reason other than that to even consider retroactive application.

JUDGE RANDOLPH: When you say the Board wants to, I mean, did you take a poll of the Board members?

COUNSEL: I'm standing before you, Your Honor. I'm authorized to represent the Board and the Board's position that the Board would like this case decided.

JUDGE RANDOLPH: Yes. Well, usually when you stand before us the Board has made a decision in writing, and you're defending an order and an opinion, but we don't have any order and we don't have any opinion regarding whether the Board wants to go forward with this case while the rule-making is pending. And so, I'm asking you, you know, are, has the Board voted on that issue?

COUNSEL: Well, I'm post-decisional counsel, and the General Counsel is the one who prosecutes, and comes and defends, or seeks enforcement in this Court. I am not privy to the Board deliberations and such things as votes.

JUDGE RANDOLPH: So, you're stating the General Counsel's view?

COUNSEL: I believe if the Board consulted with the General Counsel if they had a different view we would have heard it. But the position in the papers stands. And I do want to note that when we are talking about what happens if the case were remanded, if it were remanded on the merits of course the Board would proceed with following the Court's instructions and limiting its decision position and all of its determinations in line and consistent with that decision. Here, if this Court were to remand on the basis of the news that a rule may be coming out, a rule-making may be undertaken, there's many different options the Board could potentially have, it has discretion in deciding how to handle its pending cases.

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Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., as a single employer and/or joint employers *and* Dakota Upshaw *and* David Newcomb *and* Ron Senteras *and* Austin Hovendon *and* Nicole Pinnick. Cases 25–CA–163189, 25–CA–163208, 25–CA–163297, 25–CA–163317, 25–CA–163373, 25–CA–163376, 25–CA–163398, 25–CA–163414, 25–CA–164941, and 25–CA–164945

December 14, 2017

DECISION AND ORDER[1]

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE, MCFERRAN, KAPLAN, AND EMANUEL

This case involves a judge's finding that two entities—Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) and Brandt Construction Co. (Brandt)—are collectively joint employers and/or a single employer for purposes of the National Labor Relations Act (NLRA or Act). Five Hy-Brand employees and two Brandt employees were discharged after they engaged in work stoppages based on concerns involving wages, benefits, and workplace safety. We agree that the work stoppages constituted protected concerted activity under Section 7 of the Act, and the discharges constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the Act.

We agree with the judge that Hy-Brand and Brandt are joint employers, but we disagree with the legal standard the judge applied to reach that finding. The judge applied the standard adopted by a Board majority in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (Browning-Ferris)*.[2] In *Browning-Ferris*, the Board majority held that, even when two entities have *never* exercised joint control over essential terms and conditions of employment, and even when any joint control is not "direct and immediate," the two entities will still be joint employers based on the mere existence of "reserved" joint control,[3] or based on indirect control[4] or control that is "limited and routine."[5] We find

[1] On November 14, 2016, Administrative Law Judge Robert A. Ringler issued the attached decision. Respondent Hy-Brand Industrial Contractors, Limited (Hy-Brand) and Respondent Brandt Construction Company (Brandt) (collectively the Respondents) jointly filed exceptions and supporting, answering, and reply briefs. The General Counsel filed a limited cross-exception and supporting and answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified below.

The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondents argue that the judge improperly limited certain testimony and erroneously excluded documents from evidence. Even assuming the judge erred in these rulings, we find that the additional evidence would not affect our disposition of this case.

The General Counsel seeks a make-whole remedy that would include consequential damages incurred by the discriminatees as a result of the Respondents' unfair labor practices. The relief sought would require a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See, e.g., *Laborers International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

There are no exceptions to the judge's application of *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), regarding the appropriate treatment of search-for-work and interim employment expenses. Accordingly, we do not revisit that issue here.

[2] 362 NLRB No. 186 (2015), petition for review docketed *Browning-Ferris Indus. of Cal. v. NLRB*, No. 16-1028 (D.C. Cir. filed Jan. 20, 2016).

[3] Prior to the Board majority's decision in *Browning-Ferris*, joint-employer status turned on whether two entities *exercised* joint control over essential employment terms, and evidence that an entity had "reserved" the right to exercise such control would *not* result in joint-employer status. See, e.g., *Flagstaff Medical Center*, 357 NLRB 659, 667 (2011) (citing *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007)), enfd. in part 715 F.3d 928 (D.C. Cir. 2013).

[4] Prior to *Browning-Ferris*, the Board—applying common law principles—held that the "essential element" when evaluating joint-employer status "was whether the putative joint employer's control over employment matters is *direct and immediate*." *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002) (emphasis added) (citing *TLI, Inc.*, 271 NLRB 798 (1984)); see also *Summit Express, Inc.*, 350 NLRB 592, 592 fn. 3 (2007). Proof that a putative joint employer *indirectly* affected the terms and conditions of employment of another employer's employees was insufficient prior to *Browning-Ferris*. An example of indirect control would be an agreement between a supplier employer (a business that supplies labor to other businesses) and a user employer (a business that uses the labor supplied by a supplier employer) specifying a maximum total amount of reimbursable labor costs. See *CNN America, Inc.*, 361 NLRB 439, 472 (2014) (Member Miscimarra, concurring in part and dissenting in part). The contractual maximum for reimbursable labor costs, codetermined by the user and supplier, would not directly establish the wage rates or fringe benefits of the supplier's employees, but it would have an indirect effect on the supplier employees' wages and/or benefits when the supplier employer sets or negotiates them.

[5] Before *Browning-Ferris*, the Board held that joint-employer status would not result from control that was "limited and routine." See, e.g., *AM Property Holding Corp*., 350 NLRB 998, 1001 (2007), order modified 352 NLRB 279 (2008), supplemented 355 NLRB 721 (2010), enfd. in relevant part sub nom. *SEIU Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011). Supervision was found "limited and routine" where a su-

that the *Browning-Ferris* standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations.[6] Accordingly, we overrule *Browning-Ferris* and return to the principles governing joint-employer status that existed prior to that decision. See, e.g., *Airborne Express*, 338 NLRB 597 (2002); *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. sub nom. *General Teamsters Local Union No. 26 v. NLRB*, 772 F.2d 894 (3d Cir. 1985); and *Laerco Transportation*, 269 NLRB 324 (1984); see also *Browning-Ferris*, 362 NLRB No. 186, slip op. at 21–50 (dissenting opinion of Members Miscimarra and Johnson). By overruling *Browning-Ferris*, we also make the Board's treatment of joint-employer status consistent with the holdings of numerous Federal and state courts.[7]

Because we find that Hy-Brand and Brandt are joint employers, we do not reach or pass on whether, in the alternative, they constitute a single employer.[8]

I. OVERVIEW

The National Labor Relations Act (Act) establishes a comprehensive set of rules for labor relations in this country, and a primary function of the Board is to foster compliance with those rules by employees, unions, and employers. To comply with these rules as they have grown and evolved over the last eight decades, substantial planning is required. This is especially true in regard to collective bargaining, a process that is central to the Act. The Act's bargaining obligations are formidable—as they should be—and violations can result in significant liability. When it comes to the duty to bargain, resort to strikes or picketing, and even the basic question of "who is bound by this collective-bargaining agreement," there is no more important issue than correctly identifying who is the employer. Changing the test for identifying the employer, therefore, has dramatic implications for labor relations policy and its effect on the economy.

In *Browning-Ferris*, a Board majority rewrote the decades-old test for determining who is the employer. More specifically, the majority redefined and expanded the test that makes two separate and independent entities a "joint employer" of certain employees. This change subjected countless entities to unprecedented new joint bargaining obligations that most may not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have hereto-

pervisor's instructions consisted primarily of telling employees what work to perform, or where and when to perform it, but not how to perform it. *G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992); see also *AT&T v. NLRB*, 67 F.3d 446 (2d Cir. 1995) ("Limited and routine supervision, without an ability to hire, fire, or discipline, cannot justify a finding of joint employer status.") (citing *TLI*, 271 NLRB at 799).

[6] See *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (A "basic policy of the Act [is] to achieve stability of labor relations.").

[7] See, e.g., *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) ("A finding of the right to control employment requires . . . a comprehensive and immediate level of 'day-to-day' authority over employment decisions.") (quoting *Vernon v. State*, 116 Cal. App. 4th 114, 10 Cal. Rptr. 3d 121, 132 (2004)); *Gulino v. N.Y. State Educ. Dep't,* 460 F.3d 361, 379 (2d Cir. 2006) (employment relationship must involve a "level of control that is direct, obvious and concrete, not merely indirect or abstract"); *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 442–443 (2d Cir. 2011) ("'An essential element' of any joint employer determination is 'sufficient evidence of immediate control over the employees.'") (quoting *Clinton's Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1984)); *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991) (same); *Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275, 1280 (8th Cir. 1980) (holding that the Board erred in finding a joint-employer relationship, distinguishing cases "where the companies share direct supervision of the employees involved and control hiring, firing, and disciplining"); see also *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689–690 (1951) (holding that contractor's supervision over subcontractor's work "did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other," emphasizing that "[t]he business relationship between independent contractors is too well established in the law to be overridden without clear language doing so").

[8] The Board and the courts have distinguished between joint-employer status on the one hand, and single-employer status on the other. The hallmark characteristic of joint-employer status is the presence of two employer entities that are separate but deemed to be joint employers because they jointly control essential employment terms. A finding that two entities are joint employers "*assumes in the first instance that [the] companies are 'what they appear to be'—independent legal entities* that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'" *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc*., 691 F.2d 1117, 1122 (3d Cir. 1982) (emphasis added) (quoting *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966)). Thus, "the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment." Id. at 1123 (emphasis in original). By contrast, single-employer status arises when two entities—though supposedly distinct—are shown to be a single enterprise based on (i) common ownership, (ii) common management, (iii) interrelated operations, and (iv) centralized control of labor relations; of these factors, common ownership is typically afforded the least weight, and centralized control over labor relations the most weight. See *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc*., 380 U.S. 255 (1965) (per curiam); *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976) (per curiam).

fore been unlawful secondary strikes, boycotts, and picketing.

The *Browning-Ferris* majority was driven by a desire to ensure that collective bargaining is not foreclosed by business relationships that allegedly deny employees the right to bargain with employers that share control over essential terms and conditions of their employment. However well-intentioned the majority's decision in *Browning-Ferris* might have been, there are five major problems with that decision.

First, the *Browning-Ferris* test exceeds the Board's statutory authority. From the *Browning-Ferris* majority's perspective, the change their decision wrought in the joint-employer analysis was a necessary adaptation of Board law to reflect changes in the national economy. In making that change, they purported to operate within the limits of traditional common law principles, and they claimed to be returning to the law applied by the Board prior to 1984. In actuality, however, the *Browning-Ferris* majority relied on theories of "economic realities" and "statutory purpose" that extended the definitions of "employee" and "employer" far beyond the common law limits that Congress and the Supreme Court have stated must apply.[9] The *Browning-Ferris* decision represented a further expansion of changes in the law made in *FedEx*,[10] which revised the Board's longstanding definition of independent contractor status in a way that will predictably extend the Act's coverage to many individuals previously considered to be excluded from that coverage as independent contractors, and in *CNN*,[11] which imposed after-the-fact joint-employer obligations contrary to the parties' 20-year bargaining history, applicable collective-bargaining agreements (CBAs), relevant services contracts, and the Board's own prior union certifications.

Second, the *Browning-Ferris* majority's rationale for overhauling the Act's definition of "employer"—i.e., to protect bargaining from limitations resulting from the absence from the table of third parties that indirectly affect employment-related issues—relied in substantial part on the notion that present conditions are unique to our modern economy and represent a radical departure from simpler times when labor negotiations were unaffected by the direct employer's commercial dealings with other entities. However, such an economy has not existed in this country for more than 200 years.[12] Many forms of subcontracting, outsourcing, and temporary or contingent employment date back to long before the 1935 passage of the Act. Congress was obviously aware of the existence of third-party business relationships in 1935, when it limited bargaining obligations to the "employer"; in 1947, when it limited the definition of "employee" and "employer" to their common law agency meaning; and in 1947 and 1959, when Congress strengthened secondary boycott protection afforded to third parties who, notwithstanding their dealings with the employer, could not lawfully be required to suffer picketing and other forms of economic coercion based on their dealings with that employer.[13] This is not mere conjecture; it is the inescapable conclusion that follows from Supreme Court precedent recognizing that the Act did not confer "employer" status on third parties merely because commercial relationships made them interdependent with an employer and its employees.[14]

Third, courts have afforded the Board deference in this context merely as to its drawing of factual distinctions when applying the common law agency standard.[15]

[9] The common law agency principles are also known as "master-servant" principles in the older cases and literature, and these terms are used interchangeably both in the doctrine and here.

[10] *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017).

[11] *CNN America, Inc*., 361 NLRB 439 (2014), enf. denied in relevant part 865 F.3d 740 (D.C. Cir. 2017). In refusing to affirm the Board's joint-employer finding in *CNN*, the D.C. Circuit found that the Board had failed to grapple with its precedents requiring a putative joint employer to have exercised "direct and immediate" control over another employer's employees' essential terms and conditions of employment. 865 F.3d at 749–751.

[12] If the *Browning-Ferris* majority desired to return to a time when labor-management relations were insulated from third-party business relationships and competitive pressures, they would need to go back to our country's origins. The work of labor economists John R. Commons and Selig Perlman, who are perhaps the two most authoritative historians of the American labor movement, indicates that unions expanded and contracted during the first centuries of economic development in the United States, and the transition to national markets, combined with unprecedented business competition, caused extensive labor-management instability. See 1 John R. Commons, HISTORY OF LABOUR IN THE UNITED STATES 25–30 (1918); Selig Perlman, A HISTORY OF TRADE UNIONISM IN THE UNITED STATES 36–41 (1922); see also Philip S. Foner, THE HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: FROM COLONIAL TIMES TO THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR 338–340 (1947).

[13] See, e.g., Sec. 8(b)(4), 8(e).

[14] See, e.g., *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692 (holding that construction industry general contractors have no employer relationship with the employees of subcontractors, notwithstanding the general contractor's responsibility for the entire project). In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), an employer contracted out its maintenance work and "merely replaced existing employees with those of an independent contractor." Even though the subcontractor's employees continued "to do the same work under similar conditions of employment" and the "maintenance work still had to be performed in the plant," id. at 213, *Fibreboard ceased being the "employer."* Indeed, the premise of *Fibreboard* and similar decisions is that the outsourcing of work may "quite clearly imperil job security, or indeed terminate employment entirely" for employees of the contracting employer. Id. at 223 (Stewart, J., concurring).

[15] The Supreme Court's decision in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), speaks directly to the Board's authority to make factu-

However, the *Browning-Ferris* majority mistakenly interpreted this as a grant of authority to modify the agency standard itself. It is not, and the change wrought in *Browning-Ferris* is solely within the province of Congress, not the Board. This was not the first time the Board overstepped its limits in this area. Thus, in *Yellow Taxi Co. v. NLRB*,[16] Judge MacKinnon of the D.C. Circuit denounced the Board majority's "thinly veiled defiance" of controlling precedent regarding the "common law rules of agency," adding that "[n]o court can overlook an agency's defiant refusal to follow well established law." 721 F.2d at 382. The judge further observed:

> [T]he Board here is acting in an area where it is called upon to apply common law principles that have been established since 1800 and where the application of that law under the National Labor Relations Act has been declared by Congress and settled by the courts, including the Supreme Court, for some 36 years. In this area, there is no dispute as to the governing principles of law; what is involved is the application of law to facts. "[S]uch a determination of pure agency law involve[s] no special administrative expertise that a court does not possess." *NLRB v. United Ins. Co. of America*, supra, 390 U.S. at 260.

Id. at 383 fn. 39. To be specific, we understand the common law standard as codified by the Act to require direct control over one or more essential terms and conditions of employment to constitute an entity the joint employer of another entity's employees. Our fundamental disagreement with the *Browning-Ferris* test is not that it treats indicia of indirect, and even potential, control to be probative of joint-employer status, but that it makes such indicia potentially dispositive without any evidence of direct control in even a single area. Under the common law, in our view, evidence of indirect control or contractually-reserved authority is probative only to the extent that it supplements and reinforces evidence of direct control.[17]

Fourth, *Browning-Ferris* abandoned a longstanding test that provided certainty and predictability, replacing it with a vague and ill-defined standard that would have resulted in the imposition of unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, based solely on a never-exercised right to exercise "indirect" control over what the Board later decides is an "essential" employment term, to be determined in litigation on a case-by-case basis. Thus, the *Browning-Ferris* test deprived employees, unions, and employers of certainty and predictability regarding the identity of the "employer." Just like the test of employee status rejected by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 530 U.S. 318, 326 (1992), the *Browning-Ferris* joint-employer standard constituted "an approach infected with circularity and unable to furnish predictable results." This confusion and disarray threatened to cause substantial instability in bargaining relationships, and it may have and certainly would have resulted in substantial burdens, expense, and liability for innumerable parties, including employees, employers, unions, and countless entities that were cast into legal limbo, with consequent delay, risk, and litigation expense.[18]

Fifth, to the extent that the *Browning-Ferris* majority sought to correct a perceived inequality of bargaining leverage resulting from complex business relationships involving entities that do not participate in collective bargaining, the inequality addressed therein was the wrong target, and expanding collective bargaining to an employer's business partners was the wrong remedy. As noted above, the inequality targeted by the *Browning-Ferris* joint-employer test is a fixture of our economy. Business entities enter into a variety of relationships, and they have different interests and varying degrees of leverage in their dealings with one another. There are contractually more powerful business entities and less powerful business entities, and all pursue their own interests. The Board would need a clear congressional command—and none exists here—before undertaking an attempt to reshape this aspect of economic reality. The Act does not redress imbalances of power between businesses, even if those imbalances have some derivative effect on employees. As Justice Stewart observed 50 years ago:

> [I]t surely does not follow that every decision which may affect job security is a subject of compulsory col-

al distinctions in applying the common law agency standard. The determination of whether two entities are joint employers, said the Court, "is essentially a factual issue." Id. at 481.

[16] 721 F.2d 366 (D.C. Cir. 1983). See also *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995) (" In some cases, there may be a question about whether the Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, renders its interpretation unreasonable.").

[17] Our dissenting colleagues do not cite any court decision finding that a company was a joint employer of another employer's employees based solely on the *indirect* effect of its business relationship on those workers' wages, hours, and other working conditions, much less a sufficient body of cases that one could say rises to the level of the common law. Nor does the dissent cite a body of cases finding that a company was a joint employer based solely on the existence of a contract clause reserving some *never-exercised* authority to the putative joint employer over the workers' terms and conditions of employment.

[18] See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679, 684–686 (1981), and other cases discussed in Part VI, subpart B of this opinion, emphasizing the need for certainty, predictability and stability.

> lective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. at 223 (Stewart, J., concurring); see also *First National Maintenance Corp. v. NLRB*, 452 U.S. at 676 (In adopting the NLRA, Congress "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."). Dragging third parties into collective bargaining wherever there is some interdependence between or among those parties and an employer is much more likely to thwart labor peace than advance it.

Indeed, on matters of economic power and relative inequality, the Board is not vested with "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970). Therefore, we are certainly not vested with general authority to shape national economic policy by balancing the competing interests of different business enterprises.

The Act encourages collective bargaining, but only between a labor organization and an employer regarding the terms and conditions of employment of the employer's employees. *Browning-Ferris* extended this purpose far beyond what Congress intended. In this respect, *Browning-Ferris* fosters substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the "employer" side of the table. Indeed, even the commencement of good-faith bargaining could have been delayed by disputes over whether the correct "employer" parties were present. This predictable outcome is irreconcilable with the Act's overriding policy to "*eliminate* the causes of certain substantial obstructions to the free flow of commerce."[19]

In sum, the *Browning-Ferris* majority opinion did not represent a "return to the traditional test used by the Board," as the majority claimed even as they admitted that the Board had never before described or articulated the test they announced. Rather, the *Browning-Ferris* joint-employer test fundamentally altered the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act. In addition, because the commerce data applicable to joint employers is combined for jurisdictional purposes,[20] the Act's coverage was extended to small businesses whose separate operations and employees had not, until *Browning-Ferris* issued, been subject to Board jurisdiction. As explained in detail below, we believe the *Browning-Ferris* majority impermissibly exceeded the Board's statutory authority, misread and departed from prior case law, and subverted traditional common law agency principles. The result was a new test that confused the definition of a joint employer and threatened to produce wide-ranging instability in bargaining relationships. It did violence as well to other requirements imposed by the Act, notably including the secondary-boycott protection that Congress affords to neutral employers. For all these reasons, we return today to pre-*Browning-Ferris* precedent. Thus, a finding of joint-employer status shall once again require proof that putative joint employer entities have *exercised* joint control over essential employment terms (rather than merely having "reserved" the right to exercise control), the control must be "direct and immediate" (rather than indirect), and joint-employer status will not result from control that is "limited and routine."

II. THE JOINT-EMPLOYER TEST PRIOR TO *BROWNING-FERRIS*

The Act does not expressly define who is an employer, whether joint or sole. In relevant part, Section 2(2) of the Act states only that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly." In cases decided prior to 1984, both the Board and the courts occasionally confused resolution of the issue whether two entities were joint employers by, among other things, blurring the distinction between the test for determining single-employer status and the test for determining joint-employer status.[21] In two cases decided in 1984—*Laerco Transportation*[22] and *TLI, Inc.*[23]—the Board clarified the law by expressly adopting the joint-employer standard announced by the Court of Appeals for the Third Circuit in *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1124

[19] NLRA Sec. 1 (emphasis added).

[20] *Valentine Properties*, 319 NLRB 8 (1995).

[21] See, e.g., *Parklane Hosiery*, 203 NLRB 597 (1973), amended 207 NLRB 991 (1973).

[22] 269 NLRB 324.

[23] 271 NLRB 798.

(3d Cir. 1982): "The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." Applying this test as to "essential terms" in both *Laerco* and *TLI*, the Board stated it would focus on whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[24]

Both *TLI* and *Laerco* were cases applying the joint-employer test to the relationship between a company supplying labor to a company using that labor. The Board found that evidence of the user employer's actual but "limited and routine" supervision and direction of the supplier employer's employees would not suffice to establish joint-employer status.[25] Subsequently, in *AM Property Holding Corp.*, 350 NLRB at 1001, the Board further explained that it has "generally found supervision to be 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."

In *Airborne Express*, 338 NLRB at 597 fn. 1, the Board explained that under the joint-employer test, "[t]he essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate."[26] Consistent with this standard, in *AM Property* the Board found that a contractual provision giving the user company (AM) the right to approve hires by the supplier company (PBS) to work at AM's office building was not, standing alone, sufficient to make AM a joint employer of those employees. Instead, "[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."[27]

The *AM Property* distinction between potential or reserved authority and the actual exercise of authority is a commonplace, well-established fixture in Board jurisprudence. For example, in the Board's single-employer test, we have repeatedly required proof that "one of the entities exercises actual or active control [as distinguished from potential control] over the day-to-day operations or labor relations of the other."[28] In other contexts where a party bears the burden of proving that an entity falls within a particular statutory definition, the Board has repeatedly endorsed this evidentiary distinction, giving weight only to the actual exercise of authority or control.[29]

As discussed in Section IV below, the pre-*Browning-Ferris* test, which we restore today, is fully consistent with the common law agency principles that the Board must apply in determining joint-employer status. Further, as an administrative law judge has accurately summarized, the test reflects a common-sense, practical understanding of the nature of contractual relationships in our modern economy: "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. It follows that the existence of such control is not, in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees."[30]

[24] *Laerco*, 269 NLRB at 325; *TLI*, 271 NLRB at 798.

[25] *Laerco*, 269 NLRB at 326; *TLI*, 271 NLRB at 799. *Laerco* and *TLI* were decided by different three-member panels of a Board then comprised of four sitting members. As such, they collectively represented the unanimous opinion of the full Board at that time.

[26] We note that, although concurring Member Liebman advocated revisiting the joint-employer standard represented by *TLI*, she agreed with the majority in *Airborne* that Board decisions applying this precedent "have required that the joint employer's control over these matters be direct and immediate." 338 NLRB at 597 fn. 1. Thus, the *Browning-Ferris* majority was mistaken in asserting that the requirement of "direct and immediate control" stated in *Airborne* was a new addition to the joint-employer test. Further, as we shall later explain, there is ample precedent in the common law for this requirement predating 1984.

[27] 350 NLRB at 1000.

[28] *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001). See also, e.g., *Dow Chemical Company*, 326 NLRB 288 (1998); *Gerace Construction, Inc.*, 193 NLRB 645 (1971); *Los Angeles Newspaper Guild, Local 69*, 185 NLRB 303, 304 (1970).

[29] E.g., *FedEx Home Delivery*, 361 NLRB 610 ("The Board has been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial autonomy, and those that are circumscribed or effectively blocked by the employer."); *Pacific Lutheran University*, 361 NLRB 1404, 1427 (2014) ("In order for decisions in a particular policy area to be attributed to the faculty, the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations."); *Lucky Cab*, 360 NLRB 271, 273 (2014) ("We reject, therefore, the judge's reliance on 'paper authority' set forth in the handbook, in light of the contrary evidence of the road supervisors' actual practice. *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000), enfg. in relevant part 327 NLRB 253 (1998) (no authority to discipline, despite statement in job description, where the alleged supervisors did not actually discipline or recommend discipline).").

[30] *Southern California Gas*, 302 NLRB 456, 461 (1991).

III. THE *BROWNING-FERRIS* JOINT-EMPLOYER TEST

The *Browning-Ferris* majority expressly overruled *TLI*, *Laerco*, *Airborne Express*, *AM Property,* and related precedent and purported to return to a joint-employer test that allegedly applied prior to this line of precedent. Their analysis began in a manner that was consistent with prior precedent: "The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." 362 NLRB No. 186, slip op. at 15. The "share or codetermine" language is the general statement of the joint-employer test in the Third Circuit's 1982 *Browning-Ferris* decision that was adopted and applied by the Board in both *TLI* and *Laerco*.

The *Browning-Ferris* majority went on to adopt *TLI*'s and *Laerco*'s description of essential terms and conditions of employment as "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction." Id. (emphasis in *Browning-Ferris*). If this was the extent of the majority's holding in *Browning-Ferris*, there would have been no need for that majority to overrule precedent.

However, the *Browning-Ferris* majority made clear that its new test expanded joint-employer status far beyond anything that had existed under then-current precedent and, contrary to the majority's claim, under precedent predating *TLI* and *Laerco*. In a two-step progression, the first of which misleadingly depicted the limits of common law, the *Browning-Ferris* majority removed all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding. "We will no longer require," they announced,

> that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.

362 NLRB No. 186, slip op. at 15–16. Moreover, the *Browning-Ferris* test evaluated the exercise of control by construing "share or codetermine" broadly:

> In some cases (or as to certain issues) employers may engage in genuinely *shared decision-making*, e.g., they *confer or collaborate* to set a term of employment. . . . Alternatively, employers may exercise *comprehensive authority* over different terms and conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. . . . Or employers *may affect different components of the same term*, e.g. one employer *defines and assigns work tasks*, while the other supervises *how those tasks are carried out*. . . . Finally, one employer may *retain the contractual right to set a term or condition of employment*.

Id., slip op. at 15 fn. 80 (emphasis added).

The *Browning-Ferris* majority conceded that "it is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining." Id., slip op. at 16. However, the majority failed to provide any guidance as to what degree of control, under what circumstances, would be insufficient to establish joint-employer status.

Several conclusions follow from the *Browning-Ferris* majority's reasoning and the decision to overrule prior Board precedent regarding joint-employer status.

First, under *Browning-Ferris*, the Board in any particular case could find joint-employer status based on evidence involving virtually any aspect of employment, and the Board could decide to give dispositive weight to an entity's "reserved" or "indirect" control over *any* essential term and condition of employment of another entity's employees.

Second, there was no requirement that control over any essential employment term be "direct and immediate" in order to be probative and potentially determinative of joint-employer status. Under *Browning-Ferris*, indirect control, even a power reserved by contract but never exercised, would be considered and could suffice, *standing alone*, to find joint-employer status.

Finally, while the *Browning-Ferris* majority purported to base its standard on the common law and sufficient control "to permit meaningful collective bargaining," id., slip op. at 16, it was possible that even the occasional limited and routine discussion or collaboration about a single essential term of employment would have sufficed to establish joint-employer status under the *Browning-Ferris* standard. The *Browning-Ferris* majority repeatedly stated that almost every aspect of a business relationship could be *probative*, but it provided no significant guidance as to what may or should be *determinative*.

The *Browning-Ferris* test represented a major departure from precedent. When applied, it placed the Board in the position of passing on details regarding business relationships that have no direct bearing on what actually occurs in the workplace, and which may be unknown to

employees or even the employer entities themselves. Nor is there any discernible limit on the *Browning-Ferris* majority's open-ended, multifactor standard, which is an analytical grab bag from which any scrap of evidence—regarding indirect control or incidental collaboration as to any aspect of work—could suffice to prove that multiple entities collectively comprise a joint employer, whether they numbered two or two dozen.

IV. *BROWNING-FERRIS* DISTORTED THE COMMON LAW AGENCY TEST AND ADOPTED THE CONGRESSIONALLY-REJECTED "ECONOMIC REALITY" AND "BARGAINING INEQUALITY" THEORIES.

A. The Implicit Reliance of Browning-Ferris on Economic Reality and Statutory Purpose Theory Directly Contravened Congressional Intent.

The threshold problem—an insurmountable one—with *Browning-Ferris*'s reformulated joint-employer test was that it far exceeded the limits of the Board's statutory authority.[31] Indeed, it was the third in a series of cases in which the Board tested or exceeded those limits by dramatically expanding "employer" and "employee" status.

In *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017), the majority claimed to be applying the common law when it broadened the Act's definition of "employee," which (based on language added in 1947 as part of the Taft-Hartley amendments) explicitly excludes any "independent contractor."[32] In altering the analysis for distinguishing employees from independent contractors, the majority distorted the common-law test to emphasize the perceived economic dependency of the putative employee on the putative employer. Member Johnson's dissent explained that the majority's treatment of "employee" and "independent contractor" status in *FedEx* was contrary to the Act and its legislative history, and the majority's factual findings were contrary to the record. Unsurprisingly, the D.C. Circuit rejected the Board's decision.

In *CNN America, Inc*., 361 NLRB 439 (2014), enf. denied in relevant part 865 F.3d 740 (D.C. Cir. 2017), the majority found that a client, CNN, was a joint employer of technical employees supplied by a contractor, TVS, although CNN undisputedly had no direct role in hiring, firing, disciplining, discharging, promoting, or evaluating TVS' employees, and CNN's "employer" status was contrary to collective-bargaining agreements between TVS and the union that represented TVS' employees, the services agreement entered into between CNN and TVS, two decades of bargaining history and CBAs (all identifying the contractor as the only employer), and prior union certifications by the Board. The Board majority in *CNN*, though ostensibly applying the traditional joint-employer test, relied on factors similar to those later emphasized by the *Browning-Ferris* majority (e.g., finding that CNN's services agreement gave it "considerable authority" over "staffing levels"). Then-Member Miscimarra's dissent in *CNN* explained that the Board and the courts had long dealt with situations where contractor employees work at client locations, with substantial interaction between the client and contracting employer, without conferring joint-employer status on the client. *CNN America, Inc*., slip op. at 28, 31–32 (citing *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692; *Fibreboard Paper Products Corp. v. NLRB*, supra, 379 U.S. at 203 (other citations omitted)). Once again, the D.C. Circuit denied enforcement of the Board's decision in relevant part, sharply criticizing the *CNN* Board majority for "casually ignor[ing]" the longstanding direct-and-immediate-control standard for determining joint-employer status and for its "silence in the face of inconvenient precedent." *NLRB v. CNN America*, 865 F.3d at 751 (internal quotations omitted).

In *Browning-Ferris*, the majority abandoned the veiled attempt to remake joint-employer law, which had been strained beyond its rational breaking point in *CNN*. Instead, similar to what was done in *FedEx* for the definition of a statutory employee, the majority announced a new test of joint-employer status that, notwithstanding adamant disclaimers, effectively resurrected and relied, at least in substantial part, on intertwined theories of "economic realities" and "statutory purpose" endorsed by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), which Congress expressly rejected in the Taft-Hartley Amendments of 1947. In *Hearst*, the Court applied the same rationale for the definitions of employee *and* employer under the original Wagner Act:

> To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper 'physical conduct in the performance of the service.' On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the

[31] The *Browning-Ferris* majority cited the following passage from *American Trucking Assns. v. Atchison, T. & S.F. Ry. Co*., 387 U.S. 397, 416 (1967), purporting to justify the change in the joint-employer standard: "[Regulatory agencies] are supposed, *within the limits of the law and of fair and prudent administration*, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." 362 NLRB No. 186, slip op. at 1 (emphasis added). As hereafter discussed, the change in the joint-employer standard was neither within the limits of the law nor representative of fair and prudent administration.

[32] Sec. 2(3).

> containers designated 'employee' and 'employer' which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that 'employers and employees not in proximate relationship may be drawn into common controversies by economic forces, and that the very disputes sought to be avoided might involve 'employees (who) are at times brought into an economic relationship with employers who are not their employers.' In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.[33]

In reaction to *Hearst*, Congress expressly excluded "independent contractors" from the Act's definition of a statutory employee in the Taft-Hartley Amendments of 1947. The purpose of this revision was manifest in the legislative history of the Amendments and repeatedly acknowledged thereafter by the Supreme Court, which stated in one case that

> [in *Hearst*] the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in s 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. . . . Thus there is no doubt that we should apply the common law agency test here in distinguishing an employee from an independent contractor.[34]

The *Browning-Ferris* majority nevertheless clung to the notion that economic and policy considerations may determine the definition of employee and employer. Even assuming that may be true in some cases *not* dealing with the right to control under the common law,[35] the Supreme Court squarely rejected reliance on these considerations in *Darden*, stating that

> *Hearst* and *Silk*, which interpreted "employee" for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read "employee," which neither statute helpfully defined, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning. . . . To be sure, Congress did not, strictly speaking, "overrule" our interpretation of those statutes, since the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law. But a principle of statutory construction can endure just so many legislative revisitations, and *Reid*'s presumption that Congress means an agency law definition for "employee" unless it clearly indicates otherwise signaled our abandonment of *Silk*'s emphasis on construing that term "'in the light of the mischief to be corrected and the end to be attained.'"

503 U.S. at 324–325 (footnote and citations omitted).

Accordingly, the inescapable conclusion to be drawn from the Taft-Hartley legislation repudiating the *Hearst* opinion is that Congress must have intended that common law agency principles, rather than the *Browning-Ferris* majority's much more expansive policy-based "economic realities" and "statutory purpose" approach, govern the definition of employer as well as employee under the Act. Even if Congress had not been so clear, "it is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless a statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)). Thus, the *Browning-Ferris* majority's joint-employer test is invalid because it does not comport with common law agency principles.

Notwithstanding the legislative repudiation of *Hearst*, the majority in *Browning-Ferris* expanded the definition of employer by redefining the joint-employer doctrine in unstated—but unmistakable—reliance on the rationale of *Hearst*.[36] The majority there was motivated by a policy

[33] 322 U.S. at 128–129. See also *United States v. Silk*, 331 U.S. 704 (1947), applying the same "economic realities" and "statutory purpose" theories to the definition of "employee" under the Social Security Act.

[34] *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). See also *Boire v. Greyhound*, supra, 376 U.S. at 481 fn. 10; *Nationwide Mutual Insurance Co. v. Darden*, supra, 503 U.S. at 324.

[35] See, e.g., *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971).

[36] An unacknowledged antecedent for the joint-employer theory adopted in *Browning-Ferris* was the concurring opinion of then-Member Liebman in *Airborne Express*, supra, 338 NLRB at 597–599, who contended that "[g]iven business trends driven by accelerating competition, highlighted by this case, the Board's joint-employer doctrine may no longer fit economic realities." See also *AM Property*

concern that an imbalance of leverage in commercial dealings between undisputed employers and third-party entities prevents "meaningful bargaining" over each term and condition of employment and is therefore in conflict with the statutory policy of encouraging collective bargaining. That approach reflected a desire to ensure that third parties with "deep pockets" become participants in existing or new bargaining relationships, and that they would also be directly exposed to strikes, boycotts and other economic weapons, based on the most limited and indirect signs of potential control.[37] Whether that was good or bad policy—and we think it was bad for numerous reasons discussed below—this fundamental balancing of interests has already been done by Congress. And the simple fact is that Congress has forbidden the Board from applying an economic realities or statutory purpose rationale in defining employer and joint-employer status under the Act.

B. The Browning-Ferris Test Does Not Comport with Common Law Agency Principles.

The *Browning-Ferris* majority did not acknowledge the Congressional rejection of *Hearst*'s economic realities theory for defining "employee" and "employer" under the Act. Neither did they acknowledge their implicit reliance on this theory in announcing a new joint-employer test. Instead, they attempted to persuade that their test of joint-employer status was consistent with common-law agency's master-servant doctrine. Their attempt failed.

The "touchstone" at common law is whether the putative employer sufficiently controls or has the right to control putative employees. See *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448–449 (2003); Restatement (Second) of Agency §§ 2, 220 (1958). Without attribution, the *Browning-Ferris* majority asserted that the common law considers as potentially dispositive not only direct control, but also indirect control and even reserved control that has never been exercised. 362 NLRB No. 186, slip op. at 15–16. They jettisoned the joint-employer test's requirement of evidence that the putative employer's control be direct and immediate. Id. As explained below, however, "control" under common-law principles *requires* some direct and immediate control even where indirect-control factors are deemed probative. The Act, with its incorporation of the common law, does not allow the Board to broaden the standard to include indirect control or an inchoate right to exercise control, *standing alone*, as a dispositive factor, which the *Browning-Ferris* majority did.

Long before Congress anchored "employer" in the common law, courts applying those principles focused on discerning whether the putative master had control over the details of the work (master) or only the results to be achieved (not master). See, e.g., *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 522 (1889) ("[T]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done'" (quoting *Railroad Co. v. Hanning*, 82 U.S. 649, 657 (1872).). Further, the Supreme Court, for more than a century, has adhered to the proposition that "under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services."[38] Lower courts as well implicitly limited their analysis to looking for direct and immediate control. See, e.g., *Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan*, 179 F.2d 882 (8th Cir. 1950) (attaching no importance to indirect control in finding real estate agents were not employees), cert. denied 340 U.S. 823 (1950); *Glenn v. Standard Oil Co.*, 148 F.2d 51 (6th Cir. 1945) (attaching no importance to indirect control in finding operators of Standard Oil's bulk distribution plants were not employees); *Spillson v. Smith*, 147 F.2d 727 (7th Cir. 1945) (attaching no importance to indirect control in finding the musicians of an orchestra were the employees of its leader, not of the restaurant where they played).

As courts undoubtedly realized, anyone contracting for services, master or not, inevitably will exert and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure that the benefit of the bargain is obtained. For example, in a case apply-

Holding Co., supra, 350 NLRB at 1012 (Member Liebman, concurring in part and dissenting in part).

[37] See Michael Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 Boston College L. Rev. 329, 348 (1998) ("[I]f workers are to be assured the opportunity to utilize collective bargaining leverage to extract a greater share of the returns from their labor, they must be able to bargain with the firms that provide the capital."); see also Craig Becker, *Labor Law Outside the Employment Relation*, 74 Texas L. Rev. 1527 (1996) ("At bottom, my intent is to inquire how the principles of labor law might be freed from the limits of outmoded definitions of the employment relationship. That effort involves questioning the sanctity of the doctrine of privity of contract *as well as departing from the common-law paradigm of master-servant as foundations for rights and duties in the workplace*. Above all, it requires rethinking the nature of power at stake in labor relations so as to bring legal doctrine in line with contemporary economic realities.") (emphasis added).

[38] *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963), citing and applying the analysis in *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909). See also *Kelly v. Southern Pacific Co.*, 419 U.S. 318, 329–330 (1974), cited with approval in *Community for Creative Non-Violence v. Reid*, 490 U.S. at 739–740, and in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 323.

ing common-law principles and finding, under the Social Security Act, that a production company was not the employer of the performers in vaudeville acts, Judge Learned Hand wrote that

> [i]n the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. By far the greater part of [the putative employer's] intervention in the 'acts' was no more than this. It is true, as we have shown, that to a very limited extent he went further, but these interventions were trivial in amount and in character; certainly not enough to color the whole relation.

Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717–718 (2d Cir. 1943).

The Supreme Court subsequently addressed the same point in construing the scope of the Act's prohibition of coercive secondary activity against neutral construction employers by unions:

> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor *or make the employees of one the employees of the other*. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.[39]

To aid in applying this well-established common law for employer-employee relationships, the Supreme Court largely adopted the Restatement (Second) of Agency § 220's nonexhaustive list of factors to be considered. *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751–752; see also *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 323–324. The *Reid* Court wrote:

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

Reid, 490 U.S. at 751–752. These factors provide useful indicia of the putative employer's direct and immediate control, or its right to exercise such control.

The comments to Section 220 of the Restatement clarify that the listed factors are not concerned with indirect control. Comment j, on the duration of the relationship, provides: "If the time of employment is short, the worker is less apt to subject himself to *control as to details* and the job is more likely to be considered his job than the job of the one employing him" (emphasis added). Comment k, on the source of the instrumentalities and tools, states it is understandable that the owner would regulate such instrumentalities because "if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will *follow the direction of the owner in their use*" (emphasis added). Comment *l*, on the location of work, states that although the putative employer's control of the location of work usually raises an inference of employer status, "[i]f . . . the rules are made only for the general policing of the premises, as where a number of separate groups of workmen are employed in erecting a building, mere conformity to such regulations does not indicate that the workmen are" employees of the entity that controls the property.

More recently, courts applying the common law have continued to make it unmistakably clear that employer status requires sufficient proof of direct and immediate control. For example, in finding that the New York State Education Department (SED) was not the employer of teachers under Title VII, the Court of Appeals for the Second Circuit wrote: "[The common-law standard] focuses largely on the extent to which the alleged master has 'control' over the day-to-day activities of the alleged 'servant.' The *Reid* factors countenance a relationship where the level of control is direct, obvious, and concrete, *not merely indirect or abstract*. . . . Plaintiffs in this case could not establish a master-servant relationship under the *Reid* test. [The SED] does have some control over New York City school teachers—e.g., it controls basic curriculum and credentialing requirements—but

[39] *NLRB v. Denver Building and Construction Trades Council*, supra, 341 U.S. at 689–690 (1951) (emphasis added).

SED does not exercise the workaday supervision necessary to an employment relationship." *Gulino v. N.Y. State Education Department*, 460 F.3d 361, 379 (2d Cir. 2006) (emphasis added), cert. denied 554 U.S. 917 (2008). Similarly, the Court of Appeals for the Ninth Circuit, applying common-law principles, found that Wal-Mart was not the joint employer of its suppliers' employees where Wal-Mart did not have the right to an "immediate level of 'day-to-day' control" over those employees. *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682–683 (9th Cir. 2009) (quoting *Vernon v. State*, 10 Cal. Rptr. 3d 121 (Cal. Ct. App. 2004)). A few years later, the Supreme Court of California used similar language in finding a franchisor not liable under the California Fair Employment and Housing Act for a franchisee supervisor's harassment of an employee: "[T]raditional common law principles of agency and respondeat superior supply the proper analytical framework . . . . This standard requires 'a comprehensive and immediate level of "day-to-day" authority' over matters such as hiring, firing, direction, supervision, and discipline of the employee." *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 740 (Cal. 2014) (quoting *Vernon*, supra).[40]

Contrary to the *Browning-Ferris* majority's characterization, the above-quoted language from *Gulino* and *Wal-Mart* cannot be dismissed as meaningless statements made "in cases where there was little if any relevant evidence of control of any sort." 362 NLRB No. 186, slip op. at 17 fn. 94. This statement begged the question why either court felt the need to specifically mention the absence of immediate control. While *Patterson* was decided under a California statute, the *Browning-Ferris* majority failed to acknowledge that the court's opinion there was founded on "traditional common law principles of agency and respondeat superior."[41] The salient point is that the cases we cite indicate that evidence of direct and immediate control is essential to a finding of joint-employer status under the common law. By contrast, the *Browning-Ferris* majority did not and could not cite a single judicial opinion that even implicitly affirms its concededly novel two-step alternative common law test or the proposition that a finding of a joint-employer relationship under the common law can be based solely on indirect control.

In re *Enterprise Rent-A-Car Wage & Employment Practices Litigation*, 683 F.3d 462, 468–469 (3d Cir. 2012), provides a useful contrast between the common law test of joint-employer status and the economic realities test that Congress authorized by the unique language of the Fair Labor Standards Act (FLSA), but rejected in the Taft-Hartley Amendments of the NLRA. With respect to the economic realities test, the Third Circuit stated:

> When determining whether someone is an employee under the FLSA, "economic reality rather than technical concepts is to be the test of employment." *Goldberg v. Whitaker House Co-op., Inc.,* 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) (internal quotation marks omitted). Under this theory, the FLSA defines employer "expansively," *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), and with "striking breadth." *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947). The Supreme Court has even gone so far as to acknowledge that the FLSA's definition of an employer is "the broadest def-

[40] In *TLI*, supra, 271 NLRB at 798, the Board stated that "there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." We read that passage to provide a nonexclusive list of direct-and-immediate-control factors to consider, and hereafter we discuss cases decided after *TLI* that did examine factors other than those enumerated in that case. However, evidence of control over the specific factors referred to in *TLI* is usually most relevant to the joint-employer analysis. It is no coincidence that the Supreme Court of California used a similar list in *Patterson*, as did the Ninth Circuit in *EEOC v. Pacific Maritime Association*, 351 F.3d 1270 (9th Cir. 2003). Discussing the Supreme Court's *Clackamas* decision in this Title VII case, the Ninth Circuit stated:

> The Supreme Court seems to suggest that the sine qua non of determining whether one is an employer is that an "employer can hire and fire employees, can assign tasks to employees and supervise their performance." Logically, before a person or entity can be a joint employer, it must possess the attributes of an employer to some degree. Numerous courts have considered the key to joint employment to be the right to hire, supervise and fire employees.

Id. at 1277. The Board's task is to weigh all of the incidents of the relationship to determine the sufficiency of the control, and that analysis necessarily includes qualitative assessments of the general significance of specific factors. The *Browning-Ferris* test discarded this safeguard against overinclusion in favor of finding any sporadic evidence or tangential effect on working conditions to be potentially sufficient to prove joint-employer status.

[41] The *Browning-Ferris* majority also distinguished *Patterson* on the ground that it involved "the particularized features of franchisor/franchisee relationships, none of which are applicable here." 362 NLRB No. 186, slip op. at 17 fn. 94. As we state elsewhere in this decision, prior to *Browning-Ferris* the Board had maintained a unitary joint-employer test for all types of employer relationships. The suggestion that the test would vary from one type of relationship to another was unprecedented and certainly had no foundation in the common law. Moreover, before the Board's decision in *Browning-Ferris* even issued, the General Counsel had already thrown this distinction overboard in the *McDonald's* litigation, in which the theory of the General Counsel's case is that McDonald's USA, LLC is a joint employer of its franchisees' employees under the joint-employer standard the Board subsequently embraced in *Browning-Ferris*. See *McDonald's USA, LLC*, 362 NLRB No. 168, slip op. at 2 fn. 1 (2015) (Members Miscimarra and Johnson, concurring in part and dissenting in part).

> inition that has ever been included in any one act." *United States v. Rosenwasser,* 323 U.S. 360, 363 n. 3, 65 S.Ct. 295, 89 L.Ed. 301 (1945).[42]

The issue in *Enterprise* was whether the district court had erred in granting summary judgment against the plaintiff employees' claim that the parent company of their wholly owned rental car subsidiary was their joint employer with shared liability for alleged overtime wage violations. The district court had relied on a traditional common law test. However, the Third Circuit held that

> [b]ecause of the uniqueness of the FLSA, a determination of joint employment "must be based on a consideration of the total employment situation and the economic realities of the work relationship." A simple application of the [district court's] test would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient *indirect* control as well. We therefore conclude that while the factors outlined today in [that test] are instructive they cannot, without amplification, serve as the test for determining joint employment under the FLSA.[43]

It is readily apparent from the distinctions underscored by the *Enterprise* court that the new joint-employer test announced in *Browning-Ferris* was rooted in "economic realities" and "statutory purpose" theory, not in the common law of agency. Indeed, the *Browning-Ferris* definition of employer equals or exceeds the "striking breadth" of the FLSA standard, and it cannot stand in the face of express Congressional disapproval.

The *Browning-Ferris* majority's explication of its joint-employer test erased any doubt that the test they invented was the analytical stepchild of *Hearst*, rather than being founded in common law. The *Browning-Ferris* majority posited that as the first step of a joint-employer analysis, it must be determined whether an employment relationship exists at all between the alleged joint employer and an employee. 362 NLRB No. 186, slip op. at 11–12. In short, they did no more than acknowledge the obvious: an entity with no control whatsoever over a person performing services in that entity's affairs cannot possibly be that person's employer. But the *Browning-Ferris* majority incorrectly set this "zero control" state as the *outer limit* of common law master-servant agency. That is, if there is *some* type of control (including indirect or contractually reserved control) over *any* aspect of the performance of services, then the common law would allegedly permit finding an employment relationship. Of course, if that were true, it would obliterate the common law concept of an independent contractor—embedded in the Act in the 1947 Taft-Hartley amendments—and erase the distinction at common law between servant and nonemployee agent. The *Browning-Ferris* majority seemed vaguely to recognize this, but in deciding whether to find that a separate business is a joint employer with an undisputed employer of an undisputed employee, the majority nevertheless looked to whether it would serve the purposes of the Act to expand the joint-employer definition in order to serve the Act's policy of "encouraging the practice and procedure of collective bargaining" (in the words of Section 1 of the Act). Id., slip op. at 1–2. In their view, it was necessary to do so because the direct and immediate control standard "serve[s] to significantly and unjustifiably narrow the circumstances where a joint employment relationship can be found—leav[ing] the Board's joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes." Id., slip op. at 1.

Compare the *Browning-Ferris* majority's reasoning set forth above to the following passages from *Hearst* concerning the test for determining whether newsboys were employees or independent contractors under the Wagner Act:

> Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment. . . . Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are

[42] Id. at 467–468; see also *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017) ("The Supreme Court has explained that the 'striking breadth' of these [FLSA] definitions [of 'employer' and 'employee'] brings within the FLSA's ambit workers 'who might not qualify as [employees] under a strict application of traditional agency law principles' or under other federal statutes.") (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 326).

[43] Id. at 469 (quoting *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)). The court nevertheless affirmed the grant of summary judgment, finding insufficient proof that the parent company was a joint employer even under the expansive FLSA standard. It is not clear whether the same evidence considered under the *Browning-Ferris* majority's test would have led to the same result.

> within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight . . . . Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.

322 U.S. 124–127 (footnotes omitted). The only significant difference between the majority's reasoning in *Browning-Ferris* and the Supreme Court's reasoning in *Hearst* is that the Court at least candidly recognized that the "intermediate region" into which it extended the Wagner Act's definition of covered employees was *beyond* the scope of common law, while the *Browning-Ferris* majority disingenuously claimed that the intermediate region into which they extended the definition of joint employer stayed well within the limits of that law. Clearly, it does not. We believe the Board's traditional joint-employer test accurately reflects common law. Moreover, we disagree with any suggestion that the *Browning-Ferris* test constitutes an appropriate way under common law to advance the statutory goal of promoting collective bargaining. Indeed, as we discuss below in Section VI, we find the *Browning-Ferris* test is more likely to destabilize collective bargaining than to promote it.

V. OTHER PROBLEMS WITH THE *BROWNING-FERRIS* STANDARD

A. The Browning-Ferris Majority's Alleged Return to the Alleged "Traditional Standard" Relies on a Selective Misreading of Precedent Before and After TLI and Laerco.

The *Browning-Ferris* majority stated that the *TLI* and *Laerco* decisions "significantly and unjustifiably narrow[ed]" what they deemed to be the Board's "traditional" joint-employer standard. 362 NLRB No. 186, slip op. at 1. This standard allegedly encompassed far more factors, including those related to indirect control and reserved contractual control, and more comprehensively analyzed employment relationships to determine whether an entity was a joint employer. However, in selecting only the few cases allegedly supporting this view of traditional practice, the *Browning-Ferris* majority neglected other cases where the Board found no joint-employer relationship, despite the presence of the supposedly "traditional" "indirect control" factors that the *Browning-Ferris* majority claimed served to justify a finding of such a relationship. Contrary to the *Browning-Ferris* majority, the Board's prior cases did not manifest an intention to apply a broad analytical framework in which indirect control played a determinative role in joint-employer cases. We agree that the Board has traditionally carried out a fact-intensive assessment of whether a putative employer exercised sufficient control over, or retained the right to control, the employees at issue. We disagree, however, with the notion that prior to *TLI* and *Laerco* the Board, as a rule, gave much probative weight to evidence of "indirect control," or that such evidence, standing alone, was routinely determinative.[44] We will now turn to a discussion of these factors of "indirect control."

The following sentence is emblematic of the *Browning-Ferris* majority's attempt to prove too much by the citation of the older cases:

> [T]he Board's joint-employer decisions found it probative that employers retained the contractual power to reject or terminate workers; set wage rates; set working hours; approve overtime; dictate the number of workers to be supplied; determine "the manner and method of work performance"; "inspect and approve work"; and terminate the contractual agreement itself at will.

362 NLRB No. 186, slip op. at 9 (footnotes omitted).

The foregoing statement included footnote citations to precedent allegedly showing that "the Board typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status." Id. (emphasis in original). According to the *Browning-Ferris* majority, the Board "did not [historically] require that this right be exercised, or that it be exercised in any particular manner." Id. They failed to mention, however, that in many of the cases cited in their decision, there was evidence that the contractual rights *were exercised*, and there was other evidence of direct control over employees' work. The majority's statement also fails to account for all the Board cases that reach the contrary result with similar contractual provisions. Thus, we can paraphrase the *Browning-Ferris* majority's statement, with appropriate citations, that during the period preceding *TLI* and *Laerco*, the Board found *no* joint-employer status where putative "employers retained the

[44] Apart from our disagreement with the *Browning-Ferris* majority's characterization of the joint-employer tests that existed prior to 1984, we note that in one major respect *TLI* and *Laerco* undisputedly broadened the circumstances in which a joint-employer relationship could be found. That is, by adopting the Third Circuit's *Browning-Ferris* joint-employer test, the Board made clear that the more restrictive single-employer test, requiring a showing of a less than arms-length relationship between employers, did not apply.

contractual power to reject or terminate workers;[45] set wage rates;[46] set working hours;[47] approve overtime;[48] determine 'the manner and method of work performance';[49] 'inspect and approve work,'[50] and terminate the contractual agreement itself at will."[51] Additionally, prior to *TLI* and *Laerco* the Board found that employers who conferred over the number of employees needed and the hours to be worked were not joint employers.[52]

The *Browning-Ferris* majority also stated that prior to *TLI* and *Laerco* "the Board gave weight to a putative joint employer's 'indirect' exercise of control over workers' terms and conditions of employment," 362 NLRB No. 186, slip op. at 9 (citing *Floyd Epperson*, 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974)). However, it is readily apparent that, while the Board in *Floyd Epperson* noted anecdotal evidence of the employer's indirect control over wages and discipline, its joint-employer finding was primarily based on evidence of direct and immediate supervision of the employees involved.[53] Similarly, in *Fidelity Maint. & Constr. Co.*, supra, 173 NLRB at 1037, the Board emphasized *direct control*, saying that "the determinative factor in an owner contractor situation is whether the owner exercises or has the right to exercise sufficient *direct control* over the labor relations policies of the contractor, or over the wages, hours and working conditions" (emphasis added). Likewise, in *The John Breuner Co.*, 248 NLRB at 989, the Board affirmed without comment the administrative law judge's observation that in prior truck delivery cases in which the Board found joint-employer status, "there have always been supporting findings that the retailer or distributor by its supervisors, *directly supervised and controlled* the employees of his trucking contractor in the performance of their work" (emphasis added). Thus, contrary to the *Browning-Ferris* majority, *Epperson* and like precedent support the proposition that findings of joint-employer status in cases prior to *TLI* and *Laerco* that mention evidence of indirect control nevertheless turn on sufficient proof of direct control.

The *Browning-Ferris* majority also contended that "[c]ontractual arrangements under which the user employer reimbursed the supplier for workers' wages or imposed limits on wages were also viewed as tending to show joint-employer status." 362 NLRB No. 186, slip op. at 9 (citing *Hamburg Industries*, 193 NLRB 67 (1971)). *Hamburg* involved a typical cost-plus contract where the user employer reimbursed the supplier employer for wages and then paid an additional fee. The Board has cited this factor in cases where it found joint-employer status. However, in numerous cases, the Board has also found that this factor did *not* establish joint-employer status.[54] In any event, as explained in a subsequent case, the facts in *Hamburg* clearly demonstrated that the disputed employer exercised significant direct and immediate control of essential terms. Specifically, "one employer, a manpower supplier, furnished another employer's entire work force, including first-level supervisors. That work force was subject to virtually complete control of the second employer. The second employer determined which tasks were to be performed and how they were to be performed. He also, in practice, set the wage rates."[55] Again, before *TLI* and *Laerco*, there was no established rule that cost-plus contracts should be given determinative weight in finding joint-employer status.

In sum, the precedent cited by the *Browning-Ferris* majority fell well short of showing that prior to *TLI* and *Laerco* there was a consistently applied "traditional joint-employer test" remotely equivalent to the one they announced. The indirect control factors cited by the *Browning-Ferris* majority existed in many cases where the Board declined to find joint-employer status and thus were not frequently, much less routinely, determinative of that status. Evidence of direct and immediate control was far more often referenced as determinative in finding such status.[56] The interpretive key to different outcomes

[45] *Cabot Corp.*, 223 NLRB 1388, 1390 fn. 10 (1976), affd. sub nom. *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977); *Hychem Constructors, Inc.*, 169 NLRB 274, 276 (1968); *Westinghouse Elec. Corp.*, 163 NLRB 914 (1967); *Space Servs. Int'l Corp.*, 156 NLRB 1227, 1232 (1966).

[46] *Cabot*, supra; *Hychem*, supra at fn. 4; *Fidelity Maintenance and Constr. Co.*, 173 NLRB 1032, 1037 (1968).

[47] *Tilden, S. G., Inc.*, 172 NLRB 752 (1968).

[48] *Hychem,* supra at 276.

[49] *Tilden, S. G., Inc.*, supra.

[50] *Cabot*, supra at 1392; *Westinghouse*, supra at 915.

[51] *Space Servs.*, supra at fn. 23.

[52] *The John Breuner Co.*, 248 NLRB 983, 989 (1980); *Furniture Distribution Center*, 234 NLRB 751, 751–752 (1978).

[53] 202 NLRB at 23 ("United establishes the work schedule of the drivers, has the authority to make changes in the drivers' assignments, selects routes for the drivers, and generally supervises the drivers in the course of their employment.").

[54] See *Hychem*, supra at 276 (referring to controls under a cost-plus contract as a "right to police reimbursable expenses under its cost-plus contract," and finding such controls "do not warrant the conclusion that [user] has hereby forged an employment relationship"); *Westinghouse*, supra at 915 (cost-plus contract; no joint-employer finding); *Space Services*, supra at 1232 (same); *Cabot*, supra at 1389 ("[C]ost plus contracts merely insured that Cabot obtain a satisfactory work product at cost and protected it against unnecessary charges being incurred."); *International House*, supra at 914 (cost-plus "purely arms length dealing"); *John Breuner*, supra at 988 (cost-plus insufficient to find joint-employer status).

[55] *Cabot*, supra, 223 NLRB at 1391 fn. 11.

[56] We recognize that dictum in *Airborne Freight* stated that "approximately 20 years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative joint em-

in this body of precedent is not a markedly different legal test. It is simply that "minor differences in the underlying facts might justify different findings on the joint-employer issue." *North Am. Soccer League v. NLRB (NASL)*, 613 F.2d 1379, 1382 (5th Cir. 1980), cert. denied 449 U.S. 899 (1980); see also *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 fn. 1 (6th Cir. 1985) (distinguishing *TLI* and *Laerco* by noting that a slight difference between two cases can tilt one toward a joint-employer finding, and the court was not deciding those other cases).

B. There Is No Judicial Precedent Adverse to the Board's "Direct and Immediate Control" Standard or Supportive of the Browning-Ferris Standard.

It is reasonable to assume that if *TLI, Laerco*, and their progeny departed abruptly from Board precedent without explanation, reviewing courts would have had the opportunity to criticize those decisions and would certainly have done so. After all, the Supreme Court and various appellate courts have warned the Board against such unexplained changes. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 375 (1998) ("The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application . . . and effective review of the law by the courts."); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 799 (1990) (Blackmun, J., dissenting) (finding the Board had departed from prior standard "without explanation"); *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) (stating that when "the Board has not been consistent in its choice of standard . . . . the Board is not entitled to the normal deference we owe it"); *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) ("Requiring an adequate explanation of apparent departures from precedent thus not only serves the purpose of ensuring like treatment under like circumstances, but also facilitates judicial review of agency action in a manner that protects the agency's predominant role in applying the authority delegated to it by Congress."). As the D.C. Circuit noted in *LeMoyne-Owen*, courts are *duty-bound* to strike down Board decisions that lack explanation or otherwise reflect that the Board was arbitrary and capricious in its exercise of statutory authority.

In this context, the Board's direct and immediate control standard has been consistently applied and upheld throughout the last 30 years. Although some courts have varied as to the particulars of a joint-employer test, many courts have expressly approved or applied the Board's test, and none have directly criticized that test or reversed a Board decision based on application of that test.

Significantly, two of the four Board decisions expressly overruled by the *Browning-Ferris* majority were reviewed by a court of appeals, and both decisions were upheld. The decision in *TLI* was reviewed by a panel of the Third Circuit—the court that authored the original *Browning-Ferris* decision—and summarily affirmed in an unpublished decision.[57] Likewise, the decision in *AM Property* was reviewed and affirmed in relevant part by a panel of the Second Circuit.[58] In accord with its own precedents, which predate *TLI* and *Laerco*, the Second Circuit endorsed the Board's pre-*Browning-Ferris* standard, holding that '"an essential element' of any joint-employer determination is 'sufficient evidence of immediate control over the employees.'"[59] The court specifically supported the Board's finding that "limited and routine" supervision is insufficient to establish joint-employer status:

> The cases the Board relied on broadly support the proposition that 'limited and routine' supervision, *G. Wes Ltd.*, 309 N.L.R.B. at 226, consisting of 'directions of where to do a job rather than how to do the job and the manner in which to perform the work,' *Island Creek Coal*, 279 N.L.R.B. at 864, is typically insufficient to create a joint employer relationship. See also *Local 254, Serv. Emps. Intern. Union, AFL–CIO*, 324 N.L.R.B. 743, 746–49 (1997) (no joint employer relationship where employer regularly directed maintenance employees to perform specific tasks at particular times but did not instruct employees how to perform their work); *S. Cal. Gas Co.*, 302 N.L.R.B. 456, 461–62 (1991) (employer's direction of porters and janitors insufficient to establish joint employer relationship where employer did not, inter alia, affect wages or benefits, or hire or fire employees).

Id. at 443.

Thus, the Second Circuit has expressly endorsed the Board's "direct and immediate control" standard for analyzing joint-employer allegations. In an earlier case, the Second Circuit observed that other courts of appeals have varying standards for determining joint-employer status,

ployer's *indirect* control over matters relating to the employment relationship." 338 NLRB at 597 fn. 1 (emphasis in original). For the reasons just stated, we find this dictum to be a mistaken characterization of precedent.

[57] *General Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985).

[58] *Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011), affirming in relevant part, enforcing in part and denying in part on other grounds 350 NLRB 998.

[59] Id. at 443 (quoting *Clinton's Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985)).

but the court saw "no need to select among these approaches or to devise an alternative test, because we find that an essential element under *any* determination of joint-employer status in a sub-contracting case is distinctly lacking in the instant case—*some evidence of immediate supervision or control of the employees.*"[60]

It is most noteworthy that, in addition to the absence of any circuit court precedent in conflict with the Board's "direct and immediate control" test of joint-employer status, there also is no circuit court precedent that supports the *Browning-Ferris* two-step test. That test, which lacked any requirement that an alleged joint employer's control be significant or substantial, much less direct and immediate, most closely resembled a single Board decision's bizarre distortion of dictum from an Eighth Circuit opinion in a case called *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (1954).

In *New Madrid*, the court denied enforcement of a Board order to the extent that it relied on a finding that a company remained a co-employer after selling its business to an individual, Jones. Finding no substantial evidence to support the Board's finding, the court found, among other things, that provisions in the contract of sale did not demonstrate that New Madrid retained control over Jones' operations. In particular, the court stated that the contract did not "either expressly or by implication, purport to give New Madrid any voice whatsoever in the selecting or discharging of Jones' employees, in the fixing of wages for such employees, or in any other element of labor relations, conditions and policies in the plant purchaser's business." Id. at 913.

Thereafter, in *Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966), a Board panel affirmed an administrative law judge's finding that a cement company was the joint employer of the employees of a company that leased trucks and drivers to the cement company. In doing so, the Board focused on the power the parties' lease and operating agreements gave to the cement company. For example, the cement company retained the power to control the disbursement of funds it furnished to the truck leasing company for the drivers' wages. In a footnote citation to *New Madrid*, the Board converted the aforementioned dictum from negative to positive, incorrectly claiming that the court's test of co-ownership was whether a contract gave the putative joint employer "any voice whatsoever" over terms and conditions of employment of another employer's employees.[61] This was not then and is not now the joint-employer test of the Eighth Circuit[62] or any other court of appeals. It was not then the Board's joint-employer test, and it has not been the test since *Hoskins Ready-Mix*. Until *Browning-Ferris*, that is.

Of course, the Board is free to go its own way and determine its own standards, but only within the statutory framework and with adequate explanation of the reasons for departing from long-established precedent. The *Browning-Ferris* majority claimed that 30 years ago the Board departed without explanation from prior precedent by drastically restricting its test in a way that denies many workers their Section 7 rights. However, the absence of any judicial criticism of the "direct and immediate control" test undermines this claim. It is simply impossible that all the courts of appeals would have missed this train wreck, had there been one.

VI. THE *BROWNING-FERRIS* TEST WAS IMPERMISSIBLY VAGUE AND OVERBROAD, FOSTERING LEGAL UNCERTAINTY AND LABOR RELATIONS INSTABILITY.

A. Browning-Ferris Provided No Guidance as to When and How Parties May Contract for the Performance of Work Without Being Deemed Joint Employers.

Multi-factor tests, like the common-law agency standard that the Board must apply, are vulnerable to an analysis that can be impermissibly unpredictable and results-oriented. As then-Judge Roberts remarked about the standard for determining whether college faculty are managerial employees under the Act under *NLRB v. Yeshiva University*:[63]

> The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication. The open-ended rough-and-tumble of factors on which *Yeshiva* launched the Board and higher education can lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why. . . . In the absence of an explanation, the totality of the circumstances can become simply a cloak for agency whim—or worse.[64]

Browning-Ferris' multi-factor test, under which any degree of indirect or contractually reserved control over a single employment term is probative of and may suffice to estab-

[60] *International House v. NLRB*, 676 F.2d 906, 913 (2d Cir. 1982) (emphasis added); see also *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991) ("[T]he essential element is immediate control over the employees.").

[61] Id. at 1493 fn. 2.

[62] The Eighth Circuit applies a four-factor test similar to a single-employer analysis. E.g., *Industrial Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981).

[63] 444 U.S. 672 (1980).

[64] *LeMoyne-Owen College v. NLRB*, supra, 357 F.3d at 61 (citations and quotations omitted).

lish joint-employer status, lacks the required explanation of "which factors are significant and which less so, and why." The *Browning-Ferris* majority provided no meaningful guidelines as to the test's future application. Further, they acknowledged no legitimate grounds for parties in a business relationship to insulate themselves from joint-employer status under the Act.

The *Browning-Ferris* test stands in marked contrast to the prior, longstanding test, under which evidence of direct and immediate control of essential terms of employment was required, thereby establishing a clearly discernible and rational line between what does and does not constitute a joint-employer relationship under the Act. As the D.C. Circuit has observed, the "direct and immediate control" test recognizes that "[s]ignificant limits . . . exist upon what actions by an employer count as control over the means and manner of performance. Most important, employer efforts to monitor, evaluate, and improve the results or ends of the worker's performances do not make the worker an employee. Such global oversight, as opposed to control over the manner and means of performance (and especially the details of that performance), is fully compatible with the relationship between a company and an independent contractor."[65]

By comparison, the *Browning-Ferris* test treats as probative of joint-employer status all evidence of indirect control of such factors as determining the place of work, defining the work to be performed and how quickly it needs to be done, prescribing the hours when work will be performed, setting minimum qualifications for the individuals the contractor furnishes to perform the work and reserving the right to reject an individual (even though the contractor may assign the rejected employee to a different job), inspecting the contractor's work, giving results-oriented feedback to the contractor that the contractor's supervisors use in directing the contractor's employees, agreeing to a price for the contractor's services that happens to be in the form of a cost-plus formula, and reserving the right to cancel the arrangement. Accordingly, under the *Browning-Ferris* test, *a homeowner hiring a plumbing company for bathroom renovations could well be deemed a joint employer of the plumbing company's employees!* By adopting such an overbroad, all-encompassing and highly variable test, the *Browning-Ferris* majority extended the Act's definition of "employer" well beyond its common-law meaning, and beyond its ordinary meaning as well. Cf. *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, supra, 404 U.S. at 168 (1971) (admonishing the Board for extending "employee" beyond its ordinary meaning by attempting to include retirees within its scope).

The expansive nature of the *Browning-Ferris* test was demonstrated by the evidence the *Browning-Ferris* majority relied on to find joint-employer status in that case, which involved a "cost-plus" arrangement common in user-supplier contracts:[66] (1) a few contract provisions that indirectly affected the otherwise unfettered right of Leadpoint (the supplier employer) to hire its own employees; (2) reports made by BFI representatives to Leadpoint of two incidents that understandably resulted in discipline, one where a Leadpoint employee was observed passing a "pint of whiskey" at the BFI jobsite, and another where a Leadpoint employee "destroyed" a drop box; (3) one contractually established pay rate ceiling restriction for Leadpoint employees, obviously stemming from the cost-plus nature of the contract; (4) BFI's control of its own facility's hours and production lines; (5) a recordkeeping requirement for Leadpoint employee hours (again, obviously stemming from the cost-plus nature of the contract); (6) a single pre-shift meeting to

[65] *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) (citations omitted).

[66] The Board and the courts have uniformly concluded that cost-plus arrangements do not automatically render the contracting client an "employer" of the vendor's employees. Accordingly, the *Browning-Ferris* majority conceded that a cost-plus "arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship." 362 NLRB No. 186, slip op. at 19. Indeed, the Board and the courts have uniformly concluded that nothing in cost-plus arrangements necessarily renders the contracting client an "employer" of the vendor's employees. In *Fibreboard*, for example, the contracting client (Fibreboard) arranged for employees of the contractor (Fluor) "to do the same [maintenance] work under similar conditions of employment," and Fibreboard committed to pay the "costs of the operation plus a fixed fee." 379 U.S. at 206–207. As noted previously (see fn. 14, supra), Fibreboard was clearly treated as a distinct entity having no employment relationship with the subcontractor's employees, even though the reasons underlying the subcontracting decision were almost *exclusively* employment-related. Indeed, the Supreme Court noted that Fibreboard "was induced to contract out the work by assurances from independent contractors that *economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments*." Id. at 213 (emphasis added).

The *Browning-Ferris* majority nevertheless attempted to distinguish the facts of *Browning-Ferris* based on an "apparent requirement of BFI approval over . . . pay increases" for the supplier employer's employees. 362 NLRB No. 186, slip op. at 19. In this respect—notwithstanding their acknowledgment that a cost-plus contract "is not necessarily sufficient to create a joint-employer relationship"—the *Browning-Ferris* majority in principle conferred "employer" status on every client-user that enters into a cost-plus arrangement with a supplier of labor, since few, if any, clients will give a blank check to supplier-employers regarding the supplier's employees' wages when the full cost will be charged to the client. This is but one illustration of the multitude of ways that the *Browning-Ferris* majority failed to adapt the Act to the "complexities of industrial life," which is one of the Board's most important responsibilities. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

advise Leadpoint supervisors what lines will be running and what tasks they are supposed to do on those lines; (7) monitoring of productivity; (8) establishment of one type of generally applicable production assignment scheme for Leadpoint; and (9) "on occasion" addressing Leadpoint employees directly about productivity. 362 NLRB No. 186, slip op. at 18–19. That is all there was, and the Regional Director correctly decided under then-extant law that it was not enough to show BFI was the joint employer of Leadpoint's employees.

The evidence relied on by the *Browning-Ferris* majority amounted to a collection of general contract terms and business practices common to most contracting entities (discussed below), plus a few actions by BFI that had some routine impact on Leadpoint employees. It would be difficult to find any two entities engaged in an arm's-length contractual relationship involving work performed on the client's premises that lack this type of interaction. Again, we suppose that our colleagues do not intend that every business relationship necessarily entails joint-employer status, but the facts relied upon in *Browning-Ferris* demonstrated the expansive, near-limitless nature of the standard created in that case.

There is a further fundamental problem with *Browning-Ferris*' joint-employer test. The majority there stated that their goal was to extend the protection of Section 7 to a large number of employees they felt had been left unprotected because they work on a contingent or temporary basis. According to them, the number of workers so employed had dramatically risen since *TLI* and *Laerco* were decided and would predictably continue to rise. 362 NLRB No. 186, slip op. at 11. Further, the *Browning-Ferris* majority asserted that "[t]he Board's current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers' terms and conditions of employment of the user." Id., slip op. at 14–15.

Thus, not only was the *Browning-Ferris* majority's *legal* justification for a new joint-employer test impermissibly based on economic reality theory, as previously discussed, but its *factual* justification was flawed as well. The majority there focused on facts limited to a particular type of business model—the user/supplier relationship involving the use of contingent employees—but they relied on these facts to justify a change in the statutory definition of employer, or joint employer, for *all* types of business relationships between two or more entities.

The number of contractual relationships potentially encompassed by the *Browning-Ferris* standard was vast, including contractual relationships involving

- insurance companies that require employers to take certain actions with their employees in order to comply with policy requirements for safety, security, health, etc.;
- franchisors (see below);
- banks or other lenders whose financing terms may require certain performance measurements;
- any company that negotiates specific quality or product requirements;
- any company that grants access to its facilities for a contractor to perform services there, and then regulates the contractor's access to the property for the duration of the contract;
- any company that is concerned about the quality of contracted services;
- consumers or small businesses who dictate times, manner, and some methods of performance of contractors.

Our point is not that the *Browning-Ferris* majority intended to make all players in the economy, no matter how small, necessary parties at the bargaining table (although, as discussed below, they may well have become targets of economic protest in support of union bargaining demands or other union causes), but that the *Browning-Ferris* standard foreshadowed the extension of obligations under the Act to a substantial group of business entities without any predictable limitations.[67] This kind of vague and overbroad government regulation is necessarily arbitrary and capricious. "In the absence of an explanation, the 'totality of the circumstances' can become simply a cloak for agency whim—or worse." *LeMoyne-Owen Coll. v. NLRB*, supra, 357 F.3d at 61.

Browning-Ferris effected a sweeping change in the law without any substantive discussion of significant adverse consequences raised by the parties and amici in that case. The *Browning-Ferris* majority professed to limit themselves to the issue of joint bargaining obligations in the user-supplier context, with a disclaimer that their decision "does not modify any other legal doctrine . . . or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act." 362 NLRB No. 186, slip op. at 20 fn. 120. However, such a disclaimer could not possibly have been valid because applying different tests in other circumstances would mark an unprecedented and unwarranted break from the unitary joint-employer test under the Act,

[67] The *Browning-Ferris* majority correctly stated that "the annals of Board precedent contain no cases that implicate the consumer services purchased by unsuspecting homeowners or lenders." But there was no guarantee that what is past is prologue under *Browning-Ferris*' impermissibly expansive test.

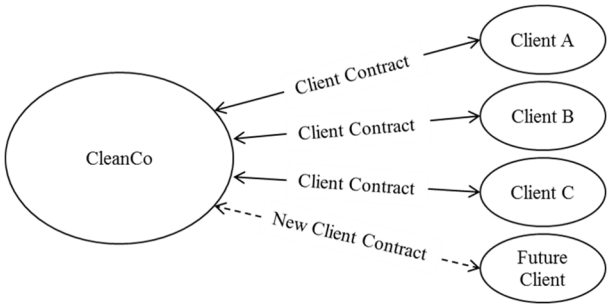
which has applied to *all* types of business relationships, each of which was affected by changing the joint-employer test. In our view, the adverse consequences that logically flow from the *Browning-Ferris* standard warrant a return to the "direct and immediate control" standard.

B. Browning-Ferris Destabilized Bargaining Relationships and Created Unresolvable Legal Uncertainty.

Browning-Ferris greatly expanded the joint-employer test without grappling with its practical implications for real-world collective-bargaining relationships. The majority there purported to be following the command in Section 1 of the Act to "encourag[e] the practice and procedure of collective bargaining." Congress did not mean, however, to blindly expand collective-bargaining obligations whether or not they are appropriate. The Act aims to "achiev[e] industrial peace by promoting *stable* collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (emphasis added). Indeed, one of the Board's primary responsibilities under the Act is to foster labor relations stability. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (A "basic policy of the Act [is] to achieve stability of labor relations."). And the Supreme Court has stressed the need to provide "certainty beforehand" to employers and unions alike. Employers must have the ability to "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and a union similarly must be able to discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 678–679, 684–686.

Collective bargaining was intended by Congress to be a process that could conceivably produce agreements. One of the key analytical problems in widening the net of "who must bargain" is that, at some point, agreements predictably will *not* be achievable because different parties involuntarily thrown together as negotiators under the *Browning-Ferris* test will predictably have widely divergent interests. *Browning-Ferris*' marked expansion of bargaining obligations to other business entities threatened to destabilize existing bargaining relationships and complicate new ones. Even if one takes an extremely simplistic user-supplier scenario, the *Browning-Ferris* standard, which made many clients an "employer" of contractor employees while making contractors an "employer" jointly with their clients, stood to produce bargaining relationships and problems unlike any that have existed in the Board's history, which could not have been contemplated or intended by Congress.

Consider the following diagram, which depicts a single cleaning company named "CleanCo" that has cleaning contracts with three clients. CleanCo employees work at each client's facilities in circumstances similar to *Browning-Ferris*, and CleanCo periodically adds future clients.



Assuming circumstances like those presented in *Browning-Ferris*, the *Browning-Ferris* majority would find that CleanCo and Client A are a joint employer at Client A's location, CleanCo and Client B are a joint employer at Client B's location, and CleanCo and Client C are a joint employer at Client C's location. Such a scenario—involving a single vendor and only three clients, each with only one location—potentially gives rise to all of the following problems under the *Browning-Ferris* test.

1. Union Organizing Directed at CleanCo. If CleanCo employees are currently unrepresented and a union seeks to organize them, this gives rise to the following issues and problems:

- *What Bargaining Unit(s)?* Although CleanCo directly controls all traditional indicia of employer status, the *Browning-Ferris* test established that three different entities—Clients A, B, and C—are joint employers of potentially overlapping groups of different CleanCo employees. It is unclear whether a single bargaining unit consisting of all CleanCo employees could be deemed appropriate, given the distinct role that the *Browning-Ferris* test requires each client to play in bargaining.
- *What "Employer" Participates in NLRB Election Proceedings?* If the union files a representation petition with the Board, the Act requires the Board to afford "due notice" and to conduct an "appropriate hearing" that involves the "employer." Section 9(c)(1). Currently, the Board has no means of identifying,

much less providing "due notice" and affording the right of participation to, "employer" entities like Clients A, B, and C, even though they would inherit bargaining obligations if CleanCo employees select the union.

- *Who Does the Bargaining?* If the union wins an election involving all CleanCo employees, the *Browning-Ferris* test would require participation in bargaining by CleanCo *and* Clients A, B, and C. Here, *Browning-Ferris* provided that each party "will be required to bargain only with respect to *such terms and conditions which it possesses the authority to control*." 362 NLRB No. 186, slip op. at 16 (emphasis added). However, because the *Browning-Ferris* standard is so broad—including direct control, indirect control, and contractually reserved control, even if never exercised in fact—nobody could ever reasonably know who is responsible for bargaining what.[68]
- *CleanCo-Client Bargaining Disagreements.* The *Browning-Ferris* standard failed to address how "employers" such as Clients A, B, and C, plus employer CleanCo, can formulate coherent proposals and provide meaningful responses to union demands, when they will undoubtedly disagree among themselves regarding many if not most matters that are the subject of collective bargaining. Here, the *Browning-Ferris* majority disregarded the fact that CleanCo's client contracts will typically have resulted from difficult negotiations with Clients A, B, and C. Therefore, the joint bargaining contemplated by the *Browning-Ferris* majority would involve significant disagreements between and among the employer entities (Clean Co and Clients A, B, and C), with no available process for resolving such disputes.[69]
- *Forced Disclosure to Clients of CleanCo Confidential Information*. The most contentious issue between CleanCo and Clients A, B, and C is likely to involve the amounts charged by CleanCo for its services, which predictably could vary substantially between Clients A, B, and C depending on their respective leverage, their varying needs for CleanCo's services, the duration of their respective client contracts (i.e., short term or long term), and other factors. If a union successfully organizes all CleanCo employees, the resulting bargaining would almost certainly require the disclosure of sensitive CleanCo financial information to Clients A, B, and C, which would likely enmesh the "employer" parties in disagreements with one another, separate and apart from those arising in collective bargaining between the union and the "employers."

  We have already found, in prior cases, that this information is sensitive and is not necessary to employees' exercise of rights under the Act. See, e.g., *Flex Frac Logistics*, 360 NLRB 1004, 1004 (2014) (detailing disruption occurring when contractor, which "was particularly concerned to maintain the confidentiality of the rates it charges its clients," had those rates disclosed to clients by employee), enfd. 746 F.3d 205 (5th Cir. 2017). *Browning-Ferris* essentially guaranteed such disruption.
- *How Many Labor Contracts?* If a single union organizes all CleanCo employees, the above problems might be avoided if CleanCo engages in three separate sets of bargaining—devoted to Client A, Client B, and Client C, respectively—resulting in three separate labor contracts. However, this would be inconsistent with the CleanCo bargaining unit if it encompassed all CleanCo employees, and CleanCo would violate the Act if it insisted on changing the scope of the bargaining unit, which under well-established Board law is a nonmandatory subject of bargaining.
- *What Contract Duration(s)?* If a union represented all CleanCo employees, and if the Board certified the employees assigned to each client location as separate bargaining units, then presumably there would be separate negotiations, and separate resulting CBAs, covering the CleanCo employees assigned to Client A, Client B, and Client C, respectively. In this case, however, the duration of each CBA might vary, depending on each side's bargaining leverage, and a further complication would arise where CBA termination dates varied from one client location to another.

[68] We discuss this aspect of the "authority problem" in more detail below.

[69] We also discuss this aspect of the "authority problem" in more detail below.

- *Do Client Contracts Control CBAs, or Do CBAs Control Client Contracts?* Regardless of whether the CleanCo CBAs have termination dates that coincide with the expiration of CleanCo's client contracts, the *Browning-Ferris* test left unanswered whether CleanCo and Clients A, B, and C could renegotiate their client contracts, or whether joint bargaining obligations and the CBAs would effectively trump any potential client contract renegotiations, even though this would be contrary to the Supreme Court's indication that Congress, in adopting the NLRA, "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." *First National Maintenance*, supra, 452 U.S. at 676. Likewise, similar to what the majority held in *CNN* (see discussion infra), the *Browning-Ferris* majority would have imposed their new joint-employer bargaining obligations on Clients A, B, and C, even if the client contracts explicitly identified CleanCo as the sole employer and stated that CleanCo had sole and exclusive responsibility for collective bargaining.
- *New Clients (Possibly with Their Own Union Obligations).* If a union represented all CleanCo employees, and if (under the *Browning-Ferris* test) all CleanCo clients were deemed joint employers with CleanCo, what happens when Clean Co obtains new clients that previously had cleaning work performed by in-house employees or a predecessor contractor, and those in-house or contractor employees were unrepresented or represented by a different union? If, based on CleanCo's existing union commitments, CleanCo refused to hire the employees who formerly did the new client's cleaning work, the refusal could constitute antiunion discrimination in violation of Sec. 8(a)(3). On the other hand, if CleanCo hired the new client's former employees (or the former employees of a predecessor contractor), then CleanCo could run afoul of its existing union obligations. See *Whitewood Maintenance Co.*, 292 NLRB 1159, 1168–1169 (1989), enfd. 928 F.2d 1426 (5th Cir. 1991). Alternatively, this situation could require further Board proceedings for resolution.[70]
- *Potential Board Jurisdiction Over Some Entities and Not Others.* The Board does not have jurisdiction over governmental employers and employees, over railways or airlines that are subject to the Railway Labor Act, or over some religiously-affiliated educational institutions or certain enterprises operated by Indian tribes. If CleanCo is subject to the NLRA, but Client A, B, or C falls within one or more of the exempt categories identified above, the *Browning-Ferris* standard would give rise to complex questions about whether the Board may lack jurisdiction over one or more particular "joint" employers.

2. Union Organizing Directed at Client(s). If two different unions, rather than targeting CleanCo, engage in organizing directed at Client A and Client B, respectively, with Client C remaining nonunion, this gives rise to additional issues and problems:

- *All of the Above Issues and Problems.* If the CleanCo employees at Client A are organized by one union, and if the CleanCo employees at Client B are organized by a different union, then the *Browning-Ferris* test would make CleanCo and Client A the joint employer of the CleanCo/Client A employees, and CleanCo and Client B the joint employer of the CleanCo/Client B employees. In both cases, joint-employer status (which, under *Browning-Ferris*, could be based solely on indirect or reserved authority) would give rise to *all* of the above problems and issues, in addition to those described below.
- *Employee Interchange and Multi-Location Assignments.* If different unions represent the employees of CleanCo/Client A and CleanCo/Client B, and if CleanCo/Client C employees are nonunion, this would create substantial potential problems and potential conflicting liabilities regarding CleanCo employees assigned to work at all three client locations or transferred from one client's facility to another. This is a common situation, arising, for example, where one CleanCo client simply is unhappy

[70] Such a resolution might result, for example, from a unit clarification petition seeking to add the new employees to the bargaining unit without an election under the Board's accretion doctrine, or jurisdictional dispute proceedings pursuant to Sec. 10(k) of the Act.

with the productivity or attitude of an assigned employee.[71]

- *Strikes and Picketing – "Neutral" Secondary Boycott Protection Eliminated.* Sections 8(b)(4) and 8(e) of the Act protect neutral parties from being subjected to secondary picketing and other threats, coercion, and restraint that have an object of forcing one employer to cease doing business with another. Therefore, if the CleanCo/Client A and CleanCo/Client B employees were involved in a labor dispute, under the Board's traditional joint-employer standard Clients A and B (as non-employers) would be neutral parties protected from secondary union activity (assuming no direct and immediate control of CleanCo employees' employment terms by Clients A and B). Under the *Browning-Ferris* standard, however, Clients A and B would be employers right along with CleanCo and thus subject to picketing.
- *Renegotiating or Terminating Client Contracts.* It is well established that "an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees."[72] However, to the extent that CleanCo and Clients A, B, and C are joint employers, then any client's termination of CleanCo's services based on union-related considerations would create a risk that the Board would find—as it did in *CNN*, supra—that the contract termination constituted antiunion discrimination in violation of Section 8(a)(3). *CNN*, supra, slip op. at 40–42 (Member Miscimarra, concurring in part and dissenting in part).

3. Existing CleanCo-Union and/or Existing Client-Union Relationships. Additional issues and problems result from the impact of the *Browning-Ferris* joint-employer test on existing union relationships and CBAs:

- *All of the Above Issues and Problems.* Under the *Browning-Ferris* test, it is clear that existing collective-bargaining agreements and union relationships involving CleanCo, with no mention of Clients A or B, do not prevent Clients A and B from having joint-employer status with CleanCo, which would give rise to all of the issues and problems described above. Again, in *CNN*, discussed infra, the Board majority found that the client, CNN, was a joint employer, even though any bargaining between CNN and the unions representing employees of contractor TVS would have been at odds with applicable labor contracts, prior Board certifications, the services agreements between CNN and its vendor (TVS), and 20 years of bargaining history in which the employer-party was always TVS (or one of its predecessor contractors), not CNN.
- *Existing CleanCo CBA: Prospective Four-Party Bargaining.* If CleanCo was party to an existing company-wide collective-bargaining agreement in which CleanCo was identified as the only employer, the *Browning-Ferris* test imposed an obligation to bargain on *all* joint-employer entities—i.e., CleanCo and Clients A, B, and C—even though such bargaining would depart from express CBA language and the past practice of CleanCo and the union.
- *"Mandatory" Arbitration, Yet Never Agreed To?* If CleanCo had an existing company-wide CBA, *Browning-Ferris*' imposition of employer status on Clients A, B, and C would not necessarily bind them to the terms of the existing CleanCo CBA. This would mean that, even though a particular grievance may pertain to essential employment terms that, according to the *Browning-Ferris* majority, Clients A, B, and C have the right to "share or codetermine," the CBA's grievance arbitration procedure would not necessarily bind Clients A, B, and C, since they had never agreed to submit to the procedure.[73]
- *Benefit Fund Contributions and Liabilities – Who Pays?* Many existing collective-

[71] The potential problems caused by multi-location assignments or employee interchange between locations could arise, for example, from CBA provisions restricting such assignments or transfers, from union-security provisions in different CBAs requiring dues payments based on a person's employment without regard to where they were employed, or from conflicting wage rates and benefits applicable at each location. Although these issues might depend on what particular CBA or other policies were in effect, they would obviously cause significant burdens and potential confusion for the employees and each entity considered a joint employer under the *Browning-Ferris* standard.

[72] *Plumbers Local 447 (Malbaff Landscape Construction)*, 172 NLRB 128, 129 (1968). See also *Computer Associates International, Inc.*, 324 NLRB 285, 286 (1997) ("[F]inding a violation of Section 8(a)(3) on the basis of an employer's decision to substitute one independent contractor for another because of the union or nonunion status of the latter's employees is inconsistent with both the language of Section 8(a)(3) . . . and with legislative policies underlying Section 8(b) of the Act aimed at protecting the autonomy of employers in their selection of independent contractors with whom to do business.").

[73] See *AT&T Technologies Inc. v. CWA*, 475 U.S. 643, 648 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582; *Steelworkers v. American Mfg. Co.*, 363 U.S. at 570–571; *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374 (1974).

bargaining agreements contain provisions regarding benefit fund contributions and benefit liabilities. If such provisions were contained in the CleanCo CBA, then Clients A, B, and C—when participating in the new four-way bargaining described above—would predictably be confronted with demands to assume liability for such provisions. Although the *Browning-Ferris* test suggests that each of Clients A, B, and C "will be required to bargain only with respect to such terms and conditions which it possesses the authority to control," 362 NLRB No. 186, slip op. at 16, it appears clear that they would face economic demands and potentially be subject to a strike based on a refusal to agree to such demands.

- *Joint Bargaining Versus "Add-On" CBAs.* If CleanCo employees assigned to Clients A, B, or C were organized for the first time by one or more unions, the *Browning-Ferris* standard clearly imposes a new mandatory bargaining obligation on all joint-employer entities. Although an existing collective-bargaining agreement generally suspends a party's obligation to bargain for the agreement's term, the *Browning-Ferris* test, as noted above, imposes an independent duty to bargain on *every* joint employer "with respect to such terms and conditions which it possesses the authority to control," which may result in separate sets of negotiations and potential "add-on" CBAs that deviate from the existing union agreements.

The foregoing represents only some of the complications created by the *Browning-Ferris* standard. And the example is obviously simplistic because it relates only to *one* service company, which has only *three* clients—and in the real world, by comparison, many businesses, large and small, rely on services provided by large numbers of separate vendors, and many service companies have dozens or hundreds of separate clients. The only thing that is clear is that the *Browning-Ferris* standard does not promote stable collective-bargaining relationships.

Moreover, how exactly are user and supplier employers to allocate the bargaining responsibilities for a single term of employment that they are deemed to codetermine under the *Browning-Ferris* joint-employer standard, one by direct control and the other by indirect control? How does one know who has authority at all over a term and condition of employment under *Browning-Ferris*' vague formulation? What if two putative employer entities get into a dispute over whether one has authority over a certain term or condition of employment? What if the putative employers are competitors? Taking the diagram above, what if Client A and Client B are competitors and have no economic interest in the other client coming to a good-faith agreement with CleanCo on how much it pays employees working for the other client? Does it make sense for the law to attempt to create such an interest? What if there are too many entities to come to an agreement? How does bargaining work in this circumstance?

Moreover, the *Browning-Ferris* standard threatened to place employers in situations where they were virtually certain to violate the Act. Again, the *Browning-Ferris* majority stated that "a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control." 362 NLRB No. 186, slip op. at 16. This was intended to temper the impact of the *Browning-Ferris* standard, but it only made matters worse. By parceling out bargaining over different employment terms to different "employers," the *Browning-Ferris* majority assumed that issues addressed in collective bargaining are severable, as if the resolution of one issue does not depend on the resolution of others. This is not how contract negotiations work. Indeed, the Board has denounced this type of segmented issue-by-issue negotiating, when unilaterally undertaken by a party, as unlawful "fragmented bargaining."[74]

Further, when multiple entities control different employment terms, the fragmented bargaining *Browning-Ferris* contemplated gave rise to the following dilemma. Section 8(a)(5) requires an employer to bargain in good faith regarding the terms and conditions of employment of its employees, but Section 8(a)(2) makes such bargaining unlawful if the union lacks majority support among the employer's employees. Under *Browning-Ferris*, a putative joint employer risked violating Section 8(a)(5) if it failed or refused to bargain over a particular

[74] See, e.g., *E.I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 fn. 1 (1991) ("What we find unlawful in the Respondent's conduct was its adamant insistence throughout the entire course of negotiations that its site service operator and technical assistant proposals were not part of the overall contract negotiations, and, therefore, had to be bargained about totally separately not only from each other but from all the other collective bargaining agreement proposals. We find this evinced fragmented bargaining in contravention of the Respondents duty to bargain in good faith."); see also *NLRB v. Patent Trader*, 415 F.2d 190, 198 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (2d Cir. 1970) (When a party "removes from the area of bargaining . . . [the] most fundamental terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.)," it has "reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises with the result of rigidly and unreasonably fragmenting the negotiations."). At the very least, an astonishing degree of cooperation among multiple "employers"—employers who cannot be assumed to share common goals in collective bargaining—would be necessary under *Browning-Ferris* to avoid fragmented bargaining.

mandatory bargaining subject it believed it did not control, if it was later determined that it *did* exercise sufficient control to require that entity to bargain regarding the subject. On the other hand, that same entity risked violating Section 8(a)(2) if it bargained over a particular employment term, if it was later determined that the entity lacked sufficient control over that term to make it an "employer" of the unit employees as to that term.

Moreover, while it is well established that the burden to prove joint-employer status rests on the General Counsel,[75] if multiple entities arguably constitute a joint employer, and one entity is alleged to have unlawfully failed to bargain over particular terms of employment, the *Browning-Ferris* standard effectively placed the burden of proof on that entity to establish that it did not control those particular employment terms. In sum, *Browning-Ferris* gave rise to unresolved questions as to (i) which entities are the "employer," (ii) which entities must or must not engage in bargaining over particular employment terms, and even (iii) what party—the putative joint employer or the General Counsel—bears the burden of proof regarding this assortment of issues.

This scenario was made all the worse by the fact that years of Board litigation would have been necessary before parties would learn whether (i) they unlawfully failed to participate in bargaining with another employer and its employees' union, or (ii) they unlawfully injected themselves into such bargaining because their commercial relationship with that employer was insufficient to make them a joint employer. Nor is the Board permitted to engage in the economic analysis needed to sort out the plethora of arm's-length, company-to-company relationships affected by the *Browning-Ferris* joint-employer test. The Board's Division of Economic Research was abolished 75 years ago, and Section 4(a) of the Act—adopted by Congress in 1947—prohibits the Board from having any agency personnel engage in "economic analysis."[76] Additionally, the Board lacks the authority to impose labor contract terms on parties,[77] and nothing in the Act authorizes the Board to impose requirements on companies regarding how they must arrange or rearrange themselves.

The extensive changes adopted in *Browning-Ferris* were unsupported by any adequate showing that existing law was deficient or contrary to Congressional mandate as reflected in the Act. The *Browning-Ferris* majority cited no evidence showing that employees in contingent or comparable employment situations have been unable to bargain with their undisputed employer. The *Browning-Ferris* majority used the phrase "meaningful bargaining" numerous times, but the majority's premise was that bargaining fails to be "meaningful" whenever the employer's business relationships influence matters under negotiation. One does not establish that the Section 7 rights of employees of supplier employers have been denied merely by citing a large number of employees whose terms and conditions of employment might be affected in some way by a user entity, plus Board cases finding that the user entity was not a joint employer of the supplier's employees and thus had no duty to bargain with the union representing those employees. How do we know that employees have been unable to engage in "meaningful bargaining" with the supplier employer? Under the *Browning-Ferris* test, it is possible to find that "meaningful bargaining" cannot take place with a supplier employer alone if a user entity possesses but never exercises contractually reserved control over even a single "essential" aspect of employment. Such a definition of meaningful bargaining has never been the law, and it cannot be reconciled with business practices that have been in existence since long before the Act.

In addition, it is difficult, if not impossible, to reconcile *Browning-Ferris*' reasoning with the Board's rationale in *Management Training*, 317 NLRB 1355 (1995), which addressed whether to assert discretionary jurisdiction over a private employer contracting for business with an exempt governmental entity. The Board in *Management Training* modified prior caselaw and held that it would no longer decline to assert jurisdiction in circumstances where the private employer lacks control of what had been deemed essential terms of employment. It reasoned that "[b]ecause of commercial relationships with other parties, an inability to pay due to financial constraints, and competitive considerations which circumscribe the ability of the employer to grant particular demands, the fact is that employers are frequently confronted with demands concerning matters *which they cannot control as a practical matter or because they have made a contractual relationship with private parties* or public entities." Id. at 1359 (emphasis added). Quite obviously, under *Management Training* the Board

[75] See, e.g., *Hobbs & Oberg Mining Co.*, 297 NLRB 575, 586 (1990) (General Counsel's burden to prove joint-employer status), enfd. 940 F.2d 1538 (10th Cir. 1991), cert. denied 503 U.S. 959 (1992).

[76] Sec. 4(a) states in part: "Nothing in this Act shall be construed to authorize the Board to appoint individuals . . . for economic analysis." This language was added to the NLRA as part of the Labor Management Relations Act (LMRA), 61 Stat. 136, Sec. 101 (amending NLRA Sec. 4(a)) (1947). The enactment of Sec. 4(a) occurred after the Board abolished its Division of Economic Research in 1940. See 93 Cong. Rec. 6661, reprinted in 2 LMRA Hist. 1577 (June 6, 1947) (analysis of H.R. 3020). See generally John E. Higgins, Jr., *Labor Czars–Commissars–Keeping Women in the Kitchen–The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941, 951–952 (1998).

[77] Sec. 8(d); *H.K. Porter Co. v. NLRB*, 397 U.S. at 99.

believes that employees and their exclusive bargaining representative can still engage in meaningful bargaining under the Act even with an employer that lacks control over a substantial number of essential terms of employment that are controlled "as a practical matter" by another entity.

C. Browning-Ferris Dramatically Changed Labor Law Sales and Successorship Principles and Discouraged Efforts to Rescue Failing Companies and Preserve Employment.

Browning-Ferris' expansion of the definition of employer also altered the landscape of successorship law under the Act. It is well established that successor employers,[78] although they must recognize and bargain with the union representing the predecessor's employees in certain circumstances, are not obligated to adopt the predecessor's collective-bargaining agreement and have the right to unilaterally set different initial terms and conditions of employment.[79] *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287–288, 294–295 (1972). This rule "careful[ly] safeguards the rightful prerogative of owners independently to rearrange their businesses." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 40 (internal quotations omitted). But the policy concerns underlying the rule of *Burns* run deeper than that:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

Burns, 406 U.S. at 287–288.

Under the expansive *Browning-Ferris* joint-employer standard, many user employers would be deemed joint employers of their supplier employers' employees. Rebidding contracts has been a common feature of the user- and supplier-employer market. Predictably under *Browning-Ferris*, it would have been less common because deeming the user employer to be a joint employer would make terminating or rebidding the contract with the supplier employer much more difficult. The user employer would often have a duty to bargain over the decision to lay off the employees or to subcontract those jobs to another supplier employer. See *Fibreboard Paper Products Corp. v. NLRB*, supra, 379 U.S. at 215 (1964); *CNN,* supra, 361 NLRB 439, 455. Assuming the user employer does contract with a new supplier employer that would otherwise be a *Burns* successor able to set its own initial employment terms, the user employer, under the *Browning-Ferris* standard, would likely have been deemed a joint employer with the new supplier employer as well. That user employer's ongoing bargaining obligation spanning the two supplier employers would prevent the new supplier employer from setting different terms and conditions of employment than its predecessor had. See *Whitewood Maintenance Co.*, supra, 292 NLRB at 1168–1169 (contractor that substituted one subcontractor for another jointly employed both the old and new subcontractors' employees, so the new subcontractor could not set its own initial terms).

Similarly, when a predecessor's union-represented employees apply for employment with a successor, the successor cannot lawfully extend recognition to the union unless and until it has hired a "substantial and representative complement" of employees.[80] In *CNN*, supra, two unions represented employees of CNN's contractor, TVS, continuing a 20-year history in which unionized contractors supplied technical employees to CNN, where only the contractor, not CNN, was considered the "employer." When CNN decided to stop using contractor employees and to directly hire its own technical workforce, CNN as a successor would have violated the Act if it recognized and bargained with the TVS unions before

[78] An employer is a successor of its predecessor under the Act when there is "substantial continuity between the enterprises," the successor hired as a majority of its employees the predecessor's employees, and the bargaining unit is still appropriate. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–52 (1987).

[79] There is a limited exception to this general rule when "'it is perfectly clear that the new employer plans to retain all of the employees in the unit,'" unless the successor "clearly announce[s] its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974) (quoting *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 294–295 (1972)), enfd. 529 F.2d 516 (4th Cir. 1975). However, a so-called "perfectly clear" successor employer is still not bound by the predecessor's labor contract. It must only adhere to terms established by the contract while negotiating new terms with the incumbent union.

[80] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 47–48.

hiring former employees of TVS as a "substantial and representative complement" of its own technical workforce. However, the *CNN* majority's expansive joint-employer finding converted CNN into an "employer" of TVS' employees before it hired *any* of its own technical employees. Based on this joint-employer finding, the Board majority determined that CNN—before it decided to terminate its relationship with TVS, and thus even before it notified TVS that it was terminating the relationship—was required to notify the TVS *unions* and engage in bargaining with them over *whether* CNN might terminate the TVS relationship and hire its own workforce.

Then-Member Miscimarra, in his *CNN* dissent, stated that employer status "does not arise as the result of spontaneous combustion," and he explained that the joint-employer finding the majority applied to CNN before it hired its own workforce was irreconcilable with the parties' understandings and existing agreements:

> Nothing in such a scenario would promote stable bargaining relationships. Rather, CNN's actions—taken as an "employer" of the TVS technical personnel—would have directly contradicted the then-existing TVS-NABET collective-bargaining agreements (which identified TVS, not CNN, as the employer). CNN's actions would have violated the CNN-TVS Agreements, which stated . . . that TVS employees "are not employees of [CNN], and shall not be so treated at any time". . . . Finally, CNN's actions would have exhibited a total disregard for the elaborate body of law regarding "successorship" and related business changes that has been the subject of nearly a dozen Supreme Court cases and innumerable Board decisions.[81]

The Board majority in *CNN*, although ostensibly applying the traditional joint-employer test, relied on factors similar to those subsequently embraced by the *Browning-Ferris* majority. Thus, the damage inflicted on successorship law by the *CNN* decision was exacerbated by *Browning-Ferris*. That decision, if not overruled, would injure the nation's economy by hindering the ability of user employers to freely terminate or rebid client contracts and of new supplier employers to set different initial employment terms. Simply put, the *Browning-Ferris* standard sent a message to user employers to *never contract with unionized supplier firms in the first place* to avoid being trapped in client contracts that cannot be terminated without bargaining with the union to agreement or impasse. On the other side, *Browning-Ferris* injured competition within the supplier-employer market: potential bidders for contracts where the incumbent supplier employer is unionized could not freely compete with the incumbent supplier on labor costs, as the new supplier employer would likely be tied to the same terms. The *Browning-Ferris* majority thus applied the Act in a manner directly contrary to the policies underlying the successorship doctrine as articulated by the Supreme Court in *Burns*.

D. Browning-Ferris Threatened Existing Franchising Arrangements in Contravention of Board Precedent and Trademark Law Requirements.

Of the thousands of business entities with various contracting arrangements that suddenly found themselves to be joint employers under the *Browning-Ferris* standard, franchisors stand out. According to the International Franchise Association (IFA), "in 2012 there were 750,000 franchise establishments in the United States employing 8.1 million workers, generating a direct economic output of $769 billion. These businesses account for approximately 3.4 percent of America's gross domestic product."[82]

For many years, the Board has generally not held franchisors to be joint employers with their franchisees, regardless of the degree of indirect control retained.[83] The *Browning-Ferris* majority did not mention, much less discuss, the potential impact of its new standard on franchising relations, but it was almost certainly momentous and hugely disruptive. Indeed, absent any discussion, *Browning-Ferris* left open whether the majority there even agreed with the General Counsel's position that the Board should continue to exempt franchisors from joint-employer status to the extent their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand. See, e.g., *Love's Barbeque Restaurant*, 245 NLRB 78, 120 (1978) (franchisor not a joint employer where franchisees were required to prepare and cook food a certain way because, among other things, the franchisor established the requirements to "keep the quality and good will of [the franchisor's] name from being eroded") (internal quotations and citations omitted), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981). Given the

[81] *CNN America*, supra, slip op. at 38–39 (Member Miscimarra, concurring in part and dissenting in part) (footnote and emphasis omitted).

[82] Amicus Br. of IFA in *Browning-Ferris* at 1.

[83] See, e.g., *Speedee 7-Eleven*, 170 NLRB 1332 (1968) (franchisor not a joint employer despite a policy manual that described "in meticulous detail virtually every action to be taken by the franchisee in the conduct of his store"); *Tilden, S. G., Inc.*, 172 NLRB 752 (1968) (franchisor not a joint employer, even though the franchise agreement dictated "many elements of the business relationship," because the franchisor did not "exercise direct control over the labor relations of [the franchisee]").

breadth of the *Browning-Ferris* test and its supporting rationale, there was reason for concern that a Board applying *Browning-Ferris* would have deemed a franchisor with this type of indirect control a joint employer of its franchisees' employees.

The *Browning-Ferris* test appears to require specific analysis of whether the franchisor shares or codetermines the manner and method of performing the work. However, in many if not most instances, franchisor operational control has nothing to do with labor policy but rather compliance with federal statutory requirements to maintain trademark protections. "It is required that the owner of the mark should set up the standards or conditions which must be met before another is permitted to use the certification mark and the owner should permit the use of the mark by others only when they meet those standards or conditions." *State of Fla. v. Real Juices, Inc.*, 330 F. Supp. 428, 432 (M.D. Fla. 1971). As one court explained:

> Without the requirement of control, the right of a trademark owner to license his mark separately from the business in connection with which it has been used would create the danger that products bearing the same trademark might be of diverse qualities. If the licensor is not compelled to take some reasonable steps to prevent misuses of his trademark in the hands of others the public will be deprived of its most effective protection against misleading uses of a trademark. The public is hardly in a position to uncover deceptive uses of a trademark before they occur and will be at best slow to detect them after they happen. Thus, unless the licensor exercises supervision and control over the operations of its licensees the risk that the public will be unwittingly deceived will be increased and this is precisely what the Act is in part designed to prevent. Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees.

Stanfield v. Osborne Indus., Inc., 839 F. Supp. 1499, 1504 (D. Kan. 1993), affd. 52 F.3d 867 (10th Cir. 1995), abrogated on other grounds by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). If a franchisor fails to maintain sufficient control over its marks, it is considered to have engaged in "naked franchising" and thereby to have abandoned the mark.[84] "The critical question in determining whether a licensing program is controlled sufficiently by the licensor to protect his mark is whether the licensees' operations are policed adequately to guarantee the quality of the products sold under the mark." *General Motors Corp. v. Gibson Chem. & Oil Corp.*, 786 F.2d 105, 110 (2d Cir. 1986). The necessity of the franchisor to police the "manner and method" of the franchisee is paramount. "'The purpose of the Lanham Act . . . is to ensure the integrity of registered trademarks, not to create a federal law of agency.' The scope of a licensor's duty of supervision of a licensee who has been granted use of a trademark must be commensurate with this limited goal." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018 (9th Cir. 1985) (quoting *Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1327 (7th Cir. 1979)).

These cases demonstrate that one important aspect of the franchising relationship is the franchisee's ability to reap the benefits of manifesting to the customer the appearance of a seamless enterprise through the use and maintenance of the franchisor's trademark. Federal franchise law recognizes this benefit and requires that the franchisor protect the mark by maintaining enough control over the franchisee to protect consumers. However, even though franchise law requires some degree of oversight and control by the franchisor over its franchisees, it was never the intent of Congress to make franchisors joint employers of their franchisees' employees. The *Browning-Ferris* joint-employer standard threatened to do just that whenever a franchisor complies with the requirements of another Federal statute that is totally unrelated to labor relations. The Board has been repeatedly reminded that it "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that [we] may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). Rather than providing a "careful accommodation of one statutory scheme to another," the *Browning-Ferris* decision placed "excessive emphasis upon [the Board's] immediate task." Id.

[84] Id.; see 15 U.S.C. § 1064(5)(A). See also *Barcamerica International USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002) ("It is well-established that '[a] trademark owner may grant a license and remain protected provided quality control of the goods and services sold under the trademark by the licensee is maintained.' *Moore Bus. Forms, Inc. v. Ryu*, 960 F.2d 486, 489 (5th Cir.1992). But '[u]ncontrolled or "naked" licensing may result in the trademark ceasing to function as a symbol of quality and controlled source.' *McCarthy on Trademarks and Unfair Competition* § 18:48, at 18-79 (4th ed. 2001). Consequently, where the licensor fails to exercise adequate quality control over the licensee, 'a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark.' *Moore*, 960 F.2d at 489.").

E. Browning-Ferris Undermined Parent-Subsidiary Relationships in Contravention of Board Precedent.

In most areas of the law, it is widely recognized that parent and subsidiary corporations are separate entities. The Board, which has developed sophisticated legal doctrines for the purpose of detecting when ostensibly separate companies are in truth either created to evade obligations under the Act (the alter-ego doctrine) or are so integrated that they function as one (the single-employer doctrine), has recognized this principle repeatedly. For example, in *Dow Chemical*, 326 NLRB 288 (1998), a bipartisan Board majority reaffirmed the longstanding rule under the single-employer doctrine that typical parents and subsidiaries are not considered a single employer for collective-bargaining purposes. See also, e.g., *Western Union*, 224 NLRB 274 (1976), affd. sub nom. *United Telegraph Workers v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978), cert. denied 439 U.S. 827 (1978). Indeed, the presumption of separateness for purposes of the Act is so strong that it also extends to unincorporated divisions that are operated independently from the company as a whole. See, e.g., *Los Angeles Newspaper Guild, Local 69 (Hearst Corporation)*, 185 NLRB 303, 304 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971). The Board honors the separateness of parents and subsidiaries even as it recognizes that a subsidiary is, of course, under the potential control of its parent. In other words, potential control is not enough to find that a parent is the same employer with its subsidiary for purposes of labor law:

> Common ownership by itself indicates only *potential* control over the subsidiary by the parent entity; a single-employer relationship will be found only if one of the companies exercises *actual* or *active* control over the day-to-day operations or labor relations of the other.

Dow, 326 NLRB at 288 (emphasis in original). The *Browning-Ferris* majority turned this principle on its head, and its wholesale adoption of the "potential control" standard risked treating parents and subsidiaries as joint employers. To our reckoning, no Board had ever taken this leap before. Indeed, the *Browning-Ferris* test—which applied to admittedly separate and independent companies—embraced a more onerous "control" standard than the one the Board applies to determine whether two apparently separate companies are *actually integrated* with one another. This made no sense.

Whatever the logical contradictions in *Browning-Ferris*, the result was serious. The standard adopted there threatened to sweep every parent and affiliate company in America into being the joint employer of its subsidiary's employees, with the concomitant bargaining obligations, the loss of secondary-employer protection from union strikes (discussed below), and all the other deleterious results mentioned above. Before upending decades of labor law precedent and probably centuries of precedent in corporate law, the Board needed a mandate from Congress rather than purporting to "find" it in our decisional law. Of course there is no such mandate, which further supports our decision today to restore the "direct and immediate control" standard. If Congress had wanted the Board to turn the world of corporate identity upside down, it would have expressly told us so.

VII. *BROWNING-FERRIS* CONFLICTS WITH CONGRESSIONAL INTENT TO INSULATE NEUTRAL EMPLOYERS FROM SECONDARY ECONOMIC COERCION.

Not only did the *Browning-Ferris* test impermissibly expand and confuse bargaining obligations under Sections 8(a)(5) and 8(d), it also did violence to other provisions of the Act that depend on a determination of who is, and who is not, the "employer." Chief among them is Section 8(b)(4)(ii)(B), which prohibits secondary economic protest activity, such as strikes, boycotts, and picketing. That section of the Act "prohibits labor organizations from threatening, coercing, or restraining a neutral employer with the object of forcing a cessation of business between the neutral employer and the employer with whom a union has a dispute," but it does not prohibit striking or picketing the primary employer, i.e., the employer with whom the union does have a dispute. *Teamsters Local 560 (County Concrete)*, 360 NLRB 1067, 1067 (2014). In enacting Section 8(b)(4)(ii)(B), Congress intended to "preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and . . . [to] shield[] unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692.

An entity that is a joint employer with the employer involved in a labor dispute is equally subject to union economic protest activities. See *Teamsters Local 688 (Fair Mercantile)*, 211 NLRB 496, 496–497 (1974) (union's picketing of a retailer did not violate Section 8(b)(4)(ii)(B) because retailer was the joint employer of employees of a delivery contractor with which the union had a labor dispute). To put this in practical terms, before *Browning-Ferris* a union in a labor dispute with a supplier employer typically could not picket a user entity in order to urge that entity's customers to cease doing business with the user, with the object of forcing the user to cease doing business with the supplier employer.[85]

[85] Of course, the user- and supplier-employer scenario often raises common situs issues as addressed in *Sailors Union (Moore Dry Dock)*,

Likewise, a union with a labor dispute with one franchisee typically could not picket the franchisor and all of its other franchisees.

Browning-Ferris' expansion of the joint-employer doctrine swept many more entities into primary-employer status as to labor disputes that are not directly their own. As a result, unions were enabled to picket or apply other coercive pressure to either or both of the joint employers as they chose. This limited the Act's secondary-boycott prohibitions in a manner Congress could not have intended. The targeted joint employer may not have direct control or even *any* control over the particular terms or conditions of employment that are the genesis of the labor dispute. Moreover, the economic consequences of this contraction of secondary-boycott protection are far reaching. For example, a union could picket all of the user entity's facilities even though the supplier employer only provides services at one. Further, assuming that a franchisor exerts similar indirect control over each franchisee, a union could picket the franchisor and all franchisees even though its dispute only involves the employees of one franchisee.[86]

It does not end there. As previously stated, numerous contractual provisions relied upon by the *Browning-Ferris* majority are typically included in a residential renovation contract—i.e., the contractor's employees cannot start work before a certain hour, they must finish work by a certain hour, they cannot use the bathrooms in the house, they have to park their vehicles in certain locations, and so forth. Suppose that the annual revenues of the company with whom John and Jane Homeowners' contract meet the Board's discretionary standard for asserting jurisdiction, not at all an unlikely possibility. Then suppose that a union initiates an area standards wage protest against this contractor. One day, the Homeowners open their front door to discover pickets patrolling the sidewalk in front of their house. In the joint-employer world of *Browning-Ferris*, the Homeowners are a lawful target for this protest activity. Unions may not have any interest in bringing the homeowners to the bargaining table, but they may be more than eager to maximize economic injury to the primary employer by expanding the cease-doing-business pressure to as many clients of that employer as possible. Congress did not intend that every entity with some degree of economic relationship with the employer-disputant be thrown into its labor dispute. The Act is supposed to encourage labor peace, and to this end Congress enacted Sections 8(b)(4) and 8(e) to prevent the very type of limitless economic warfare the *Browning-Ferris* decision fomented.

The *Browning-Ferris* majority's expansive definition of joint-employer status posed particular questions about its applicability to common situs work in the construction industry. As previously stated, the Supreme Court has held that the fact "the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other."[87] The breadth of the *Browning-Ferris* majority test and its holding that "reserved" control, by itself, may result in joint-employer status cannot be reconciled with the Supreme Court's decision—more than 50 years ago—that a general contractor in the construction industry is not an "employer" of subcontractor employees, even though general contractors obviously have "reserved" control over most if not all work performed by subcontractor employees on construction projects.[88]

VIII. THE JOINT-EMPLOYER QUESTION PRESENTED IN THIS CASE

"The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). The Board considers the following factors when determining whether retroactive application would cause manifest injustice: "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines, and any particular injustice to the losing party under the retroactive application of the change of law." *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993) (citing *NLRB v. Bufco Corp.*, 899 F.2d 608, 609 (7th Cir. 1990)). After

92 NLRB 547 (1950), and its progeny, but explicitly targeting the secondary employer is blatantly unlawful.

[86] Going back to the CleanCo diagram above for an example, Client A likely has no control over what goes on at the premises of Client C. More importantly, there is no underlying economic relationship between the two that could supply even a remotely rational foundation for the Act to allow economic weapons like strikes, picketing, etc. at Client A to convince it to use its obviously non-existent "power" over Client C in a labor dispute involving CleanCo employees posted at Client C.

[87] *Denver Building Trades*, 341 U.S. at 692.

[88] There is a further question. *Denver Building Trades* involved a situation in which a subcontractor was the primary employer target of protest, and the general contractor was the neutral employer. In *Markwell & Hartz*, the Board applied the same principles of separateness and neutrality when the general contractor was the primary employer in a labor dispute, thereby finding all subcontractors at the common situs to be neutrals. *Building & Construction Trades Council (Markwell & Hartz)*, 155 NLRB 319 (1965), enfd. 387 F.2d 79 (5th Cir. 1967). The breadth of the *Browning-Ferris* test threatened to undermine this decision as well.

consideration of these factors, we find that retroactive application in this case and in all pending cases would not result in manifest injustice. First, there has been no showing that Brandt and/or Hy-Brand relied on *Browning-Ferris* when structuring or maintaining their relationship.[89] Second, retroactive application here would further the purposes of the Act and the incorporated common law by ensuring that Brandt, Hy-Brand, and employers in other pending cases that present a joint-employer issue are not held jointly and severally liable based only on proof of joint control that is reserved, indirect, and/or "limited and routine." Finally, we find that retroactive application of the restored joint-employer standard will not result in any particular injustice to the losing parties, here Brandt and Hy-Brand, because the restored standard places a heavier burden of proof on the General Counsel than the *Browning-Ferris* standard we overrule today.

Applying the joint-employer standard that existed prior to *Browning-Ferris*, we find that the record establishes that Brandt and Hy-Brand constitute a joint employer, which means they are jointly and severally liable for remedying the unfair labor practices committed in the instant case. Substantial evidence supports a finding that the two entities *exercised* joint control over essential employment terms involving Brandt and Hy-Brand employees, the control was direct and immediate, and it was not limited and routine. Terence Brandt, who served as the Corporate Secretary for both companies, was directly involved in the decisions at both companies to discharge all seven of the discriminatees. Moreover, he identified himself as an official of Brandt when he signed letters effectively informing two of the Hy-Brand strikers that their employment had been terminated. Also, Terence Brandt is the primary individual making hiring decisions at Brandt, and he also hired Randy Sackville to be Hy-Brand's General Manager. Employees of both companies participate in the same 401(k) and health benefit plans, and they are covered by the same workers compensation policy. Hy-Brand employees and Brandt employees attend common mandatory training sessions and an annual corporate meeting where common employment policies are reviewed. Such common employment policies, drafted by Terence Brandt and Brandt Human Resources Director Lisa Coyne, include an equal employment opportunity policy, a workplace harassment policy, an FMLA policy, and a drug-free workplace policy. Thus, the record establishes that the joint control described above was actually exercised, not merely reserved, and that it had a direct and immediate impact on Brandt and Hy-Brand employees.

[89] While the General Counsel may have relied on *Browning-Ferris* when litigating this case, the General Counsel prevails, for the reasons stated below, under the standard that we restore today.

IX. RESPONSE TO THE DISSENT

One would never guess that two short years ago, our dissenting colleagues were part of the Board majority that, in *Browning-Ferris*, implemented sweeping changes in the Board's joint-employer doctrine. Then, our dissenting colleagues had no reluctance to overrule then-existing Board law based on their conclusion that it was "out of step with changing economic circumstances," including the "recent dramatic growth in contingent employment relationships."[90] In *Browning-Ferris*, our dissenting colleagues announced they had "decided to revisit and to revise the Board's joint-employer standard."[91] Quoting the Supreme Court, our colleagues emphasized that federal regulatory agencies "'are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.'"[92] Now, our colleagues raise an array of objections, most of which are contradicted by their own actions when deciding *Browning-Ferris*.

Most of our colleagues' contentions have been effectively addressed above. However, several additional points are relevant here.

First, there is no merit in the claim that the Board, in the instant case, has failed to satisfy requirements set forth in the Administrative Procedures Act, nor has the Board failed to engage in "reasoned decisionmaking." Our colleagues quote *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998), where the Supreme Court stated: "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Id. We agree with the Court's statement, as indeed we must. However, we disagree with our dissenting colleagues' suggestion that the Board's decision in the instant case fails the "logical and rational" test. Obviously, a decision reflecting the views of a Board majority does not become "illogical" or "irrational" merely because dissenting members disagree with the outcome. If this were the standard, then *Browning-Ferris* itself failed the "logical and rational" test, based on the dissenting views of Chairman (then-Member) Miscimarra and former Member Johnson in that case.

[90] *Browning-Ferris*, supra fn. 2, 362 NLRB No. 186, slip op. at 1.

[91] Id., slip op. at 1–2.

[92] Id., slip op. at 1 (footnote omitted) (quoting *American Trucking Assns. v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967)). See also *UGL-UNICCO Service Co.*, 357 NLRB 801, 801 (2011) (quoting *American Trucking Assns.*, supra, and revising Board's successor-bar doctrine).

See *Browning-Ferris*, supra fn. 2, 362 NLRB No. 186, slip op. at 21–49 (Members Miscimarra and Johnson, dissenting).[93]

Second, there is no greater merit in our dissenting colleagues' objection that the joint-employer issue is not appropriately before the Board. Here, our colleagues claim that we are straining to address and reverse *Browning-Ferris* and that we should avoid resolving the joint-employer issue here until judicial appeals in *Browning-Ferris* have been exhausted. These arguments are unpersuasive. In the instant case, the administrative law judge squarely found that Respondents Brandt and Hy-Brand were joint employers. And regarding that issue, the judge cited a single case: the Board's 2015 decision in *Browning-Ferris*.[94] Indeed, the judge focused specifically on the *changes* in joint-employer doctrine effectuated by *Browning-Ferris*. Thus, he explained: "The Board *does not require actual control* over essential terms and conditions of employment; it is sufficient that the alleged joint employer has the *authority* to do so." Moreover, the judge pointed out that in *Browning-Ferris*, "the Board *overruled prior precedent* to the extent those cases held that mere authority to control employees' terms and conditions of employment was an inadequate indicia of joint employer status unless the authority was exercised directly and immediately and not in a limited and routine manner." And there is no question that the Respondents filed exceptions to the judge's joint-employer finding. Of course, it is no surprise that our dissenting colleagues argue in favor of deciding this case on a basis that would prevent the Board from overruling *Browning-Ferris*: they were part of the *Browning-Ferris* majority that erroneously, in our view, overturned then-existing legal principles. However, the Board is presented here with the question of whether the judge correctly concluded, based on *Browning-Ferris*, that the Respondents are joint employers. Therefore, we have the responsibility and obligation to address this question, and in doing so, to determine whether *Browning-Ferris* correctly stated the applicable standard. We have concluded that it did not, based on the common law and sound policy reasons outlined at length above.[95]

Third, there is no merit in our dissenting colleagues' protest that we cannot or should not overrule *Browning-Ferris* in this case without inviting *amicus* briefing. The Board has broad discretion with respect to whether to invite briefing prior to adjudicating a major issue. As we

[93] The NLRB functions in a manner that is very different from the U.S. Department of Labor because the two agencies enforce different statutes and have different structures, procedures, and practices. This renders immaterial our dissenting colleagues' reliance on comments by Secretary of Labor Alexander Acosta concerning "public debate, discussion, and comment" regarding joint-employer status.

[94] When addressing the joint-employer issue in the instant case, the judge stated: "In *BFI/Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 15 (2015), the Board described the following joint employer test: 'The Board may find that two entities . . . are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment'" (footnotes omitted; paragraph structure modified).

[95] Equally without merit is our colleagues' position that the Board should refrain from resolving the joint-employer issue in this case, and from overruling *Browning-Ferris*, because appeals have not been exhausted in the *Browning-Ferris* case. For several reasons, this contention is without merit. First, the parties in the instant case and other parties affected by the *Browning-Ferris* decision are entitled to the prompt resolution of the joint-employer issue presented here, without regard to pending appeals in other cases. Second, even if the *Browning-Ferris* decision were upheld by a court of appeals, this would not render inappropriate the Board's independent assessment of the joint-employer issue here and in other cases. Indeed, in the *Murphy Oil* litigation, the Board decided that class-action waiver agreements constitute unlawful interference with protected rights in violation of Section 7 of the Act; the Board's position was rejected by the Fifth Circuit; and the Board continued to find similar violations in dozens of other cases and to defend the Board's position in the courts (even in cases appealed to the Fifth Circuit). See, e.g., *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S. Ct. 809 (2017). Third, for obvious reasons, there is no doctrine that precludes the Board from deciding cases whenever prior decisions involving similar issues are pending appeal. Because of the large number of Board cases that involve the same issues and legal principles, such a principle would impede the timely adjudication of cases by the Board, given the frequency with which losing parties seek review in the courts of appeals. Finally, the Board has the discretion to direct the General Counsel to request courts of appeals to remand pending cases to the Board; such requests have been granted; and subsequent Board decisions reversing the original Board ruling have been enforced. See, e.g., *Milwaukee Spring Div. of Illinois Coil Spring Co.*, 265 NLRB 206 (1982), remanded 718 F.2d 1102 (7th Cir. 1983), reversed on reconsideration 268 NLRB 601 (1984), affd. 765 F.2d 175 (D.C. Cir. 1985).

The Board's resolution of the joint-employer issue in the instant case is materially different from *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016), where our dissenting colleagues unnecessarily overruled existing law to find a petitioned-for bargaining unit appropriate despite unrebutted evidence that the bargaining unit had ceased to exist more than 3 years before the Board issued its decision. The Board majority there refrained from ruling on a motion to dismiss the representation case as moot and instead elected to decide the legal issue. The *Miller & Anderson* majority reinstated the election petition and remanded the case to the Regional Director to determine whether any employees existed who could vote in the election—again, despite unrebutted evidence that made it almost certain none did. (No hearing was ever held, and 14 days after the Board's decision, the Region granted the Petitioner's request to withdraw its election petition.) In this context, Chairman (then-Member) Miscimarra dissented, based in part on the absence of a case or controversy, and he objected that the Board majority "decided an election case . . . when the available evidence makes it virtually certain that no election will ever take place." Id., slip op. at 23 (Member Miscimarra, dissenting). By comparison, in the instant case, the questions presented undeniably have an immediate impact on the Respondents and other parties. Indeed, our colleagues do not argue that the instant case need not be resolved; they simply disagree with the outcome.

recently stated, "[n]either the Act, the Board's Rules, nor the Administrative Procedures Act requires the Board to invite amicus briefing before reconsidering precedent." *UPMC*, 365 NLRB No. 153, slip op. at 10 (2017). Additionally, the issue we decide today was the subject of amicus briefing when the Board decided *Browning-Ferris*. Further, we respectfully disagree with our dissenting colleagues' contention that the Board maintains a "longstanding practice of notifying the public and the parties that a reversal of precedent was under consideration, and soliciting briefs from them." In the past decade, the Board has freely overruled or disregarded established precedent in numerous cases without supplemental briefing. See, e.g., *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing). Obviously, our dissenting colleagues have no blanket commitment to "public participation" in agency policymaking. Just this past week, Members Pearce and McFerran dissented from a request for information that merely asked interested members of the public whether the Board's extensive rewriting of its representation-case procedures should be retained, modified, or rescinded.[96]

Fourth, the Board clearly has the authority to resolve issues based on legal standards that have not been expressly raised or challenged by the parties. When the Board decides cases, it performs an appellate function.[97] And the Supreme Court has instructed that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991).[98] Likewise, there is no principle of law that requires the Board to resolve this case by addressing the judge's single-employer finding rather than his joint-employer finding. Clearly, our colleagues would prefer that the Board only address the single-employer issue because our resolution of the joint-employer issue requires the Board to pass on *Browning-Ferris*, which we now overrule. In any event, the Board has concluded it is appropriate to resolve the joint-employer issue, and that makes it unnecessary to reach or pass on the question of single-employer status.

In sum, the Board has the responsibility to decide all matters that are properly before it, based on our "special function of applying the general provisions of the Act to the complexities of industrial life."[99] In the present case, the question of joint-employer liability is directly presented to us. In addressing that issue, we have the authority and the obligation to apply the law as we believe it should be, regardless of whether any party has directly challenged *Browning-Ferris*. For the reasons explained above, the Board has concluded that the common law and numerous policy considerations favor abandoning the *Browning-Ferris* joint-employer standard. In its place, based on the same considerations, we reinstate the joint-employer standard that existed prior to the *Browning-Ferris* decision.

X. CONCLUSION

The Board is not Congress. It can only exercise the authority Congress has given it. The *Browning-Ferris* majority announced a new test of joint-employer status based on policies and economic interests Congress has expressly prohibited the Board from considering. That alone is reason enough to overrule *Browning-Ferris*. At least as troubling from an institutional perspective, however, was the nature of the *Browning-Ferris* test. That test created uncertainty where certainty is needed. It provided no real standard for determining in advance when entities in a business relationship will be viewed as

[96] See 82 FR 58783 (2017) (NLRB Notice and Request for Information, Representation-Case Procedures) (dissenting views of Members Pearce and McFerran).

[97] In typical unfair labor practice cases, the Board engages in appellate review of decisions and orders of the Agency's administrative law judges, and in typical representation cases, the Board engages in appellate review of decisions by Regional Directors.

[98] In *Dish Network Corp.*, 359 NLRB 311, 312 (2012), Member Pearce expressly endorsed the applicability of the *Kemper Financial Services* rationale to the Board's adjudicatory authority. Although *Dish Network* was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), based on the absence of a quorum of validly appointed Board members who decided the case, we agree with Member Pearce that the description in *Kemper Financial Services* appropriately explains the scope of the Board's authority.

[99] *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963).

independent and when they will be viewed as joint employers.

Moreover, as noted previously, the uncertainty created by *Browning-Ferris*' vague standard created an unreasonable risk that (i) parties would discover after the fact, following years of litigation, that they were unlawfully absent from negotiations in which they were legally required to participate; and (ii) other parties would discover that they unlawfully injected themselves into collective bargaining involving another employer and its union(s), based on a relationship that turned out to be insufficient to result in joint-employer status. The *Browning-Ferris* majority essentially said that the Board would look at every aspect of a business relationship on a case-by-case basis and then decide the joint-employer question after the fact. As the dissenters in *Browning-Ferris* put it, the Board owed a greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that "we'll see how it floats."

Accordingly, for all the reasons set forth above, we return today to a standard that has served labor law and collective bargaining well, a standard that is understandable and rooted in the real world. It recognizes joint-employer status in circumstances that make sense and would foster stable bargaining relationships. Indeed, in the Board's treatment of joint-employer status as turning on whether joint control is exercised (rather than merely reserved), whether such control has a "direct and immediate" impact on employment terms (rather than a merely indirect impact), and whether such control is not merely "limited and routine," there have still been many cases where two or more employers were found to exercise sufficient control over a common group of employees to warrant joint bargaining obligations and shared liability for unfair labor practices.[100] Our quarrel with *Browning-Ferris* stems not from any disagreement about the general concept of joint-employer status but rather from its imposition of a test that we firmly believe cannot be reconciled with the common law agency standard the Board is compelled to apply, based on a statute the Board is duty-bound to enforce.

The Supreme Court has cautioned that a Federal agency must explain itself when departing from an interpretation of well-established rules that have governed business practices for long periods, even when the rules are of the agency's own making. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court reviewed a new interpretation promulgated by the Department of Labor, under which pharmaceutical sales representatives would no longer be considered outside salesmen exempt from the overtime provisions of the Fair Labor Standards Act (FLSA). The Court emphasized that its usual deference to such an agency action was not warranted because of the "potentially massive" economic implications of the new interpretation "for conduct that occurred well before that interpretation was announced,"[101] and because deference "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[102] The Court also noted that DOL's "longstanding practice" of exempting "detailers" went back to the beginning of the FLSA, and that there were currently 90,000 detailers working for pharmaceutical companies with the understanding that they were exempt outside sales representatives.[103]

Because the DOL's new interpretation would have been so disruptive to the regulated industry, the Court could not simply defer to it:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.
>
> Accordingly, whatever the general merits of . . . deference, it is unwarranted here. We instead accord the Department's interpretation a measure of deference proportional to the "'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *United States v. Mead Corp.,* 533 U.S. 218, 228, 121 S.Ct. 2164, 150

[100] The *Browning-Ferris* majority faulted the dissenters for making "no real effort to address" the issues they raised. We believe the criticism was unfair, but the pre-*Browning-Ferris* framework we return to today already supplies the answer. Economic interdependence and indirect influence *work both ways*, and unions enjoy great flexibility when dealing with employers that are interdependent with other entities. As long as the union respects secondary boycott principles, leverage applied to the undisputed employer is likely to affect the employer's suppliers, vendors, and other parties having closely aligned economic interests, which predictably may lead to meaningful discussions and changes across the various entities. Such discussions are likely to occur even "without the intervention of the Board enforcing a statutory requirement to bargain," and there is an "important difference" between such discussions being "permitted" as opposed to making them "mandatory." *First National Maintenance v. NLRB*, 452 U.S. at 681 fn. 19, 683.

[101] Id. at 2167.

[102] Id. (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

[103] Id. at 2167–2168.

L.Ed.2d 292 (2001) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).[104]

What the *Browning-Ferris* majority did was far broader in scope than DOL's invalidated interpretive change. Instead of overturning one discrete, longstanding agency interpretation that affected a statutory exemption for a single category of employer, the Board substantially altered its interpretation of joint-employer status across the entire spectrum of private business relationships subject to our jurisdiction. Our return to the principles of the *TLI* and *Laerco* is based in part on our grave concern regarding the impact of *Browning-Ferris*' reformulation of the joint-employer standard on a much broader body of law, affecting multiple doctrines central to the Act that have been developed and refined through decades of work by bipartisan Boards, the courts, and Congress. As in *Christopher*, the *Browning-Ferris* majority gave insufficient consideration to the "potentially massive" economic implications of its new joint-employer standard, and it required innumerable parties to "divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding."

For the reasons stated above, we overrule *Browning-Ferris* and restore the joint-employer standard that existed prior to the *Browning-Ferris* decision. Thus, a finding of joint-employer status requires proof that the alleged joint-employer entities have actually *exercised* joint control over essential employment terms (rather than merely having "reserved" the right to exercise control), the control must be "direct and immediate" (rather than indirect), and joint-employer status will not result from control that is "limited and routine."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Hy-Brand Industrial Contractors, Ltd., Muscatine, Iowa, and Brandt Construction Co., Milan, Illinois, a joint employer, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the introductory paragraph of the recommended Order.

Respondent, a joint employer consisting of Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) of Muscatine, Iowa, and Brandt Construction Co. (Brandt) of Milan, Illinois, its officers, agents, successors, and assigns, shall

2. Substitute the following for paragraph 2(a).

"2a. Within 14 days from the date of this Order, offer Dakota Upshaw, Cole Hinkhouse, Austin Hovendon, Alezzandro Campbell, David Newcomb, Ron Senteras, and Nicole Pinnick full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 14, 2017

Philip A. Miscimarra, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS PEARCE and MCFERRAN, dissenting.

Today, the majority resurrects a restrictive joint-employer standard under the National Labor Relations Act, adopting point for point the dissent in *BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015). The majority reflexively reverses precedent even though:

(1) this case should easily be decided without reaching the joint-employer issue at all, by correctly finding that the Respondents are a single employer;

(2) the adoption of a new joint-employer standard concededly makes no difference to whether the Respondents here are, in fact, joint employers;

(3) no party in this case has asked the Board to reconsider *BFI* (and, to the contrary, the parties cite and apply *BFI* as the applicable standard);

(4) breaking with established practice, the Board has failed to give notice that it was considering a change in the law and has failed to provide interested persons with an opportunity to file briefs on the issue; and

(5) the United States Court of Appeals for the District of Columbia Circuit is currently reviewing *BFI*.

To say that the majority is reaching out—and rushing—to reverse *BFI* is an understatement.

Today's decision represents a failure to engage in the reasoned decisionmaking required of administrative agencies by the Administrative Procedure Act. This case

[104] Id. at 2168–2169.

is not a proper vehicle for reconsidering the joint-employer standard to begin with, and the majority's failure to permit public participation only worsens matters. Not surprisingly, a deeply flawed process leads to a deeply flawed result. The majority starts with a willful misunderstanding of the joint-employer standard adopted in *BFI* and ends by reverting to a standard that, before today, the Board had never even attempted to justify in terms of the common-law principles that must guide us. As we will explain, the resurrected standard not only is impossible to reconcile with the common law of agency, it also violates the explicit policy of the National Labor Relations Act: to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. §151. Today's decision is an unfortunate and unwarranted step backward.

I.

There is no genuine occasion here to revisit the Board's joint-employer standard.[1] The material facts underscore the simplicity of this case—and the arbitrary process that has led to today's decision. Charles Brandt and his three sons owned two ostensibly separate construction businesses – Brandt, which performed public works and other construction projects and employed 140 employees; and Hy-Brand, which erected steel warehouses and other structures and employed 10 employees. All four principals had the same ownership interest and played the same management role in both entities. Vice President Terence Brandt oversaw all major decisions for Brandt and Hy-Brand, including firing decisions. The entities maintained identical workplace rules, shared a single payroll and benefit administrator, and provided the same benefits. In addition, the evidence indicates that certain operations were interrelated; specifically, Brandt and Hy-Brand employees testified that they had worked together, shared equipment, and performed construction services for the other entity.

Between July and November 2015, five Hy-Brand employees and two Brandt employees went on strike to protest unsafe working conditions and substandard wages and benefits. Terence Brandt personally made the decision to fire all seven employees in retaliation for their actions.

On those facts, this should be a simple case. There is no dispute over the unlawful act that was committed: the discharge of seven employees who engaged in a protected work stoppage. Nor is there any real question about the legal status of the actors here: nominally separate companies that were commonly owned and managed by the Brandt family, which exercised centralized control over labor policy and personnel decisions. As found by the judge, decades of Board law make clear that, in the situation described, Brandt and Hy-Brand should be liable as a single employer.[2] The two entities shared: (1) common ownership; (2) common management; (3) interrelated operations; and (4) common control of labor relations. It is particularly significant that the Brandt family exercised centralized control over labor relations, as evinced by Terence Brandt's significant control over employment matters at both entities and his direct participation in the unfair labor practices.[3] By any measure, this has all the hallmarks of a single, integrated enterprise, characterized by the "absence of an arm's-length relationship among seemingly independent companies."[4] In sum, all the elements of an easy case are here.

Moreover, this is a case that merited quick disposition. The timely resolution of allegations such as these—involving the permanent loss of employment—is "most central to achievement of the Agency's mission," and for good reasons. See NLRB Casehandling Manual Part One, Sec. 11740.1. The Board has explained that "[t]he discharge of employees because of union activity is one of the most flagrant means by which an employer can hope to dissuade employees . . . because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work." *Mid-East Consolidation Warehouse*, 247 NLRB 552, 560 (1980). Accordingly, such cases are considered to have an "exceptional impact" on the public and are subject to the most stringent case-processing goals. See NLRB Casehandling

[1] To recall the words of our majority colleague in an earlier case (misplaced there, but apt here):

> [T]he importance of an issue does not warrant the issuance of a decision in the absence of an actual case or controversy. Moreover . . . the issues presented here will undoubtedly arise in another case . . . and the existence of an evidentiary record in such a case would predictably render any resulting Board decision more concrete and, hopefully, more understandable.

Miller & Anderson Inc., 364 NLRB No. 39, slip op. at 23 (2016) (Member Miscimarra, dissenting). The majority incorrectly characterizes *Miller & Anderson* as involving unrebutted evidence that the representation issue presented there was moot. In fact, while one of the employers did move to dismiss the petition as moot, the petitioner contested that motion and offered to test the employer's factual claims at hearing. The Board appropriately found that the motion to dismiss raised material factual issues warranting a hearing and remanded the case to the Regional Director to resolve those issues. 364 NLRB No. 39, slip op. at 14 fn. 40 (2016).

[2] See, e.g., *Overton Markets, Inc.*, 142 NLRB 615 (1963); *Blumenfeld Theaters Circuit*, 240 NLRB 206 (1979), enfd. mem. 626 F.2d 865 (9th Cir. 1980); *Truck & Dock Services*, 272 NLRB 592, 592 fn. 2 (1984); *Alexander Bistritzky*, 323 NLRB 524, 524–525 (1997); *Spurlino Materials, LLC*, 357 NLRB 1510 (2011), enfd. 805 F.3d 1131 (D.C. Cir. 2015).

[3] See *Rogan Brothers Sanitation, Inc.*, 362 NLRB No. 61 (2015), slip op. at 5–6, enfd. 651 Fed.Appx. 34 (2nd Cir. 2016).

[4] *Bolivar-Tees, Inc.*, 349 NLRB 720, 720 (2007), enfd. 551 F.3d 722 (8th Cir. 2008).

Manual (Part One) Unfair Labor Practice Proceedings Sec. 11740.1. Had the Board simply voted to adopt the judge's decision—while disclaiming reliance on his alternative finding of joint-employer status—an Order requiring reinstatement could have issued well before now.

Instead, the newly-constituted majority invents an opportunity to overrule the Board's 2-year-old joint-employer standard. It is indisputable, however, that this case is missing the foundational element of a joint-employer claim—namely separate and independent employers.

In *BFI*, the Board reiterated its endorsement of the Third Circuit's careful distinguishing of the joint-employer doctrine from the single-employer doctrine. 362 NLRB No. 186, slip op. at 9–10. The court had explained many years ago that:

> a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be"- *independent legal entities* that have merely "historically chosen to handle jointly . . . important aspects of their employer-employee relationship." . . . . The basis of the finding is simply that one employer while contracting in good faith with an *otherwise independent company*, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the "joint employer" concept recognizes that the business entities involved *are in fact separate* but that they share or co-determine those matters governing the essential terms and conditions of employment.

NLRB v. Browning Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1122–1123 (1982) (emphasis added, internal citations omitted).[5] For reasons that should be very obvious, applying the joint-employer test to a single, integrated employer is illogical: it is absurd to ask whether an organization shares or codetermines essential terms and conditions of employment *with itself*. Yet this is exactly what the majority does here—in a single paragraph of analysis that includes no reference to joint-employer principles and cites no case law.

Likewise, the key tenets of *BFI* that the majority purports to overrule – namely those relating to the significance of reserved, indirect, and routine control (all of which are discussed in detail below) – have no application in this case. There is no allegation or evidence that, pursuant to a contract, Brandt reserved the right to exercise control over Hy-Brand employees, or vice versa. Nor is there any allegation or evidence that Brandt exercised control over Hy-Brand employees indirectly or through an intermediary, such as a Hy-Brand supervisor.[6] Again, the entire record underscores that the Brandt family directly controlled both entities as a single employer.

So, this is a single-employer case, not a joint-employer case.[7] Yet the majority insists that this case must be resolved under joint-employer principles.[8] This makes sense, of course, only in light of the majority's overriding goal to reverse *BFI*. Significantly, even the parties

[5] Oddly, the majority devotes a lengthy footnote (which cites the same Third Circuit case) to delineating the legal distinction between single employer and joint employer relationships. It then proceeds to willfully ignore this distinction.

[6] Even assuming that the majority is correct in applying joint-employer precedent (which it is not), there is no allegation that Brandt's control over Hy-Brand was anything other than direct and immediate. Accordingly, this case does not implicate the doctrinal changes effected by *BFI*, and a finding that Brandt and Hy-Brand are joint employers would not require that precedent to be overruled.

In addition to unnecessarily reaching the joint employer doctrine, the majority then misapplies it under any understanding. The majority finds Brandt and Hy-Brand to be joint employers of all seven discharged employees, five of whom were employed by Hy-Brand and two of whom were employed by Brandt. But the entirety of the majority's analysis focuses on Brandt's control over Hy-Brand employees and includes no evidence indicating why Hy-Brand, the smaller entity, would be a joint employer of Brandt's employees. Perhaps unsurprisingly, the majority's analysis reads like an application of single-employer precedent, wherein both nominally separate entities would be the employer of all the discharged employees.

[7] Accordingly, we would adopt the judge's finding that Brandt and Hy-Brand are liable for the discharges as a single employer, without needing to pass on the judge's joint-employer finding.

[8] The majority states that "there is no principle of law that requires the Board to resolve this case by addressing the judge's single-employer finding rather than his joint-employer finding." But there is certainly a principle requiring that the correct legal analysis be applied to the facts at hand. It is indisputable that this case presents a single-employer scenario, and that the joint-employer analysis the majority purports to apply simply does not fit the facts. The "share or co-determine" inquiry only makes sense when there are two separate and independent employers—and not a single employing entity, as in this case.

The majority also asserts that "our colleagues would prefer that the Board only address the single-employer issue because our resolution of the joint-employer issue requires the Board to pass on *Browning-Ferris* . . ." In our view, however, any sound and proper analysis of this case would begin by asking whether Hy-Brand and Brandt constitute a single employer. This is because a single-employer finding would essentially render a joint-employer finding to be both unnecessary and nonsensical. Tellingly, the majority bypasses the single-employer inquiry completely and without explanation.

Finally, the majority contrasts its decision here with *Miller & Anderson*, supra, in which the Board revisited representation precedent—improperly, in the majority's view—where one party claimed that the petitioned-for unit no longer existed and the controversy was thus rendered moot. Even accepting the majority's characterization of that decision (which, as previously explained, we do not), the majority here does exactly what it accuses the *Miller & Anderson* Board of doing. Although a live controversy surely exists in this case, it is not one that implicates the joint-employer precedent that the majority overrules. Accordingly, and contrary to the majority, we disagree with its resolution of this case under an inapplicable theory.

and the judge recognized that this is really a single-employer case. [9]

II.

To make matters worse, the majority's procedural course disregards basic principles of reasoned decisionmaking as well as longstanding Agency norms in favor of public participation. As the Supreme Court has made clear, the Board's adjudication in cases like this one is subject to the requirement of the Administrative Procedure Act that an agency engage in "reasoned decisionmaking." *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Id. The majority's decision here fails on both counts.

First, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). But the majority's decision bears little relationship to the facts, which, as explained, do not fairly present a genuine joint-employer issue.

Equally troubling is the majority's disregard for established Agency norms favoring public participation in the decision-making process. As in other recent decisions,[10] the majority once again arbitrarily dispenses with the Board's longstanding practice of notifying the public and the parties that a reversal of precedent was under consideration, and soliciting briefs from them.[11] (None of the

[9] The record makes clear that, throughout the course of litigation, the General Counsel's primary theory of the case was single employer. Tellingly, moreover, the judge's legal analysis focused almost exclusively on the single-employer issue, with only a perfunctory joint-employer paragraph that largely restated his single-employer rationale. Likewise, even the Respondent's 31-page exceptions brief devotes only a single, citation-free paragraph to contesting the judge's joint-employer finding.

[10] *The Boeing Company*, 365 NLRB No. 154 (2017) (Member McFerran dissenting); *UPMC*, 365 NLRB No. 153 (2017) (Member McFerran dissenting).

[11] See, e.g., *Temple University Hospital, Inc.*, Case No. 04–RC–162716, Order Granting Review in Part and Invitation to File Briefs (filed Dec. 29, 2016), available at https://apps.nlrb.gov/link/document.aspx/09031d45822fb922 (whether the Board should exercise its discretion to decline jurisdiction over the employer); *Postal Service*, 364 NLRB No. 116 (2016) (whether the Board may continue to permit administrative law judges to issue a "consent order," incorporating the terms proposed by a respondent to settle an unfair labor practice case, to which no other party has agreed, over the objection of the General Counsel); *King Soopers, Inc.*, 364 NLRB No. 93 (2016) (whether the Board should revise its treatment of search-for-work and interim employment expenses as part of the make-whole remedy for unlawfully discharged employees), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017); *Columbia University*, 364 NLRB No. 90 (2016) (whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), in which it held that graduate assistants who perform services at a university in connection with their studies are not statutory employees under the National Labor Relations Act); *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016) (whether the Board should adhere to its decision in *Oakwood Care Center*, 343 NLRB 659 (2004), which disallowed inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers); *Service Workers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015) (whether the Board should reconsider its rule that, in the absence of a valid union-security clause, a union may not charge nonmembers a fee for processing grievances); *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (whether the Board should adhere to its existing joint employer standard or adopt a new standard); *Northwestern University*, 362 NLRB No. 167 (2015) (whether the Board should find grant-in-aid scholarship football players are employees under the NLRA); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (whether the Board should adopt a rule that employees who are permitted to use their employer's email for work purposes have the right to use it for Section 7 activity, subject only to the need to maintain production and discipline); *Pacific Lutheran University*, 361 NLRB 1404 (2014) (whether a religiously-affiliated university is subject to the Board's jurisdiction, and whether certain university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managerial employees); *Latino Express, Inc.*, 361 NLRB 1171 (2014) (whether, in awarding backpay, the Board should routinely require the respondent to: (1) submit documentation to the Social Security Administration so that backpay is allocated to the appropriate calendar quarters, and (2) pay for any excess Federal and state income taxes owed as a result of receiving a lump-sum payment); *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014) (whether the Board should change the standard for determining when the Board should defer to an arbitration award), rev. denied sub nom *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017); *New York University*, Case No. 02–RC–023481, Notice and Invitation to File Briefs (filed June 22, 2012), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3252/ntc_02-rc-23481_nyu_and_polytechnic_notice___invitation.pdf (whether graduate student assistants who perform services at a university in connection with their studies are or are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act); *Point Park University*, Case No. 06–RC–012276, Notice and Invitation to File Briefs (filed May 22, 2012), available at https://apps.nlrb.gov/link/document.aspx/09031d4580a0ee7d (whether university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managers); *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) (whether mandatory arbitration agreements that preclude employees from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial, violate the NLRA), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013); *Hawaii Tribune-Herald*, Case No. 37–CA–007043, Notice and Invitation to File Briefs (filed March 2, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/stephensmediainvite.pdf (whether the Respondent had a duty to provide the Union with a statement provided to it by an employee or any other statements that it obtained in the course of its investigation of another employee's alleged misconduct); *Chicago Mathematics and Science Academy Charter School, Inc.*, Case No. 13–RM–001768,

cases cited by the majority diminish the fact that inviting briefs has become an established Board norm—and the majority tellingly cites no recent case in which the Board refused to seek briefing over objections from a member.[12]) The Board followed this very process before deciding *BFI*—providing notice in May 2014 that the joint-employer standard was to be revisited, disseminating a set of questions, soliciting briefs, and reviewing those submissions as part of the decision-making process. The *BFI* decision, in turn, benefited from the insights of key stakeholders, including employer interest groups, labor unions, workplace safety advocates, academics, Federal agencies, and our own General Counsel.[13] Secretary of Labor Alexander Acosta, speaking of his own agency's interpretation of the joint-employer standard under the Fair Labor Standards Act, recently observed:

> [A]s a matter of public policy[,] public debate, discussion, and comment are good. Perhaps the joint-employer doctrine is good policy; perhaps not. It is certainly not the type of policy change we want to make without public input. . . . Congress entrusts policy decisions to an agency's discretion on the condition

Notice and Invitation to File Briefs (filed January 10, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/chicago_mathematics_brief.pdf (whether an Illinois charter school should fall under the jurisdiction of the NLRB or the Illinois Educational Labor Relations Board); *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (what constitutes an appropriate bargaining unit), enfd. sub nom *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *Roundy's Inc.*, Case No. 30–CA–017185, Notice and Invitation to File Briefs (filed November 12, 2010), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/roundys_notice_and_invitation.pdf (what standard the Board should apply to define discrimination in cases alleging unlawful employer discrimination in nonemployee access); *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (what duties a successor employer has toward an incumbent union); *Lamons Gasket Co.*, 357 NLRB 739 (2011) (whether, and how long, employees and other unions should have to file for an election following an employer's voluntary recognition of a union); *J. Picini Flooring*, 356 NLRB 11 (2010) (whether Board-ordered remedial notices should be posted electronically and, if so, what legal standard should apply and at what stage of the proceedings any necessary factual showing should be required); *Kentucky River Medical Center*, 356 NLRB 6 (2010) (whether the Board should routinely order compound interest on backpay and other monetary awards in backpay cases and if so, what the standard period for compounding should be); *Long Island Head Start Child Development Services*, 354 NLRB No. 82 (2009) (two-member Board decision) (whether the Board should find contract termination based on bargaining even in the absence of any contractually-required notice); *Register Guard*, 351 NLRB 1110 (2007) (whether employees have a Section 7 right to use their employer's email system to communicate with one another, what standard should govern that determination, and whether an employer violates the Act if it permits other nonwork-related emails but prohibits emails on Section 7 matters), enfd. in part and remanded in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Can-Am Plumbing, Inc.*, 350 NLRB 947 (2007) (whether the job targeting program at issue violated the Davis-Bacon Act), enfd. 340 Fed.Appx. 354 (9th Cir. 2009); *Dana Corp.*, 351 NLRB 434 (2007) (whether the Board should modify its recognition bar doctrine as articulated in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), *Smith's Food & Drug Centers.*, 320 NLRB 844 (1996), and *Seattle Mariners*, 335 NLRB 563 (2001)); *Alyeska Pipeline Service Co.*, 348 NLRB 779 (2006) (whether a systemwide presumption is warranted in the circumstances of the instant case); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) (seeking comment relating to (1) the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act; and (2) an appropriate test for determining unit placement of employees who take turns or "rotate" as supervisors), see also *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Golden Crest Heath Center*, 348 NLRB 727 (2006); *Firstline Transportation Security*, 347 NLRB 447 (2006) (whether the Board should assert jurisdiction over the employer, a private company contracting with the Transportation Security Administration).

[12] The majority asserts that there are "numerous" cases where the Board "has freely overruled or disregarded established precedent . . . without supplemental briefing." But the six decisions the majority cites are easily distinguishable from this one.

First, in all six cases—*E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015); *Pressroom Cleaners*, 361 NLRB 643 (2014); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014)—a party explicitly and publicly asked the Board to overrule precedent. (The General Counsel asked the Board to revisit or overrule precedent in *Fresh & Easy*, *Lincoln Lutheran*, *Loomis*, *Graymont*, and *Du Pont*; in *Pressroom Cleaners*, the Charging Party asked the Board to overrule precedent.)

Additionally, in *Loomis* and *Lincoln Lutheran*, amicus briefs were actually filed requesting, respectively, that the Board reverse or adhere to extant Board precedent.

Further, *Du Pont* and *Lincoln Lutheran* were the culmination of long-running discussions of the precedent they ultimately overruled. In *Du Pont*, the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit for the express purpose of deciding between two conflicting branches of precedent. See *E.I. Du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). *Lincoln Lutheran*, in turn, was the culmination of a 15-year dialogue with the United States Court of Appeals for the Ninth Circuit about *Bethlehem Steel.* See *WKYC-TV, Inc.*, 359 NLRB 286, 286 (2012) (discussing history).

Finally, as already pointed out, in none of these cases did the Board refuse to request briefing over the objection of one or more Board members.

These six cases stand in sharp relief from the instant case where no party has asked us to revisit or overrule precedent and there has been no long-running dialogue with a Federal court of appeals; indeed, neither the parties nor the public could have anticipated that the Board was planning to overrule precedent in this case.

[13] Remarkably, the majority points to the fact that the *BFI* Board invited briefing as a reason *not* to do so here. But our assumption should be that public participation is desirable, unless there are legitimate and compelling reasons to think otherwise. No party to this case, and no member of the public, has addressed the merits of the Board's decision in *BFI* and its specific rationale, as opposed to its mere application to the facts presented in this case. Nor has there been an opportunity for the public to address the impact of the application of the *BFI* standard to the decision of specific cases and controversies. The better course here would be to give interested persons (including those who did not file briefs in *BFI*) the opportunity to address the Board.

> that the agency receive the public's input on substantive policy.

Alexander Acosta, Remarks to the Federalist Society (Sept. 15, 2017), as reported in Bureau of National Affairs, *Daily Labor Report* (Oct. 23, 2017).

The majority's unwillingness to let the parties and the public participate here is particularly curious given its characterization of the Board's joint-employer jurisprudence as having "dramatic implications for labor relations policy and . . . the economy." Surely, hearing from the parties and the public would inform the majority of the precise nature of those "dramatic implications" and what role, if any, the *BFI* standard has played in relation to those implications. For their part, the parties and the public surely will share our surprise in finding that this case—in which single-employer status was, at all times, the primary issue—has been misappropriated as a vehicle to overrule joint-employer precedent.

They may equally wonder why they were denied an opportunity for briefing in light of the questions that the majority leaves unanswered: What is the justification for overruling *BFI* after just 2 years, and why in this case? Even a cursory glance at today's decision reveals that the majority's policy basis for overruling *BFI* is entirely speculative: pages upon pages bemoaning the changes supposedly wrought by *BFI* and their potential catastrophic effects, but no real-world examples or even remotely plausible hypotheticals. It is reasonable to infer that our colleagues do not want to engage the public for fear of what they might learn—namely, that none of the predicted effects of *BFI* have actually come to pass.

Of course, the reality is that, after a mere 2 years, any accounting of *BFI*'s effects would be premature; indeed, before it was overruled today, *BFI* has been applied by the Board in only one other Board decision.[14] The complete absence of relevant experience under *BFI* underscores the essentially reflexive nature of today's exercise. That reflex is only confirmed by the majority's decision to cast aside the customary benchmarks of reasoned Board review: the assessment of case law, the evaluation of evidence, even drafting an original opinion. And the majority is even unwilling to wait for a decision from the United States Court of Appeals for the District of Columbia Circuit, before which *BFI* was argued earlier this year.[15] Absent explanation, we are left to speculate why today's decision was carried out with such unfortunate urgency.

III.

The process by which the majority has reached its decision is indefensible—and, as we explain now, the result of that process is no better. The majority errs in failing to adhere to the joint-employer standard adopted in *BFI*. That standard, as we will explain, has a required foundation in the common law of agency that the joint-employer standard resurrected today demonstrably lacks. And unlike the majority's test, the *BFI* standard actually serves the policies of the National Labor Relations Act. First, we will review what *BFI* actually was—a measured, common-law based restoration of earlier Board precedent. Second, we will demonstrate why the *BFI* approach represented the best reading of the common law, and why the majority's approach cannot be reconciled with agency principles. Finally, we will explain why the majority's depiction of *BFI*'s practical consequences is wildly off base and why the majority's approach is contrary to the goals of Federal labor law.

A.

In *BFI*, decided in 2015, the Board sought to address the difficult question of how best to "encourag[e] the practice and procedure of collective bargaining" (in the Act's words) when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer. As a starting point, the *BFI* Board described the specific legal and policy shortcomings in the Board's existing jurisprudence. First, the *BFI* Board noted that the Board's joint-employer standard had become increasingly restrictive over the past 30 years—a change in the law that had not been explained or squared with earlier, more expansive precedent.[16] (In fact, before *BFI*, the Board's joint-employer doctrine had never been clearly or comprehensively explained at all.) Specifically, beginning in the mid-1980's, the Board had implicitly repudiated its traditional reliance on a putative employer's reserved control and indirect control as indicia of joint-employer status; it instead focused exclusive-

[14] *Retro Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70 (2016).

[15] The majority rejects any suggestion that the Board not reach out to decide the joint-employer issue in this case while the U.S. Court of Appeals for the District of Columbia Circuit considers *BFI* on review. But a commitment to reasoned administrative decisionmaking counsels waiting for the court's decision (whatever its resolution) and the guidance it would represent. If the court holds that the standard adopted in *BFI* is permissible under the National Labor Relations Act, then the Board would face a choice between adhering to a judicially-approved, permissible standard (i.e., *BFI*) and adopting an alternative standard (whether the test endorsed by the majority today or some other standard). That the majority chooses not to await the court—and even raises the possibility of pretermitting the court's decision by seeking a remand of *BFI*—is troubling. As with the refusal to issue a notice and invitation to file briefs, proceeding without the benefit of the District of Columbia Circuit's decision suggests a Board uninterested in considering alternative views of the law – even those of a reviewing court.

[16] 362 NLRB No. 186, slip op. at 8–11.

ly on actual control and required the exercise of that control to be direct, immediate, and not "limited and routine."[17] See, e.g. *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d. Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984). Second, the *BFI* Board observed that, over the same period, the diversity of workplace arrangements had expanded significantly, particularly those involving staffing and subcontracting arrangements, or contingent employment.[18] The immediate impetus for *BFI* was thus twofold: putting the Board's joint-employer jurisprudence on solid legal footing, while fulfilling the Board's primary responsibility of "applying the general provisions of the Act to the complexities of industrial life."[19]

The Board's holding in *BFI* comprised several key components. First, the Board returned to its traditional joint-employer test, as endorsed by the Third Circuit in *NLRB v. Browning-Ferris*:

> The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.[20]

"Central to both of these inquiries," the *BFI* Board observed, "is the existence, extent, and object of the putative joint employer's control."[21] Second, the Board reaffirmed that its joint-employer standard was informed by the common-law concept of control, as required by the Act and the Supreme Court's interpretation of the statute.[22] Finally, the Board held that it would no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner.[23] Accordingly, the Board held that the *right* to control, in the common-law sense, was probative of joint-employer status, as was the *exercise* of control, whether direct or indirect.[24]

Properly understood then, *BFI* was essentially a modest and limited holding, with clear constraints built into the majority's formulation of the joint-employer standard. With respect to those constraints, the Board first explained that the existence of a common-law employment relationship was necessary, but not sufficient, to find joint-employer status.[25] Accordingly, even where the common law permitted the Board to find joint employer status in a particular case, the Board would still determine whether it would serve the purposes of the National Labor Relations Act to do so, taking into account the policies of the statute.[26] For instance, the Board explained that, in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.[27] Second, the Board made clear that, as a rule, a joint employer would be required to bargain only with respect to those terms and conditions which it possessed the authority to control.[28] Finally, the Board emphasized that joint-employment inquiries would take into account "all of the incidents" of the parties' relationship, in accordance with Supreme Court precedent.[29]

The Board's decision in *BFI* belies the current majority's repeated and false assertion that *BFI* created a license to find joint-employer status based on only the slightest, most tangential evidence of control.[30] That assertion, of course, echoes much of the *BFI* dissent, which focused on the allegedly far-reaching, novel, and destabilizing nature of the decision. But, again, the standard announced in *BFI* was hardly a radical or unprecedented departure. In fact, it was not even new: it was a common-law based restoration of the Board's traditional standard that, with court approval, had been applied for decades. Indeed, a leading scholar of labor law recognized the decision for what it was: "nothing more than a narrowly crafted opinion that reinstates a prior definition of the joint employment relationship for purposes of collective bargaining under the regulatory umbrella of the National Labor Relations Act (NLRA)."[31]

[17] Id., slip op. at 10–11.

[18] Id., slip op. at 11.

[19] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979), quoting *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963).

[20] 362 NLRB No. 186, slip op. at 15.

[21] Id., slip op. at 2.

[22] Id., slip op. at 15.

[23] Id., slip op. at 15–16. To this end, the Board overruled previous Board decisions to the extent that they were inconsistent with this principle.

[24] Id.

[25] Id., slip op. at 12.

[26] Id.

[27] Id., slip op. at 16.

[28] Id.

[29] Id., citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).

[30] Significantly, the *BFI* Board's joint-employer holding was based on a full assessment of the facts that revealed multiple examples of reserved, direct, and indirect control over employees.

[31] *H.R. 3459, "Protecting Local Business Opportunity Act": Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Education and the Workforce*, 114th Cong. 43- 44 (2015) (testimony of Michael C. Harper, Professor of Law and Barreca Labor Relations Scholar, Boston University School of Law), *available at* https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CHRG (explaining that BFI was a "narrow and limited decision because it is tethered to judicial and Board precedents that existed for several decades prior to the mid-1980s cases"). See also Howard Yale Lederman, *The National Labor Relations Board's Redefined Joint*

B.

The *BFI* Board took care to ensure and explain that the standard it was reestablishing was well grounded in settled common-law agency principles. By contrast, the current majority's standard—the pre-*BFI* standard espoused in *TLI* and *Laerco*, but never before explained with reference to the common law—plainly violates those principles.

To be sure, all Board members seem to agree here that the Board's joint-employer standard must be consistent with the general common-law agency principles that apply to employment-status issues under the National Labor Relations Act.[32] But today, the majority resurrects the pre-*BFI* standard, echoing the *BFI* dissenters' claims that *BFI* represented "a distortion of common law" that was "contrary to the Act" while, in contrast, the old standard "is fully consistent with the common law agency principles that the Board must apply." [Majority op. at 7.] As the Board explained in *BFI*, and we elaborate below, the majority's assertions about the *BFI* standard are demonstrably wrong. Compounding its error, the majority reinstates three control-related restrictions that demonstrably are not mandated by the common law—just the opposite. The Supreme Court has observed that the "Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, [may] render[] its interpretation [of the National Labor Relations Act] unreasonable."[33] This is such a case.

There should be no dispute about what common-law agency principles are or where to look for them. In establishing a Federal rule of agency under those Federal statutes whose terms are interpreted under the common law, the Supreme Court relies on the "general common law of agency, rather than on the law of any particular State."[34] The Court has explained that "[i]n determining whether a hired party is an employee under the general common law of agency," the Court has "traditionally looked for guidance to the Restatement of Agency."[35] The *BFI* Board looked to the Restatement as well—and found no support for the restrictions imposed by the pre-*BFI* joint-employer standard: that an employment relationship requires (1) that the employer's control actually be exercised; (2) that the control be "direct and immediate;" and (3) that the control is not "limited and routine."[36]

Instead of carefully examining controlling principles and prior precedent (as *BFI* did) and formulating a joint-employer standard based on the common law of agency, today's majority recycles tangentially relevant authorities and arguments from the *BFI dissent*, as if this suffices to justify the return to a standard that the Board had never even attempted to explain adequately. The majority's approach—invoking the common law persistently, while baselessly insisting that *BFI* was not faithful to it—is understandable (if unforgivable), because a good-faith examination of agency principles would lead to a result that the majority cannot accept: that its three control-related restrictions cannot withstand careful scrutiny.

1. Right to control

The Board's decision in *BFI* was firmly and explicitly grounded in common-law agency principles, in contrast to the restrictive joint-employer standard that *BFI* replaced. To begin, consider the issue of the putative employer's *right to control* the work. The *BFI* Board, quoting Sections (2) and 220(1) of the *Restatement (Second) of Agency* (1958), explained that "[u]nder common-law principles, the *right* to control is probative of an employment relationship – whether or not that right is exercised" and observed, correctly, that the Board's "joint-employer decisions requiring the *exercise* of control impermissibly ignore this principle."[37]

The majority, conversely, endorses those old decisions under which—in the majority's words (emphasis in original)—"joint-employer status turned on whether two entities *exercised* joint control over essential employment terms, and evidence that an entity had 'reserved' the right to exercise such control would *not* result in joint-employer status." [Majority op. at 2 fn. 3.] These decisions, and the majority's endorsement of them, cannot be reconciled with common law agency principles.

Start with the *Restatement (Second) of Agency*, which the Supreme Court repeatedly has used for a guide. It is beyond dispute that the Restatement recognizes that the

Employer Standard is Justified and Necessary, 96-May Mich. B. J. 30 (2017).

[32] *NLRB v. United Insurance Co. of America*, 390 U.S. at 256. In *United Insurance*, the Court addressed the standard for "differentiating 'employee' from 'independent contractor' as those terms are used in the [National Labor Relations] Act," concluding that Congress intended "to have the Board and the courts apply general agency principles" and the "common law agency test." Id.

[33] *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995), citing *United Insurance*, supra, 390 U.S. at 256.

[34] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (interpreting phrase "work prepared by an employee within the scope of his employment" under Copyright Act of 1976). See also *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322–324 (1992) (reaffirming approach of *Community for Creative Non-Violence* in construing meaning of "employee" under Employee Retirement Income Security Act).

[35] *Reid*, 490 U.S. at 752 fn. 31 (collecting cases). The Court there cited Sec. 220(2) of the Restatement (Second) of Agency (1958). See also *Darden*, 503 U.S. at 324 (citing same Restatement provision).

[36] 362 NLRB No. 186, slip op. at 13–15.

[37] 362 NLRB No. 186, slip op. at 13 (emphasis added).

right to control, and not merely the *exercise* of control, is probative of an employment relationship. Section 220(1) defines a "servant" as a "person employed to perform services . . . who with respect to the physical conduct in the performance of the services is subject to the other's control *or right to control*." The key phrase, of course, is "subject to the other's . . . right to control." If the actual exercise of control were essential, the Restatement would be phrased quite differently. Section 220(2), in turn, identifies as a relevant factor in determining the existence of an employment relationship "the extent of control which, *by the agreement*, the master *may* exercise over the details of the work." Again, the Restatement here refers plainly to reserved authority: the right to control as defined by any agreement covering the relevant work.

In *Reid*, supra, the Supreme Court drew on the Restatement and observed that "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's *right to control* the manner and means by which the product is accomplished."[38] In *Darden*, the Court reiterated its statement in *Reid*.[39] Remarkably, even while insisting that the right to control is *not* probative, the majority cites authority to the contrary, including the Restatement, a modern Supreme Court decision,[40] and an old decision from the Court observing that the "relation of master and servant exists whenever the employer *retains the right* to direct the manner in which the business shall be done."[41]

Well before the National Labor Relations Act was amended by the Taft-Hartley Act in 1947 to incorporate common-law agency principles, it was black-letter law that "[i]n every case which turns upon the nature of the relationship between the employer and the person employed, the essential question to be determined is not whether the former actually exercised control over the details of the work, but whether he had a right to exercise that control."[42] Cases supporting that proposition are far too numerous to cite, but a sample from the Federal courts of appeals, decided in the 1940s, is illustrative.[43] Not surprisingly, then, the Board's first cases to address the common-law distinction between employees and independent contractors after the Taft-Hartley amendments also focused on the putative employer's right to control, not the exercise of that right.[44] Against this backdrop, the Board clearly acted well within the mainstream of the controlling common law when it subsequently gave determinative weight to reserved control in joint-employer cases like *Jewel Tea Co.*[45] and *Value Village*.[46] The

[38] 490 U.S. at 751 (emphasis added).

[39] 503 U.S. at 323.

[40] *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). The issue in *Wells* was whether a shareholder-director of a professional corporation was an employee under the Americans with Disabilities Act. The Court, citing *Reid* and *Darden*, looked to the common law and to the Restatement as reflecting the controlling standard. Id. at 444–448.

[41] *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889) (emphasis added).

[42] *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226 at §7 & fn. 1 (1922).

[43] See, e.g., *Grace v. Magruder*, 148 F.2d 679, 681 (D.C. Cir. 1945) (in distinguishing independent contractors from employees, "it is the right to control, not control or supervision itself, which is most important"), cert. denied, 326 U.S. 720 (1945); *NLRB v. Nu-Car Carriers*, 189 F.2d 756, 757, 759 (3d Cir. 1951) (emphasis added) (applying the "conventional, common law test of the right to control" "[t]he test for determining whether the employer-employee relationship exists is *right to control, not the actual exercise of control*. However, the evidence as to what the parties actually did in this case merely strengthens the conclusion"), enfg. *Nu-Car Carriers*, 88 NLRB 75 (1950), cert. denied, 342 U.S. 919 (1952); *Birmingham v. Bartels*, 157 F.2d 295, 300 (8th Cir. 1946) (citation and internal quotation marks omitted) ("It is not necessary that the employer actually shall direct the manner in which the services are performed, but it is sufficient if he has the right to do so."), revd. on other grounds, 332 U.S. 126 (1947); *Cimorelli v. New York Cent. R. Co.*, 148 F.2d 575, 578 (6th Cir. 1945) ("The fact of actual interference or exercise of control by the employer is not material. If the existence of the right or authority to interfere or control appears, the contractor cannot be independent."); *Williams v. U.S.*, 126 F.2d 129, 132 (7th Cir. 1942) ("The test usually employed for determining the distinction between an independent contractor and an employee is found in the nature and the amount of control reserved by the person for whom the work is done . . . . it is the right and not the exercise of control which is the determining element."), cert. denied, 317 U.S. 655 (1942); *Jones v. Goodson*, 121 F.2d 176, 179 (10th Cir. 1941) ("[I]t is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.").

[44] See, e.g., *Vaughn Bros.*, 94 NLRB 382, 383 (1951) ("Under this [common-law] test an employment relationship exists where the person for whom the services are performed reserves the right, even though not exercised, to control the manner and means by which the result is accomplished."); *Alaska Salmon Industry, Inc. (Seattle Wash)*, 81 NLRB 1335, 1338 (1949) ("[A]n employee relationship . . . is found to exist where the person for whom the services are performed reserves the right (even if not exercised) to control the manner and means by which the result is accomplished."); *San Marcos Telephone Co.*, 81 NLRB 314, 317 (1949) ("Under [common-law] doctrine, an employee relationship, rather than that of an independent contractor, exists where the person for whom the services are performed reserves the right (even if not exercised) to control the manner and means by which the result is accomplished."); *Steinberg and Co.*, 78 NLRB 211, 220–221, 223 (1948) ("Under [common-law] doctrine it has been generally recognized that an employer-employee relationship exists where the person for whom the services are performed reserves the right to control the manner and means by which the result is accomplished."), enf. denied 182 F.2d 850 (5th Cir. 1950).

[45] 162 NLRB 508, 510 (1966) (finding that licensor was joint employer, based on license agreements, and observing that licensor's failure to exercise control was "not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control").

[46] 161 NLRB 603, 607 (1966) ("Since the power to control is present by virtue of the operating agreement, whether or not exercised, we find

Board's later, more restrictive analysis in joint-employer cases did not cite, and could not have cited, any parallel narrowing of common-law doctrine by the courts over the same period. To the contrary, state and Federal courts applying the common-law test in determining the existence of an employment relationship continue to give determinative weight to reserved control.[47]

Before today, the Board had never held—including in the decisions resurrected by the majority—that reliance on a putative joint employer's reserved right of control was improper because it was inconsistent with common-law agency principles. Indeed, the majority-endorsed decisions did not even purport to apply common-law doctrine. Neither in *TLI* or *Laerco*, nor in their progeny, did the Board ever explain the control-related restrictions it imposed on the joint-employer standard as deriving from, much less required by, the common law. The majority here simply chooses to pretend that agency doctrine has been something other than what it ever was. It fails to cite a single decision applying common-law agency principles that holds that a reserved right of control is *not* probative of the existence of an employment relationship. Any such decision, moreover, would be contrary to the Restatement (which guides the Supreme Court, as shown) and to the great weight of precedent.

With respect to the issue of reserved control, then, it is today's decision—and not *BFI*—that violates common-law agency principles.

2. Indirect control

The *BFI* Board observed that in many workplace arrangements involving more than one employing entity, "employees' working conditions are a byproduct of two layers of control," one direct and one indirect.[48] Here, too, the Board's consideration of indirect control was supported by the common law. The Restatement observes that the "control needed to establish the relation of master and servant may be very attenuated"—in other words, *not* "immediate" (as the majority demands).[49] And, the Restatement clearly reflects that control may be *indirect*, as illustrated by the subservant doctrine addressing cases in which one employer's control is or may be exercised indirectly, while a second employer directly controls the employee.[50] The subservant doctrine has been applied by the Federal courts in cases arising under statutes that incorporate the common-law standard for determining employment relationships[51]—including cases under the National Labor Relations Act.[52]

The majority insists that the "comments to Section 220 of the Restatement clarify that the listed factors [considered in determining the existence of an employment relationship] are not concerned with indirect control." But the factors that the majority points to (duration of the relationship, source of the instrumentalities and tools, location of the work) do not directly involve the question of control—in contrast to factor (a), the "extent of control which, by the agreement, the master may exercise over the details of the work"—and nothing in the Restatement comments even hints that indirect control is

it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record").

[47] Again, the cases are too numerous to cite. For a sample, see *Williams v. JaniKing of Philadelphia, Inc.*, 837 F.3d 314, 320–321 (3d Cir. 2016) ("[in] distinguishing between employee and independent contractor status in many different contexts. . . . the right to control, rather than actual control, is the most important of the factors."); *Langfitt v. Federal Marine Terminals, Inc.*, 647 F.3d 1116, 1121 (11th Cir. 2011) (citing *NLRB v. Steinberg*, 182 F.2d 850, 857) (5th Cir. 1950)) ("Significantly, [under the common law test] it is the right and not the actual exercise of control that is the determining element of employment."); *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 172 (Cal. 2014) ("Significantly, what matters under the common law is not how much control a hirer *exercises,* but how much control the hirer retains the *right* to exercise."); *Anthony v. Okie Dokie Inc.*, 976 A.2d 901, 906 (D.C. 2009) ("The determinative factor 'is whether the employer has the *right* to control and direct the servant in the performance of his work and the manner in which the work is to be done . . . and not the actual exercise of control or supervision.'"); *JFC Temps, Inc. v. W.C.A.B. (Lindsay)*, 680 A.2d 862, 864 (Pa. 1996) ("The entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised.").

[48] *BFI*, 362 NLRB No. 186, slip op. at 14–15.

[49] *Restatement (Second) of Agency* §220(1), comment d (1958).

[50] See *Restatement (Second) of Agency*, §5 ("Subagents and Subservants") (1958); Warren A. Seavey, *Subagents and Subservants*, 68 Harv. L. Rev. 658, 669 (1955) (in subservant situation, the "employing servant . . . is in the position of a master to those whom he employs but they are also in the position of servants to the master in charge of the entire enterprise"). Comment e to *Restatement* §5(2) observes that:

> Illustrations of the subservant relation include that between the mine owner and the assistant of a miner who furnishes his own tools and assistants, the latter, however, being subject to the general mine discipline; the relation between the owner of a building and an employee of a janitor; the relation between the employees of a branch manager of a corporation where the branch manager is free to control and pay his assistants, but where all are subject to control by the corporation as to their conduct.

[51] See, e.g., *Schmidt v. Burlington Northern & Santa Fe Railway Co.*, 605 F. 3d 686, 689–690 (9th Cir. 2010) (applying Federal Employers' Liability Act and finding evidence sufficient to establish employment relationship between railroad line and employee of railroad-car maintenance-and-repair company). Cf. *Williamson v. Consolidated Rail Corp*., 926 F.2d 1344, 1350 (3d. Cir. 1991) (observing that use of subservant doctrine is unnecessary where there is evidence of direct control). See generally *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 325 (1974) (recognizing subservant doctrine for purposes of Federal Employers' Liability Act).

[52] *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 818–819 (3d. Cir. 1985) (upholding Board's determination that newspaper was statutory employer of mailroom employees, although second employer operated mailroom), cert. denied, 474 U.S. 1081 (1986).

immaterial or that only directly exercised control can establish an employment relationship.

3. Limited and routine

Common law agency doctrine also fully supported the *BFI* Board's decision not to continue the "limited and routine" control requirement imposed by the *TLI-Laerco* line of cases—to the extent that the requirement is meaningful at all. By contrast, the current majority's decision to resurrect this restriction lacks any apparent basis in the common law.

Certainly there may be instances where evidence of control will be too limited to establish an employment relationship. But the notion that "routine" control is not probative of an employment relationship is nonsensical. If an entity routinely exercises control "over the details of the work,"[53] it is more likely—not less—to be a common-law employer, and the fact that control might be "routine" in the sense of not requiring special skill to exercise is immaterial to the agency inquiry.[54]

In sum, a careful examination of applicable common-law agency principles makes clear that in rejecting the control-related restrictions on joint employment that the Board had imposed without explanation, the *BFI* Board adopted an approach not only consistent with common-law principles, but also fully informed by them. Not surprisingly then, like the dissenters in *BFI*, the majority here does not (and cannot) explain how it is that the common law supposedly requires that control be exercised in a particular way, when it does not require that control be exercised at all.[55] Nor does the majority acknowledge the subservant doctrine reflected in the Restatement, despite its obvious parallels with joint-employer situations arising in Board cases. This failure speaks volumes, especially given the extraordinary length and vehemence of the majority opinion.

Having failed to articulate any common-law based justification for reinstating the pre-*BFI* joint-employer standard, the majority is reduced to effectively embracing that rejected standard and then struggling to find authority that supports resurrecting it. This is not reasoned decisionmaking, even if *BFI* were somehow contrary to the common law of agency (which it emphatically is not).[56] In any case, the authority on which the majority relies, both to attack *BFI* and to support the resurrected joint-employer standard, provides no solid foundation for the majority's position.[57]

As the *BFI* Board explained,[58] the single Supreme Court decision to address the Board's approach to the joint-employer issue, *Boire v. Greyhound Corp.*, [59] dates to an era when the Board took a significantly more inclusive view than today's majority adopts. On review, the Court expressed no disapproval, observing instead that the question presented was "essentially a factual issue" for the Board to determine.[60] The majority—while wrongly neglecting Supreme Court decisions that focus on the Restatement as the source of common-law agency principles—points to no decision by the Court that either

[53] *Restatement (Second) of Agency* §220(2)(a) (1958).

[54] If control of the worker does not require skill, then presumably the worker himself is not skilled – and thus more likely to be an employee, not an independent contractor. See *Restatement (Second) of Agency* §220(2)(d) & comment i (1958). The old joint-employer test's reference to "routine" control as being immaterial may simply be an unconscious echo of the Act's definition of a "supervisor"—supervisors are excluded from statutory coverage, in contrast to "employees"—which refers to certain "authority" as establishing supervisory status, provided that the "exercise of such authority is not of a merely *routine* or clerical nature, but requires the use of independent judgment." Sec. 2(11), 29 U.S.C. §152(11) (emphasis added). This formulation has no bearing on the existence of a common-law employment relationship between a statutory employer and a statutory employee.

[55] The majority doggedly and incorrectly insists that the common law does not permit finding an employer-employee relationship based on the existence of reserved or indirect control absent evidence of direct control. Despite the overwhelming body of judicial opinion to the contrary spanning more than a century—a sampling of which we cite elsewhere in this opinion— the majority claims this body of law somehow fails to "rise[] to the level of the common law." See also *NLRB v. Deaton Inc.*, 502 F.2d 1221, 1224 (5th Cir. 1974) (citing *NLRB v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983, 986 (7th Cir. 1948), enfg. 73 NLRB 1463 (1947), cert. denied 335 U.S. 845 (1948)) ("numerous decisions have stressed that a company's right to control, even if not exercised, makes workers employees."), enfg. 203 NLRB 1099 (1973), cert. denied 422 U.S. 1047 (1975); *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1027 (6th Cir. 1974) (citing *NLRB v. A.S. Abell Co.*, 327 F.2d 1, 4 (4th Cir. 1964)) ("It is the right to control, not its exercise, that determines an employee relationship"), enfg. 200 NLRB 841 (1972), cert. denied 419 U.S. 828 (1974); *Madix v. Hochgreve Brewing Co.*, 143 N.W. 189, 190 (Wis. 1913) (citing *Atlantic Transport Co. v. Coneys*, 82 F. 177, 178 (2d Cir. 1897); *Pickens & Plummer v. Diecker & Bro.*, 21 Ohio St. 212, 215 (1871); *Hardaker v. Idle District Council*, L. R. 1 Q. B. Div. 335, [1895–1899] All ER Rep 311 (judgment by Rigby, LJ)). The majority implies, without explicitly saying, that judicial opinions describing common-law employment relationships outside the specific context of a joint-employer analysis are irrelevant. But surely if the common law controls at all—and we all agree that it does—what controls is the common definition of "employer" and "employee," not some special definition applicable only to joint employers and ascertainable only by the current Board majority. The majority's willful refusal to acknowledge the common law's clear emphasis on the *existence* of control—whether that control is exercised directly, indirectly, or not at all—underscores the fundamentally arbitrary character of its decision today.

[56] Put somewhat differently, reversing *BFI* does not automatically make the pre-*BFI* standard a reasonable substitute for the standard adopted in *BFI*. The resurrected standard must still be defended on its own terms. We have shown, however, that it cannot be reconciled with the common law of agency.

[57] See *BFI*, 362 NLRB No. 186, slip op. at 17 & fn. 94 (addressing decisions cited by the dissenters there and the majority here).

[58] 362 NLRB No. 186, slip op. at 8–9.

[59] 376 U.S. 473 (1964).

[60] Id. at 481.

supports the joint-employer standard resurrected today or undercuts the standard adopted in *BFI*. As noted above, the 1889 *Singer* decision,[61] cited by the majority, actually supports the proposition that reserved authority can establish the control necessary to establish an employment relationship. Supreme Court decisions involving the "loaned-servant" doctrine, also cited by the majority, have no bearing on the joint-employer issue in cases like this one.[62] And the same is true of the cited decision involving the Court's analysis of a secondary-boycott issue under the National Labor Relations Act.[63]

The majority points to no decision, meanwhile, in which the joint-employer standard it resurrects today was upheld by a Federal appellate court in the face of an actual challenge that the standard was inconsistent with common-law agency principles. The majority cites Second Circuit cases as endorsing the requirements that control be "direct and immediate" and not "limited and routine" in affirming Board decisions. But there is no indication in those decisions that the court's view reflected its understanding of common-law agency doctrine or was based on a careful review of that doctrine. Nor was the court's "endorsement" much more than a determination that the Board had adhered to its own precedent in applying "direct and immediate" restrictions and not "limited and routine" restrictions.[64]

Meanwhile, those cited cases in which Federal appellate courts have invoked the common law, and have referred to the lack of direct and immediate control by the putative employer, involve situations far removed from the sort of joint-employer situations confronted by the Board and far more attenuated theories of control than *BFI* advanced. In *Gulino*,[65] a Title VII case, the Second Circuit rejected the argument that New York's state education department was the employer of New York City school teachers, based on the control of curriculum and credentialing. In *Wal-Mart*,[66] the Ninth Circuit rejected the argument that Wal-Mart was the joint employer of its foreign suppliers' employees, based primarily on a code of conduct included in Wal-Mart's supply contracts specifying basic labor standards that those suppliers promised to meet. Neither *Gulino*, nor *Wal-Mart* speaks to the issues involved in this case.[67]

The majority cites various decisions in which, according to the majority, the courts have "implicitly limited their analysis to looking for direct and immediate control." As the *BFI* Board correctly observed, however, "none of these decisions hold, even implicitly, that the existence of indirect control would not be probative of employer status."[68] And, as already explained, the Restatement not only fails to support the proposition that the indirect control is immaterial, it affirmatively addresses situations (i.e., those covered by the subservant

[61] 132 U.S. at 522.

[62] As the majority-cited decision in *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963), makes clear, the "loaned servant" doctrine involves the principle that "when the nominal employer furnishes a third party 'with men to do the work, *and places them under his exclusive control* in the performance of it, (then) those men become pro hac vice the servants of him to whom they are furnished.'" Id. at 6 (emphasis added; citation omitted). In that context, where the issue is which entity is liable for the negligence of the servant, "immediate control and supervision is critical in determining for whom the servants are performing services." Id. In the joint-employer context, of course, neither employing entity has "exclusive control" of the worker; rather, control is shared, and the services are performed for both entities.

[63] The issue in *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951), was whether (as the Board had found) a labor union violated Sec. 8(b)(4)(A) of the Act "by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a certain subcontractor on the project." Id. at 677. The relevant statutory language prohibits a strike "where an object thereof is . . . forcing or requiring . . . any employer or other person … to cease doing business with any other person." Id. at 677 fn. 1 (citing 29 U.S.C. §158(b)(4)(A), current version at 29 U.S.C. §158(b)(4)(i)(B)). The Court agreed with the Board's conclusion that the general contractor and the subcontractor were "doing business" with each other. Id. at 690.

It was in that context that the Court observed that "the fact that the contractor and the subcontractor were engaged on the same construction project, and that the contactor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other," such that the "doing business" element could not be satisfied. Id. at 689–690. The Court's decision in no way implicated the common-law test for an employment relationship or the Board's joint-employer standard. As a general matter, to say that a general contractor and a subcontractor are independent entities (e.g., not a "single employer") is not to say that they can *never* be joint employers, *if* it is proven that the general contractor retains or exercises a sufficient degree of control over the subcontractor's workers to satisfy the common-law test of an employment relationship.

[64] See *Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (rejecting union's assertion that in applying joint-employer standard, Board "articulated a 'new rule that represents a significant departure from settled law' and is inconsistent with agency precedent").

[65] *Gulino v. N.Y. State Education Dept.*, 460 F.3d 361 (2d Cir. 2006), cert. denied 554 U.S. 917 (2008).

[66] *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680 (9th Cir. 2009).

[67] *Wal-Mart* involved claims filed under California state law and removed to Federal court based on diversity jurisdiction. Id. at 680. In cases—unlike *Wal-Mart*—that *do* raise a plausible claim that a common-law employment relationship exists, California state courts have long adhered to the generally accepted proposition that the retained right to control, not the exercise of control, is dispositive. See, e.g., *Ayala v. Antelope Valley Newspapers, Inc.*, above; *Hillen v. Industrial Accident Commission*, 250 P. 570, 581 (Cal. 1926) (citations omitted) ("It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent.").

[68] *BFI*, supra, 362 NLRB No. 186, slip op. at 17 fn. 94 (emphasis omitted).

doctrine) in which indirect control provides the basis for finding an employment relationship.

Finally, as did the *BFI* dissenters, the majority insists that *BFI*—despite everything that the Board there plainly said and carefully explained—is not predicated on common-law agency principles at all, but rather is somehow secretly based on the "economic realities" test reflected in the Supreme Court's *Hearst* decision,[69] and subsequently rejected by Congress in the 1947 Taft-Hartley Amendments to the Act. As stated in *BFI*,[70] the majority's assertion is recklessly false at a minimum—and it confirms that its decision today is anything but an exercise in reasoned decisionmaking.

C.

The majority's incorrect assertion that *BFI* was improperly based on "economic realities" is particularly ironic, given that the majority devotes the rest of its decision to deploring the supposed real-world consequences of the *BFI* test. Here, the majority presents a nearly interminable parade of horribles and hypotheticals. In the majority's account, *BFI*, among other things, severely destabilized bargaining relationships, imposed "unprecedented bargaining obligations on multiple entities in a wide variety of business relationships," created pervasive uncertainty as to when bargaining obligations would accrue, and extended coverage of the National Labor Relations Act to small businesses that were not previously subject to Board jurisdiction. This is nonsense. And, as we have already made clear, the majority presents no evidence that any of these scenarios have come to pass since *BFI* was decided. At the same time, the majority's refusal to solicit briefing—the most logical way to collect feedback about *BFI* from interested parties—makes the majority's irresponsibly speculative assessments impossible to take seriously. The majority's decision is long on rhetoric, but short on reality.

At center, many of the majority's fears—that bargaining would become unreasonably fragmented and complex, for example—evince a fundamental discomfort with the joint-employer concept itself, which has been recognized by the Board and the courts for decades. The hypotheticals presented by the majority merely exaggerate the challenges that theoretically could arise if and when multiple employers (who had voluntarily entered into business relationships with each other) were required to engage in collective bargaining. As the *BFI* Board correctly noted, employers and unions have long managed to navigate these types of challenges, and none of the disasters forecast here have materialized.[71] At an even deeper level, the majority's opinion reveals a troubling lack of commitment to the institution of collective bargaining—the mechanism at the heart of the statute and one that has proven sufficiently flexible to deal with the obstacles posed by multiparty negotiations.

Tellingly absent from the majority's endless recitation of potential hardships for employers is any mention of the concern that should undoubtedly be foremost: ensuring that the statutory promise of collective bargaining extends to as many workplaces and working arrangements as the Act contemplates. The majority argues again and again that the pre-*BFI* standard it resurrects is necessary to ensure predictable results. But, for the reasons discussed, that supposed predictability comes at the expense of the goals of the statute. Indeed, over the course of its lengthy decision, the majority makes no genuine effort to address the challenging issue that *BFI* presented: how best to "encourag[e] the practice and procedure of collective bargaining" when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer. The predictability that the majority achieves here is a one-sided assurance to employers that, by retaining a nominal distance from the supervision of workers, they can exert control and still avoid statutory bargaining obligations.[72]

IV.

The issue of joint employment under the National Labor Relations Act is undeniably important. The Board should address this issue with care and with the full benefit of public participation. And it did so—in *BFI*. It is no overstatement to say that the Board's decision in *BFI* was the most fully explicated joint-employer decision in the history of the Board. The standard it adopted was firmly grounded in the common law, while tailored to the aims of the National Labor Relations Act. Today's reflexive reversal of *BFI*, in contrast, reflects neither a grasp of common-law agency principles, nor a commitment to the policy of Federal labor law. The majority has simply failed to engage in reasoned decision-making, in favor of reaching a desired result as quickly as possible. Because we cannot join such an unfortunate exercise, we dissent.

[69] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

[70] 362 NLRB No. 186, slip op. at 17.

[71] 362 NLRB No. 186, slip op. at 20.

[72] Contrary to the majority, *BFI* did not modify any other precedent under the Act, including the secondary boycott doctrine, or change the way that the Board's joint-employer doctrine interacted with other rules and restrictions under the Act. 362 NLRB No. 186, slip op. at 20 fn. 120. Finally, and contrary to the majority's assertion, *BFI* did not "fundamentally alter[] the law" governing various legal arrangements between entities, including lessor-lessee, parent-subsidiary, franchisor-franchisee, and contractor-consumer relationships. Id. None of those scenarios were before the Board in *BFI.*

Dated, Washington, D.C. December 14, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for participating in a strike or engaging in any other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Dakota Upshaw, Cole Hinkhouse, Austin Hovendon, Alezzandro Campbell, David Newcomb, Ron Senteras and Nicole Pinnick full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make these employees whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate them for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of these employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

HY-BRAND INDUSTRIAL CONTRACTORS, LTD. AND BRANDT CONSTRUCTION CO., SINGLE AND JOINT EMPLOYERS

The Board's decision can be found at www.nlrb.gov/case/25-CA-163189 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Fredric Roberson and *Patricia McGruder, Esqs.,* for the General Counsel.

James Faul, Esq. (Hartnett, Gladney Hetterman, L.L.C.), for the Charging Parties.

Stanley E. Niew and *David A. Courtright, Esqs. (Law Offices of Stanley E. Niew, P.C.),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Davenport, Iowa from July 12 to 14, 2016. The complaint alleged that Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) and Brandt Construction Co. (Brandt) are single and/or joint employers (collectively called the Respondent), and terminated Dakota Upshaw, Cole Hinkhouse, Austin Hovendon, Alezzandro Campbell, David Newcomb, Ron Senteras, and Nicole Pinnick in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the witnesses' demeanors, and after considering post-hearing briefs, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

At all material times, Hy-Brand, a corporation located in Muscatine, Iowa, has performed construction services as a general contractor. Annually, it provided services valued in excess of $50,000 to clientele located outside of Iowa. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Brandt, a corporation located in Milan, Illinois, has performed construction services as a highway builder. Annually, it provided services valued in excess of $50,000 to clientele located outside of Illinois. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Brandt performs public works and other construction projects.[2] It is a family business, which is owned by Charles Brandt and his 3 sons, Terrance, Todd, and Trent. It employs 140 employees, who act as laborers, operators, ironworkers, carpenters, masons and drivers. Terrance Brandt (i.e. the eldest son) oversees all major decisions, and supervises Human Resources Director Lisa Coyne, Safety Director Anna Copeland, and Comptroller Kelly Bisbee.

Hy-Brand erects steel warehouses and other structures, and employs about 10 ironworkers, carpenters, and masons. These workers are supervised by General Manager Randy Sackville and Superintendent Mike Thurman. Sackville reports to Terrence Brandt.

B. Comparing Operations

1. Management and Ownership

The following chart is descriptive:

Individual	Brandt	Hy-Brand
Charles W. Brandt	President (50% interest)	Same role and interest
Terrence L. Brandt	Vice-President (25.5% interest)	Same role and interest
Todd L. Brandt	Secretary(12.5% interest)	Same role and interest
Trent L. Brandt	Treasurer (12% interest)	Same role and interest

(GC Exh. 2.)

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

[2] Its projects include: asphalt and concrete paving of interstate roads and municipal airports; new and rehabilitative structural concrete work; water line and sewer construction; and railway construction.

2. Labor Policy and Control

a. Workplace Rules

Both entities maintain these identical workplace rules: Equal Employment Opportunity (EEO policy); Workplace Harassment (harassment policy); Family and Medical Leave Act (FMLA policy); and Drug Free Workplace (the Drug policy). (GC Exhs. 3–10.) These policies were drafted by Terrence Brandt and Brandt's Coyne. Brandt and Hy-Brand employees are also subject to common safety and mobile phone rules. Hy-Brand has its own safety manual (GC Exh. 11), which was drafted by Hy-Brand's Sackville and Brandt's Copeland.

b. Payroll and Benefit Administration

Brandt's Coyne processes payroll and direct deposit, handles health, life, and dental insurance benefits, and maintains W-2 and tax records for both entities. Terrence and Todd Brandt authorize direct deposit releases for both entities.

c. Annual Meeting

Hy-Brand and Brandt employees jointly attend an annual meeting, which is led by the Brandt family. (GC Exhs. 12–14.) Common employment, benefit, safety, labor relations, and training policies are reviewed at this meeting. (GC Exh. 13.)

d. Hiring and Firing

Terrence Brandt makes firing decisions for both entities. (GC Exhs. 16, 18) (Hy-Brand); (GC Exh. 20) (Brandt). Hy-Brand's Sackville independently makes hiring decisions, although he is managed by Terrence Brandt, who is empowered to reverse his decisions.

e. Common Benefits

Employees of both entities receive identical 401K, health, dental and life insurance benefits, and are covered under the same workers compensation policy. Hy-Brand reimburses Brandt for such benefits. (R. Exh. 32.)

f. Safety Servicing

Brandt's Copeland provides safety services to Hy-Brand. She visits jobsites, provides training, and cites deficiencies. (R. Exh. 36; Tr. 327.)

3. Interrelated Operations

a. Personnel

Certain operations are interrelated. Hy-Brand's Upshaw testified that he worked alongside Brandt employees on several projects, where he dually reported to Brandt and Hy-Brand managers. He recalled sharing a scissor lift with Brandt's Adam Warren on a GSTC warehouse project in 2015,[3] and related that Brandt and Hy-Brand workers performed the same work (i.e., rigging and steel erection) at this jobsite. Hy-Brand's Hinkhouse and Hovendon, and Brandt's Senteras, provided similar testimony regarding the GSTC jobsite.[4] Senteras added that he also worked with Hy-Brand personnel at the Marquis

[3] All dates are in 2015, unless otherwise indicated.

[4] Hy-Brand's Newcomb indicated that, at the GTSC job, Brandt operated a crane, while Hy-Brand worked the roof.

Energy plant and John Deere warehouse jobsites. No examples were offered of employees transferring between entities.

b. Equipment

Hy-Brand's Upshaw recalled using Brandt equipment (e.g., a telehandler and skid steer). Hy-Brand rented large-scale equipment and rolling stock (e.g., cranes) from Brandt.

c. Services and Billing

Hy-Brand performs construction services for Brandt, and then bills Brandt for such services. (R. Exh. 21.) The opposite is also true. (R. Exh. 22; GC Exhs. 26–32.)

C. Discharges

1. Upshaw, Hovendon, Campbell and Hinkhouse

On July 8, Upshaw, Hovendon, and Campbell submitted letters to Hy-Brand announcing their decision to strike over unsafe working conditions, and substandard wages and benefits; they also asked to meet over their grievances.[5] (GC Exhs. 15, 17.) Their letters did not describe an intention to resign. Thereafter, they began their strike and left the jobsite.[6] Although Hinkhouse did not submit a strike letter, he simultaneously joined the strike and stated his intention to strike to his supervisor, Larry Wendt.[7] Upshaw, Hovendon, Campbell, and Hinkhouse, who each possessed strong demeanors and were highly consistent, testified that their sole intent was to strike, i.e. not resign.[8] On July 10, Terrence Brandt notified the employees that they had quit, and terminated their employment. (GC Exhs. 16, 18, 23; R. Exh. 8A.)

2. Newcomb

Newcomb testified about the safety concerns that he had, while he was employed at Hy-Brand (e.g., the absence of a safety spotter and insufficient safety gear). He stated that, consequently, he told Hy-Brand supervisor Andrew Campbell that he was joining the strike on July 23. He also credibly denied resigning. On July 30, Terrence Brandt advised him that he had quit. (GC Exh. 24.)

3. Senteras

On October 12, Senteras joined the strike. (GC Exh. 19.) He credibly stated that he did not resign. On October 12, Terrence Brandt advised him that he had resigned. (GC Exh. 20.)

4. Pinnick

On November 18, Pinnick joined the strike. (GC Exh. 21.) On November 19, she received a similar discharge letter. (GC Exh. 22.) In a November 25 letter, she advised Terence Brandt that she did not resign, was striking, and requested a meeting. (R. Exh. 9A.) He did not reply.

5. Terrence Brandt's Contentions

Terrence Brandt averred that the workers were not fired, were not classified as resignations, and he knew that it was unlawful to fire strikers. (Tr. 517.) He said that only Hinkhouse was fired because he never tendered a strike letter.

6. Credibility Resolution

Terrence Brandt's claim that the strikers were neither fired nor handled as resignations is incredible. This testimony is irreparably contradicted by his letters, which repeatedly described their resignations. His letters omitted any discussion of the strike or their connected employment rights. I find, accordingly, that he fired the strikers, and falsely stated that they had quit.

III. ANALYSIS

A. Single Employer Status[9]

Brandt and Hy-Brand are a single employer. In *Cimato Brothers, Inc.*, 352 NLRB 797, 798 (2008), the Board held:

> In determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. No single factor is controlling, and not all need be present. Rather, single-employer status ultimately depends on all the circumstances. It is characterized by the absence of an arm's-length relationship among seemingly independent companies.

This inquiry assesses whether nominally "separate corporations are not what they appear to be, [and] that in truth they are but divisions or departments of a single enterprise." *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960). Centralized control of labor relations is, generally, considered to be the most important factor in this analysis. See, e.g., *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1337 (1988). "[C]ommon ownership, while significant, is not determinative in the absence of centralized control over labor relations." *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001).

1. Common Ownership and Management

Common ownership and management favors single employer status. Both entities have the same owners in identical percentages, with common presidents, vice-presidents, secretaries, treasurers, safety officers, and human resources officials.

2. Central Control of Labor Relations

This factor heavily supports single employer status. First, Hy-Brand lacks a human resources department and delegates this key labor relations function to Brandt, which administers payroll, tax, and direct deposit matters for both entities. Second, both entities are subject to identical EEO, harassment, FMLA, drug, safety and cell phone polices. Third, both entities offer identical health, life, dental, and retirement benefits, which are administered by Brandt. All workers are covered under the same workers compensation insurance policy. Fourth, all employees attend an annual meeting, which addresses several common employment issues. Additionally, Terrence Brandt makes firing decisions at both entities, and Copeland

[5] Campbell's strike letter was not produced.

[6] The strike was unaccompanied by picketing; it solely involved withheld labor.

[7] Wendt was never called to rebut such testimony, which has been credited.

[8] Such testimony was consistent with their strike letters and other undisputed record evidence.

[9] This allegation is listed under complaint par. 3.

provides safety consulting services to both entities.

3. Interrelationship of Operations

This factor favors single employer status. Employees of both entities work together on certain projects, and periodically share equipment. Brandt rents equipment and machinery to Hy-Brand, and receives reimbursement. Hy-Brand performs construction services for Brandt, and vice versa, and then bills the other entity. No evidence was presented, which established that these arrangements were arms-length deals involving a market rate of compensation.

4.Conclusion

Respondent is a single employer. All factors were satisfied; there is a clear lack of an arm's-length relationship.

B. Joint-Employer Status[10]

Respondent is also a joint employer, on the basis of much of the same evidence that prompted a single employer finding. In *BFI/Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 15 (2015), the Board described the following joint employer test:

> The Board may find that two entities …are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. [citations and footnotes omitted].

The Board does not require actual control over essential terms and conditions of employment; it is sufficient that the alleged joint employer has the authority to do so.[11] Terms of employment such as hiring, firing, disciplining, supervising and directing employees as well as wages and hours are examined to determine whether such authority exists. Other examples include dictating the number of workers, controlling scheduling, seniority and overtime, assigning work, and determining the manner and method of work. Id.; see also, *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 5 (2016).

Respondent is a joint employer; employees' essential terms and conditions of employment are jointly governed. Both entities share payroll, tax, overtime, timesheets, and direct deposit duties. They administer identical workplace policies and rules covering EEO, harassment, FMLA, drug, safety, workers compensation, and cell phone issues. They share in the administration of several identical benefits, including health, life, dental, and retirement benefits. Day-to-day safety issues are jointly administered by Copeland, who services both Brandt and Hy-Brand. Joint governance is reinforced at annual meetings. Finally, VP Terrence Brandt makes firing decisions at both entities and is unequivocally empowered to make all key personnel decisions, even though he delegates many ministerial tasks to lower level supervision.

[10] This allegation is listed under complaint par. 4.

[11] Thus, the Board overruled prior precedent to the extent those cases held that mere authority to control employees' terms and conditions of employment was an inadequate indicia of joint employer status unless the authority was exercised directly and immediately and not in a limited and routine manner. *BFI*, supra, slip op. at 16.

C. Discharge Allegations[12]

Respondent unlawfully discharged Upshaw, Hinkhouse, Hovendon, Campbell, Newcomb, Senteras, and Pinnick (collectively called the strikers). They were fired for engaging in a work stoppage, and were intentionally mislabeled as resignations. Respondent failed to show that they abandoned their employment before their firings.

1. Legal Precedent

In *Atlantic Scaffolding Co.*, 356 NLRB 835 (2011), the Board held as follows:

> [W]hen an employer asserts that employees were discharged because they would not return to work after commencing a work stoppage, the assertion suggests that the discharge was for engaging in the work stoppage itself.… In order to show that employees truly abandoned their jobs, an employer must present "unequivocal evidence of intent to permanently sever [the] employment relationship." ….
>
> Where …employees are terminated for engaging in a protected concerted work stoppage, *Wright Line* is not the appropriate analysis, as the existence of the 8(a)(1) violation does not turn on the employer's motive…. Rather, when the conduct for which the employees are discharged constitutes protected concerted activity, "the only issue is whether [that] conduct lost the protection of the Act because … [it] crossed over the line separating protected and unprotected activity."

Id. at 838 (citations omitted).

2. Analysis

The strikers engaged in protected activity, when they conducted a work stoppage regarding safety, wages and benefits. The essence of their work stoppage was repeatedly communicated in their strike letters.[13] (GC Exhs. 15, 17, 19, 21, 22.)

Respondent did not show that they had quit, as asserted in their termination letters. The strikers credibly testified that they did not resign, and such testimony was consistent with their strike letters. Respondent, as a result, fell vastly short of proving that they "unequivocal[ly] . . . intend[ed] to permanently sever [their] employment relationship." *L.B. & B. Associates, Inc.*, 346 NLRB 1025, 1029 (2006), enfd. 232 Fed. Appx. 270 (4th Cir. 2007). Respondent similarly failed to show that the strikers lost the protection of the Act by engaging in misconduct. See *Atlantic Scaffolding Co.*, supra 356 NLRB at 836. There was no showing in this regard.

In sum, the record clearly shows that the Respondent fired the strikers because they participated in a protected, concerted work stoppage. Any claims that they had quit or lost the Act's protection was a sham. Their discharges, therefore, violated the Act.

CONCLUSIONS OF LAW

1. Brandt and Hy-Brand, which collectively comprise the Respondent, are single and joint employers, and are jointly and severally liable for the violations found herein.

[12] These allegations are listed under complaint pars. 6 and 7.

[13] Knowledge of the strike was also conceded by Terrence Brandt.

2. Brandt and Hy-Brand are individually, and as single and joint employers, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent violated Section 8(a)(1) by discharging Upshaw, Hinkhouse, Hovendon, Campbell, Newcomb, Senteras, and Pinnick for participating in a work stoppage.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act's policies. It must offer the strikers full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. It must also make them whole for any loss of earnings and other benefits suffered as a result of their discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), it shall compensate them for their search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. It is further ordered to compensate the strikers for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). It is must also remove from its files any references to these unlawful discharges, and within 3 days thereafter to notify the strikers in writing that this has been done and that their discipline will not be used against them in any way. It shall also post the attached notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[14]

ORDER

Respondent, a single and joint employer, which consists, inter alia, of Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) of Muscatine, Iowa, and Brandt Construction Co. (Brandt) of Milan, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Firing or otherwise discriminating against its employees for participating in a work stoppage or engaging in any other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Upshaw, Hinkhouse, Hovendon, Campbell, Newcomb, Senteras and Pinnick full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make these employees whole for loss of earnings and other benefits suffered due to the discrimination against them, as set forth in this decision's remedy section.

(c) Compensate these employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to these unlawful discharges, and within 3 days thereafter, notify the strikers in writing that this has been done and that their discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by Region 25, post at its Milan, Illinois and Muscatine, Iowa facilities copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since July 10, 2015.

g. Within 21 days after service by the Region, file with the

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C. November 14, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against you for participating in a strike or engaging in any other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL within 14 days from the date of the Board's Order, offer Upshaw, Hinkhouse, Hovendon, Campbell, Newcomb, Senteras, and Pinnick full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make these employees whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate them for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for these employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of these employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

HY-BRAND INDUSTRIAL CONTRACTORS, LTD. AND BRANDT CONSTRUCTION CO., SINGLE AND JOINT EMPLOYERS

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-163189 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

(c) Applicability

This AD applies to all Zodiac Seats France, 536-Series Cabin Attendant Seats, part number (P/N) 53600, all dash numbers, all serial numbers. These appliances are installed on, but not limited to, Avions de transport regional (ATR) 42 and ATR 72 airplanes of U.S. registry.

(d) Subject

Joint Aircraft System Component (JASC) Code 2500, Cabin Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by corrosion found on the seat structure or on clamps of the Zodiac Seats France 536-Series Cabin Attendant Seats. We are issuing this AD to prevent failure of these seats. The unsafe condition, if not addressed, could result in failure of the seat occupied by the cabin attendant, and possible injury to the seat occupant.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Required Actions

(1) Within 14 months after the first installation of the seat on an aircraft, or within three months after the effective date of this AD, whichever occurs later, remove the seat from the aircraft and perform a detailed visual inspection in accordance with the Accomplishment Instructions, Paragraph 2.B., of Zodiac Seats France Service Bulletin (SB) No. 536–25–002, Revision 3, dated September 30, 2016. If the date of the first installation of a seat on an airplane is unknown, use the date of manufacture of the seat (which can be found on the ID placard of the seat) to determine when the inspection must be accomplished.

(2) Within three months after the inspection required by paragraph (g)(1) of this AD, and, thereafter, at intervals not to exceed three months, perform a detailed visual inspection in accordance with the Accomplishment Instructions, Paragraphs 2.A. and 2.B., of Zodiac Seats France SB No. 536–25–002, Revision 3, dated September 30, 2016.

(3) If corrosion or other damage is found, before further flight or before reinstallation of the seat on an aircraft, as applicable, repair the seat in accordance with the Accomplishment Instructions, Paragraphs 2.B. and 2.C., of Zodiac Seats France SB No. 536–25–002, Revision 3, dated September 30, 2016.

(4) Temporarily stowing and securing a damaged attendant seat in a retracted position to prevent occupancy, in accordance with the provisions and limitations applicable Master Minimum Equipment List item, is an acceptable alternative method to defer compliance with the requirements of paragraph (g)(3) of this AD.

(h) Installation Prohibition

After the effective date of this AD, do not install an affected Zodiac Seats France 536-Series Cabin Attendant Seat on any aircraft, unless having accumulated more than 14 months since first installation on any aircraft, provided that before installation, it has passed an inspection in accordance with the Accomplishment Instructions, Paragraph 2.B., of Zodiac Seats France SB No. 536–25–002, Revision 3, dated September 30, 2016.

(i) Credit for Previous Actions

You may take credit for actions required by paragraph (g) of this AD if you performed these actions before the effective date of this AD using Zodiac Seats France SB No. 536–25–002, Revision 2, dated August 29, 2016.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Boston ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO Branch, send it to the attention of the person identified in paragraph (k)(1) of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(k) Related Information

(1) For more information about this AD, contact Dorie Resnik, Aerospace Engineer, Boston ACO Branch, FAA, 1200 District Avenue, Burlington, MA, 01803; phone: 781–238–7693; fax: 781–238–7199; email: *dorie.resnik@faa.gov*.

(2) Refer to European Aviation Safety Agency AD 2016–0167, dated August 17, 2016, for more information. You may examine the EASA AD in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2017–0839.

(3) For service information identified in this AD, contact Zodiac Service Europe, 61, rue Pierre Curie, 78 373 Plaisir, France; phone: +33 (0)1 61 34 19 58; email: *zs.aog@zodiacaerospace.com;* website: *https://www.zodiacaerospace.com/en/zodiac-aerospace-services/contacts.* You may view this referenced service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA, 01803. For information on the availability of this material at the FAA, call 781–238–7759.

Issued in Burlington, Massachusetts, on September 5, 2018.

Robert J. Ganley,

Manager, Engine and Propeller Standards Branch, Aircraft Certification Service.

[FR Doc. 2018–19797 Filed 9–13–18; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Chapter I

RIN 3142–AA13

The Standard for Determining Joint-Employer Status

AGENCY: National Labor Relations Board.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: In order to more effectively enforce the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes a regulation establishing the standard for determining whether two employers, as defined in Section 2(2) of the Act, are a joint employer of a group of employees under the NLRA. The Board believes that this rulemaking will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability, one of the principal purposes of the Act. Under the proposed regulation, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. More specifically, to be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine.

DATES: Comments regarding this proposed rule must be received by the Board on or before November 13, 2018. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 20, 2018. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted.

ADDRESSES:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov.*

Delivery—Comments should be sent by mail or hand delivery to: Roxanne Rothschild, Associate Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001. Because of security

precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. It is not necessary to send comments if they have been filed electronically with *regulations.gov.* If you send comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273–2917 (this is not a toll-free number). Individuals with hearing impairments may call 1–866–315–6572 (TTY/TDD).

Only comments submitted through *http://www.regulations.gov,* hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at *http://www.regulations.gov* and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post, as soon as practicable, all comments received on *http://www.regulations.gov* without making any changes to the comments, including any personal information provided. The website *http://www.regulations.gov* is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board requests that comments include full citations or internet links to any authority relied upon. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and email addresses in their comments, as such submitted information will become viewable by the public via the *http://www.regulations.gov* website. It is the commenter's responsibility to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's email address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Roxanne Rothschild, Associate Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001, (202) 273–2917 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: Whether one business is the joint employer of another business's employees is one of the most important issues in labor law today. There are myriad relationships between employers and their business partners, and the degree to which particular business relationships impact employees' essential terms and conditions of employment varies widely.

A determination by the Board regarding whether two separate businesses constitute a ''joint employer'' as to a group of employees has significant consequences for the businesses, unions, and employees alike. When the Board finds a joint-employer relationship, it may compel the joint employer to bargain in good faith with a Board-certified or voluntarily recognized bargaining representative of the jointly-employed workers. Additionally, each joint employer may be found jointly and severally liable for unfair labor practices committed by the other. And a finding of joint-employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful.

The last three years have seen much volatility in the Board's law governing joint-employer relationships. As detailed below, in August 2015, a divided Board overruled longstanding precedent and substantially relaxed the evidentiary requirements for finding a joint-employer relationship. *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015) (*Browning-Ferris*), petition for review docketed *Browning-Ferris Indus. of Cal.* v. *NLRB,* No. 16–1028 (D.C. Cir. filed Jan. 20, 2016). Then, in December 2017, a different Board majority restored the prior, more stringent standard. In February 2018, the Board vacated its December 2017 decision, effectively changing the law back again to the relaxed standard of *Browning-Ferris.* A petition for review challenging *Browning-Ferris*'s adoption of the relaxed standard as beyond the Board's statutory authority is currently pending in the United States Court of Appeals for the District of Columbia Circuit. In light of the continuing uncertainty in the labor-management community created by these adjudicatory variations in defining the appropriate joint-employer standard under the Act, and for the reasons explained below, the Board proposes to address the issue through the rulemaking procedure.

I. Background

Under Section 2(2) of the Act, ''the term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 *et seq.*], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.'' Under Section 2(3) of the Act, ''the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter [of the Act] explicitly states otherwise . . . .''

Section 7 of the Act grants employees ''the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .'' Section 8(a)(1) of the Act makes it an unfair labor practice for an employer ''to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7],'' and Section 8(a)(5) of the Act makes it an unfair labor practice for an employer ''to refuse to bargain collectively with the representatives of *his* employees . . . .'' (emphasis added).

The Act does not contain the term ''joint employer,'' much less define it, but the Board and reviewing courts have over the years addressed situations where the working conditions of a group of employees are affected by two separate companies engaged in a business relationship. *Boire* v. *Greyhound Corp.,* 376 U.S. 473 (1964) (holding that Board's determination that bus company possessed ''sufficient control over the work'' of its cleaning contractor's employees to be considered a joint employer was not reviewable in federal district court); *Indianapolis Newspapers, Inc.,* 83 NLRB 407, 408–409 (1949) (finding that two newspaper businesses, Star and INI, were not joint employers, despite their integration, because ''there [wa]s no indication that Star, by virtue of such integration, t[ook] an active part in the formulation or application of the labor policy, or exercise[d] any immediate control over the operation, of INI'').

When distinguishing between an ''employee'' under Section 2(3) of the Act and an ''independent contractor'' excluded from the Act's protection, the Supreme Court has explained that the Board is bound by common-law principles, focusing on the control exercised by one employer over a person performing work for it. *NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256 (1968); see also *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318, 322–323 (1992)

(''[W]hen Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine.'') (citations omitted). Similarly, it is clear that the Board's joint-employer standard, which necessarily implicates the same focus on employer control, must be consistent with the common law agency doctrine.

The Development of the Joint-Employment Doctrine Under the NLRA

Under the Act, there has been a longstanding consensus regarding the general formulation of the Board's joint-employer standard: Two employers are a joint employer if they share or codetermine those matters governing the employees' essential terms and conditions of employment. See *CNN America, Inc.,* 361 NLRB 439, 441, 469 (2014), enf. denied in part 865 F.3d 740 (D.C. Cir. 2017); *Southern California Gas Co.,* 302 NLRB 456, 461 (1991). The general formulation derives from language in *Greyhound Corp.,* 153 NLRB 1488, 1495 (1965), enfd. 368 F.2d 778 (1966), and was endorsed in *NLRB* v. *Browning-Ferris Industries,* 691 F.2d 1117, 1122–1123 (3d Cir. 1982), where the United States Court of Appeals for the Third Circuit carefully explained the differences between the Board's joint-employer and single-employer doctrines, which had sometimes been confused.[1]

At certain points in its history, the Board has discussed the relevance of an employer's direct control over the essential employment conditions of another company's employees, as compared with its indirect control or influence, in determining whether joint-employer status has been established. For example, in *Floyd Epperson,* 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974), the Board found that a dairy company (United) was the joint employer of truck drivers supplied to it by an independent trucking firm (Floyd Epperson) based on evidence of both United's direct control and indirect control over the working conditions of Epperson's drivers. The Board relied on ''all the circumstances'' of the case, including the fact that United dictated the specific routes that Epperson's drivers were required to take when transporting its goods, ''generally supervise[d]'' Epperson's drivers, and had authority to modify their work schedules. Id. at 23. The Board also relied in part on United's ''indirect control'' over the drivers' wages and discipline.[2] Id. Importantly, in *Floyd Epperson* and like cases, the Board was not called upon to decide, and did not assert, that a business's indirect influence over another company's workers' essential working conditions, standing alone, could establish a joint-employer relationship.[3]

In fact, more recently, the Board, with court approval, has made clear that ''the essential element'' in a joint-employer analysis ''is whether a putative joint employer's control over employment matters is direct and immediate.'' *Airborne Express,* 338 NLRB 597, 597 fn. 1 (2002) (citing *TLI, Inc.,* 271 NLRB 798, 798–799 (1984), enfd. mem. sub nom. *General Teamsters Local Union No. 326* v. *NLRB,* 772 F.2d 894 (3d Cir. 1985)); see also *NLRB* v. *CNN America, Inc.,* 865 F.3d 740, 748–751 (D.C. Cir. 2017) (finding that Board erred by failing to adhere to the Board's ''direct and immediate control'' standard); *SEIU Local 32BJ* v. *NLRB,* 647 F.3d 435, 442–443 (2d Cir. 2011) ('''An essential element' of any joint employer determination is 'sufficient evidence of immediate control over the employees.' '') (quoting *Clinton's Ditch Co-op Co.* v. *NLRB,* 778 F.2d 132, 138 (2d Cir. 1985)); *Summit Express, Inc.,* 350 NLRB 592, 592 fn. 3 (2007) (finding that the General Counsel failed to prove direct and immediate control and therefore dismissing joint-employer allegation); *Laerco Transportation,* 269 NLRB 324 (1984) (dismissing joint-employer allegation where user employer's supervision of supplied employees was limited and routine).

Accordingly, for at least 30 years (from no later than 1984 to 2015), evidence of indirect control was typically insufficient to prove that one company was the joint employer of another business's workers. Even direct and immediate supervision of another's employees was insufficient to establish joint-employer status where such supervision was ''limited and routine.'' *Flagstaff Medical Center, Inc.,* 357 NLRB 659, 667 (2011); *AM Property Holding Corp.,* 350 NLRB 998, 1001 (2007), enfd. in relevant part sub nom. *SEIU, Local 32 BJ* v. *NLRB,* 647 F.3d 435 (2d Cir. 2011); *G. Wes Ltd. Co.,* 309 NLRB 225, 226 (1992). The Board generally found supervision to be limited and routine where a supervisor's instructions consisted mostly of directing another business's employees what work to perform, or where and when to perform the work, but not how to perform it. *Flagstaff Medical Center,* 357 NLRB at 667.

The Board's treatment of a company's contractually reserved authority over an independent company's employees also evolved over the years. In the 1960s, the Board found that a contractual reservation of authority, standing alone, could establish a joint-employer relationship even where that reserved authority had never been exercised. For example, in *Jewel Tea Co.,* 162 NLRB 508, 510 (1966), the Board found that a department store (the licensor) was a joint employer of the employees of two independent companies licensed to operate specific departments of its store. The text of the license agreements between the store and the departments provided, inter alia, that ''employees shall be subject to the general

[1] As the Third Circuit explained, a ''single employer'' relationship exists where two nominally separate employers are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a ''single employer.'' The question in the ''single employer'' situation, then, is whether two nominally independent enterprises constitute, in reality, only *one integrated enterprise.* In answering that question, the Board examines four factors: (1) Functional integration of the operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. In contrast, the ''joint employer'' concept assumes that the two companies are indeed independent employers, and the four-factor standard is inapposite. Rather, as stated above, the Board has analyzed whether the two separate employers share or codetermine essential terms and conditions of employment.

[2] In *Floyd Epperson,* the Board found that United had indirect control over the drivers' wages because wage increases to Epperson's drivers came from raises given by United to Epperson, a sole proprietor. The Board found that United had indirect influence over discipline because Epperson replaced a certain driver on a route after United complained that the driver had been constantly late. 202 NLRB at 23.

[3] See also *Sun-Maid Growers of California,* 239 NLRB 346 (1978) (finding that food-processing company was joint employer of maintenance electricians supplied by a subcontractor where company actually directed electricians by making specific assignments to individual electricians and determined which of those assignments took precedence when all could not be timely completed; the Board also relied on indirect impact on other terms), enfd. 618 F.2d 56 (9th Cir. 1980); *Hamburg Industries, Inc.,* 193 NLRB 67, 67 (1971) (finding remanufacturer of railroad cars was a joint employer of labor force supplied by subcontractor where remanufacturer used subcontractor's supervisors as conduit to convey work instructions while ''constantly check[ing] the *performance* of the workers and the quality of the work'' and where remanufacturer also indirectly affected employees' other terms) (emphasis added). The Board's decision in *Clayton B. Metcalf,* 223 NLRB 642 (1976), appears to be the closest the Board has come to finding a joint-employment relationship in the absence of some exercise of direct and immediate control over essential terms. There, the Board found that a mine operator did not exercise direct supervisory authority over the employees of a subcontractor engaged to remove ''overburden'' atop coal seams. However, the Board found that the subcontractor's entire operation in removing the overburden, as well as other collateral duties performed by it, depended entirely on the mine operator's site plan, and, ''[a]s a result, [the mine operator] exercised considerable control over *the manner and means* by which [the subcontractor] performed its operations.'' Id. at 644 (emphasis added).

supervision of the licensor,'' that the licensee ''shall at all times conform to a uniform store policy with reference to wages, hours and terms, and conditions of employment for all sales and stock personnel,'' that the licensor shall approve employees hired by the licensee, and that the licensor ''may request discharge and the licensee will immediately comply with such request.'' The Board found it ''clear beyond doubt'' that the license agreements gave the store the ''power to control effectively the hire, discharge, wages, hours, terms, and other conditions of employment'' of the other two companies' employees. According to the Board, ''[t]hat the licensor has not exercised such power is not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control, and we find such right of control adequately established by the facts set out above.'' Id.; see also *Thriftown, Inc.,* 161 NLRB 603, 607 (1966) (''Since the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record.'').

However, even during the same period, not all contractual reservations of authority were found sufficient to establish a joint-employer relationship. For example, in *Hy-Chem Constructors, Inc.,* 169 NLRB 274 (1968), the Board found that a petrochemical manufacturer was not a joint employer of its construction subcontractor's employees even though their cost-plus agreement reserved to the manufacturer a right to approve wage increases and overtime hours and the right to require the subcontractor to remove any employee whom the manufacturer deemed undesirable. The Board found that the first two reservations of authority ''are consistent with the [manufacturer's] right to police reimbursable expenses under its cost-plus contract and do not warrant the conclusion that [the manufacturer] has thereby forged an employment relationship, joint or otherwise, with the [subcontractor's] employees.'' Id. at 276. Additionally, the Board found the manufacturer's ''yet unexercised prerogative to remove an undesirable . . . employee'' did not establish a joint-employment relationship. Id.

Over time, the Board shifted position, without expressly overruling precedent, and held that joint-employer status could not be established by the mere existence of a clause in a business contract reserving to one company authority over its business partner's employees absent evidence that such authority had ever been exercised. For example, in *AM Property Holding Corp.,* the Board found that a ''contractual provision giving [a property owner] the right to approve [its cleaning contractor's] hires, standing alone, is insufficient to show the existence of a joint employer relationship.'' 350 NLRB at 1000. The Board explained that ''[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties.'' Id. (citing *TLI,* 271 NLRB at 798–799). Because the record in *AM Property* failed to show that the property owner had ever actually participated in the cleaning contractor's hiring decisions, the Board rejected the General Counsel's contention that the two employers constituted a joint employer. See also *Flagstaff Medical Center,* 357 NLRB at 667 (finding that business contract's reservation of hospital's right to require its subcontractor to ''hire, discharge, or discipline'' any of the subcontractor's employees did not establish a joint-employer relationship absent evidence that the hospital had ever actually exercised such authority); *TLI,* 271 NLRB at 798–799 (finding that paper company's actual practice of only limited and routine supervision of leased drivers did not establish a joint-employer relationship despite broad contractual reservation of authority that paper company ''will solely and exclusively be responsible for maintaining operational control, direction and supervision'' over the leased drivers).

The law governing joint-employer relationships changed significantly in August 2015. At that time, a divided Board overruled the then-extant precedent described above and substantially relaxed the requirements for proving a joint-employer relationship. Specifically, a Board majority explained that it would no longer require proof that a putative joint employer has exercised any ''direct and immediate'' control over the essential working conditions of another company's workers. *Browning-Ferris,* 362 NLRB No. 186, slip op. at 2, 13–16. The majority in *Browning-Ferris* explained that, under its new standard, a company could be deemed a joint employer even if its ''control'' over the essential working conditions of another business's employees was indirect, limited and routine, or contractually reserved but never exercised. Id., slip op. at 15–16.

The *Browning-Ferris* majority agreed with the core of the Board's long-recognized joint-employer standard: whether two separate employers ''share'' or ''codetermine'' those matters governing the essential terms and conditions of employment. Elaborating on the core ''share'' or ''codetermine'' standard, the *Browning-Ferris* majority noted that, in some cases, two companies may engage in genuinely shared decision-making by conferring or collaborating directly to set an essential term or condition of employment. Alternatively, each of the two companies ''may exercise comprehensive authority over different terms and conditions of employment.'' Id., slip op. at 15 fn. 80.

While agreeing with the core standard, the *Browning-Ferris* majority believed that the Board's joint-employer precedents had become ''increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships.'' Id., slip op. at 1. The *Browning-Ferris* majority's expressed aim was ''to put the Board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of 'encouraging the practice and procedure of collective-bargaining.' '' Id., slip op. at 2 (quoting 29 U.S.C. 151).

According to the *Browning-Ferris* majority, during the period before *Laerco* and *TLI* were decided in 1984, the Board had ''typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status.'' Id., slip op. at 9 (emphasis in original). Also during that time, ''the Board gave weight to a putative joint employer's 'indirect' exercise of control over workers' terms and conditions of employment.'' Id. (citing *Floyd Epperson,* 202 NLRB at 23).

The *Browning-Ferris* majority viewed Board precedent, starting with *Laerco* and *TLI,* that expressly required proof of some exercise of direct and immediate control as having unjustifiably and without explanation departed from the Board's pre-1984 precedent. Specifically, the *Browning-Ferris* majority asserted that, in cases such as *Laerco, TLI, AM Property,* and *Airborne Express,* the Board had ''implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status.'' Id., slip op. at 10. Further, the *Browning-Ferris* majority viewed those decisions as ''refus[ing] to assign *any significance* to contractual language expressly giving a putative employer the power to dictate

workers' terms and conditions of employment.'' Id. (emphasis added).

In short, the *Browning-Ferris* majority viewed Board precedent between 1984 and 2015 as having unreasonably ''narrowed'' the Board's joint-employer standard precisely when temporary and contingent employment relationships were on the rise. Id., slip op. at 11. In its view, under changing patterns of industrial life, a proper joint-employer standard should not be any ''narrower than statutorily required.'' Id. According to the *Browning-Ferris* majority, the requirement of exercise of direct and immediate control that is not limited and routine ''is not, in fact, compelled by the common law—and, indeed, seems inconsistent with common-law principles.'' Id., slip op. at 13. The *Browning-Ferris* majority viewed the common-law concept of the ''right to control'' the manner and means of a worker's job performance—used to distinguish a servant (*i.e.,* employee) from an independent contractor—as precluding, or at least counseling against, any requirement of exercise of direct and immediate control in the joint-employment context. Id.

Browning-Ferris reflects a belief that it is wise, and consistent with the common law, to include in the collective-bargaining process an employer's independent business partner that has an indirect or potential impact on the employees' essential terms and conditions of employment, even where the business partner has not itself actually established those essential employment terms or collaborated with the undisputed employer in setting them. The *Browning-Ferris* majority believed that requiring such a business partner to take a seat at the negotiating table and to bargain over the terms that it indirectly impacts (or could, in the future, impact under a contractual reservation) best implements the right of employees under Section 7 of the Act to bargain collectively through representatives of their own choosing. The *Browning-Ferris* majority conceded that deciding joint-employer allegations under its stated standard would not always be an easy task, id., slip op. at 12, but implicitly concluded that the benefit of bringing all possible employer parties to the bargaining table justified its new standard.

In dissent, two members argued that the majority's new relaxed joint-employer standard was contrary to the common law and unwise as a matter of policy. In particular, the *Browning-Ferris* dissenters argued that by permitting a joint-employer finding based solely on indirect impact, the majority had effectively resurrected intertwined theories of ''economic realities'' and ''statutory purpose'' endorsed by the Supreme Court in *NLRB* v. *Hearst Publications,* 322 U.S. 111 (1944), but rejected by Congress soon thereafter. In *Hearst,* the Supreme Court went beyond common-law principles and broadly interpreted the Act's definition of ''employee'' with reference to workers' economic dependency on a putative employer in light of the Act's goal of minimizing industrial strife. In response, Congress enacted the Taft-Hartley Amendments of 1947, excluding ''independent contractors'' from the Act's definition of ''employee'' and making clear that common-law principles control.

Additionally, the *Browning-Ferris* dissenters disagreed with the majority's understanding of the common law of joint-employment relationships. The dissenters argued that the ''right to control'' in the joint-employment context requires some exercise of direct and immediate control.

Then, accepting for argument's sake that the common law does not preclude the relaxed standard of *Browning-Ferris,* the dissenters found that practical considerations counseled against its adoption. They found the relaxed standard to be impermissibly vague and asserted that the majority had failed to provide adequate guidance regarding how much indirect or reserved authority might be sufficient to establish a joint-employment relationship. Additionally, the dissenters believed that the majority's test would ''actually foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the 'employer' side.'' Id., slip op. at 23.

The *Browning-Ferris* dissenters also complained that the relaxed standard made it difficult not only to correctly identify joint-employer relationships but also to determine the bargaining obligations of each employer within such relationships. Under the relaxed standard, an employer is only required to bargain over subjects that it controls (even if the control is merely indirect). The dissenters expressed concern that disputes would arise between unions and joint employers, and even between the two employers comprising the joint employer, over which subjects each employer-party must bargain. Further, the dissenters found such fragmented bargaining to be impractical because subjects of bargaining are not easily severable, and the give-and-take of bargaining frequently requires reciprocal movement on multiple proposals to ultimately reach a comprehensive bargaining agreement. Finally, the dissenters were suspicious about the implications of *Browning-Ferris* for identifying an appropriate bargaining unit in cases involving a single supplier employer that contracts with multiple user employers and with potential subversion of the Act's protection of neutral employers from secondary economic pressure exerted by labor unions. Accordingly, the dissenters would have adhered to Board precedent as reflected in cases such as *Laerco, TLI,* and *Airborne Express.*

Recent Developments

In December 2017, after a change in the Board's composition and while *Browning-Ferris* was pending on appeal in the D.C. Circuit, a new Board majority overruled *Browning-Ferris* and restored the preexisting standard that required proof that a joint employer actually exercised direct and immediate control in a manner that was neither limited nor routine. *Hy-Brand Industrial Contractors, Ltd.,* 365 NLRB No. 156 (2017). Soon thereafter, the charging parties in *Hy-Brand* filed a motion for reconsideration. The Board granted that motion and vacated its earlier decision for reasons unrelated to the substance of the joint-employer issue, effectively returning the law to the relaxed joint-employer standard adopted in *Browning-Ferris. Hy-Brand,* 366 NLRB No. 26 (2018). Subsequently, the Board in *Hy-Brand* denied the respondents' motion for reconsideration and issued a decision finding it unnecessary to address the joint-employer issue in that case because, in any event, the two respondents constituted a single employer under Board precedent and were therefore jointly and severally liable for each other's unfair labor practices. 366 NLRB No. 93 (2018); 366 NLRB No. 94 (2018). As stated above, a petition for review of the Board's *Browning-Ferris* decision remains pending in the court of appeals.

II. Validity and Desirability of Rulemaking; Impact Upon Pending Cases

Section 6 of the Act, 29 U.S.C. 156, provides, ''The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act, 5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act.'' The Board interprets Section 6 as

authorizing the proposed rule and invites comments on this issue.[4]

Although the Board historically has made most substantive policy determinations through case adjudication, the Board has, with Supreme Court approval, engaged in substantive rulemaking. *American Hospital Assn.* v. *NLRB,* 499 U.S. 606 (1991) (upholding Board's rulemaking on appropriate bargaining units in the healthcare industry); see also *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) (''[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.'').

The Board finds that establishing the joint-employer standard in rulemaking is desirable for several reasons. First, given the recent oscillation on the joint-employer standard, the wide variety of business relationships that it may affect (*e.g.,* user-supplier, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, lessor-lessee, parent-subsidiary, and contractor-consumer), and the wide-ranging import of a joint-employer determination for the affected parties, the Board finds that it would be well served by public comment on the issue. Interested persons with knowledge of these widely varying relationships can have input on our proposed change through the convenient comment process; participation is not limited, as in the adjudicatory setting, to legal briefs filed by the parties and amici. Second, using the rulemaking procedure enables the Board to clarify what constitutes the actual exercise of substantial direct and immediate control by use of hypothetical scenarios, some examples of which are set forth below, apart from the facts of a particular case that might come before the Board for adjudication. In this way, rulemaking will provide unions and employers greater ''certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice,'' as the Supreme Court has instructed the Board to do. *First National Maintenance Corp.* v. *NLRB,* 452 U.S. 666, 679 (1981). Third, by establishing the joint-employer standard in the Board's Rules & Regulations, employers, unions, and employees will be able to plan their affairs free of the uncertainty that the legal regime may change on a moment's notice (and possibly retroactively) through the adjudication process. *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 777 (1969) (''The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming.'') (Douglas, J., dissenting).

[4] As previously stated, Secs. 2(2) and 2(3) of the Act define, respectively, ''employer'' and ''employee,'' but neither these provisions nor any others in the Act define ''joint employer.''

III. The Proposed Rule

Under the proposed rule, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

The proposed rule reflects the Board's preliminary view, subject to potential revision in response to comments, that the Act's purposes of promoting collective bargaining and minimizing industrial strife are best served by a joint-employer doctrine that imposes bargaining obligations on putative joint employers that have actually played an active role in establishing essential terms and conditions of employment. Stated alternatively, the Board's initial view is that the Act's purposes would not be furthered by drawing into an employer's collective-bargaining relationship, or exposing to joint-and-several liability, a business partner of the employer that does not actively participate in decisions setting unit employees' wages, benefits, and other essential terms and conditions of employment. The Board's preliminary belief is that, absent a requirement of proof of some ''direct and immediate'' control to find a joint-employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers. The Board is inclined toward the conclusion that the proposed rule will provide greater clarity to joint-employer determinations without leaving out parties necessary to meaningful collective bargaining.

The proposed rule is consistent with the common law of joint-employer relationships. The Board's requirement of exercise of direct and immediate control, as reflected in cases such as *Airborne Express,* supra, has been met with judicial approval . See, *e.g., SEIU Local 32BJ* v. *NLRB,* 647 F.3d at 442–443.

The Board believes that the proposed rule is likewise consistent with Supreme Court precedent and that of lower courts, which have recognized that contracting enterprises often have some influence over the work performed by each other's workers without destroying their status as independent employers. For example, in *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 689–690 (1951), the Supreme Court held that a contractor's exercise of supervision over a subcontractor's work ''did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other,'' emphasizing that ''[t]he business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.''

The requirement of ''direct and immediate'' control seems to reflect a commonsense understanding that two contracting enterprises will, of necessity, have some impact on each other's operations and respective employees. As explained in *Southern California Gas Co.,* 302 NLRB at 461:

> 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. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees. Generally a joint employer finding is justified where it has been demonstrated that the employer-customer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

Notably, the Board is presently inclined to find, consistent with prior Board cases, that even a putative joint employer's ''direct and immediate'' control over employment terms may not give rise to a joint-employer relationship where that control is too limited in scope. See, *e.g., Flagstaff Medical Center,* 357 NLRB at 667 (dismissing joint-employer allegation even though putative joint employer interviewed applicants and made hiring recommendations, evaluated employees consistent with criteria established by its supplier employer, and disciplined supplied employees for unscheduled absences); *Lee Hospital,* 300 NLRB 947, 948–950 (1990) (putative joint employer's ''limited hiring and disciplinary authority'' found insufficient to establish that it ''shares or codetermines those matters governing the essential terms and conditions of employment *to an extent* that it may be found to be a joint employer'') (emphasis added). Cases like *Flagstaff Medical Center* and *Lee Hospital* are

consistent with the Board's present inclination to find that a putative joint employer must exercise substantial direct and immediate control before it is appropriate to impose joint and several liability on the putative joint employer and to compel it to sit at the bargaining table and bargain in good faith with the bargaining representative of its business partner's employees.[5]

Accordingly, under the proposed rule, there must exist evidence of direct and immediate control before a joint-employer relationship can be found. Moreover, it will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer).

The proposed rule contains several examples, set forth below, to help clarify what constitutes direct and immediate control over essential terms and conditions of employment. These examples are intended to be illustrative and not as setting the outer parameters of the joint-employer doctrine established in the proposed rule.

The Board seeks comment on all aspects of its proposed rule. In particular, the Board seeks input from employees, unions, and employers regarding their experience in workplaces where multiple employers have some authority over the workplace. This may include (1) experiences with labor disputes and how the extent of control possessed or exercised by the employers affected those disputes and their resolution; (2) experiences organizing and representing such workplaces for the purpose of collective bargaining and how the extent of control possessed or exercised by the employers affected organizing and representational activities; and (3) experiences managing such workplaces, including how legal requirements affect business practices and contractual arrangements. What benefits to business practices and collective bargaining do interested parties believe might result from finalization of the proposed rule? What, if any, harms? Additionally, the Board seeks comments regarding the current state of the common law on joint-employment relationships. Does the common law dictate the approach of the proposed rule or of *Browning-Ferris*? Does the common law leave room for either approach? Do the examples set forth in the proposed rule provide useful guidance and suggest proper outcomes? What further examples, if any, would furnish additional useful guidance? As stated above, comments regarding this proposed rule must be received by the Board on or before November 13, 2018. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 20, 2018.

Our dissenting colleague, who was in the majority in *Browning-Ferris* and in the dissent in the first *Hy-Brand* decision, would adhere to the relaxed standard of *Browning-Ferris* and refrain from rulemaking. She expresses many of the same points made in furtherance of her position in those cases. We have stated our preliminary view that the Act's policy of promoting collective bargaining to avoid labor strife and its impact on commerce is not best effectuated by inserting into a collective-bargaining relationship a third party that does not actively participate in decisions establishing unit employees' wages, benefits, and other essential terms and conditions of employment. We look forward to receiving and reviewing the public's comments and, afterward, considering these issues afresh with the good-faith participation of all members of the Board.

VI. Dissenting View of Member Lauren McFerran

Today, the majority resumes the effort to overrule the Board's 2015 joint-employer decision in *Browning-Ferris,* which remains pending on review in the United States Court of Appeals for the District of Columbia Circuit.[6] An initial attempt to overrule *Browning-Ferris* via adjudication—in a case where the issue was neither raised nor briefed by the parties[7]—failed when the participation of a Board member who was disqualified required that the decision be vacated.[8] Now, the Board majority, expressing new support for the value of public participation, proposes to codify the same standard endorsed in *Hy-Brand I*[9] via a different route: rulemaking rather than adjudication. The majority tacitly acknowledges that the predictable result of the proposed rule would be fewer joint employer findings.[10]

The Board has recently made or proposed sweeping changes to labor law in adjudications going well beyond the facts of the cases at hand and addressing issues that might arguably have been better suited to consideration via rulemaking.[11] Here, in contrast, the majority has chosen to proceed by rulemaking, if belatedly.[12] Reasonable minds might question why the majority is pursuing rulemaking here and now.[13]

[5] Even the *Browning-Ferris* majority acknowledged that ''it is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.'' 362 NLRB No. 186, slip op. at 16.

[6] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015), petition for review docketed *Browning-Ferris Indus. of Cal.* v. *NLRB,* No. 16–1028 (D.C. Cir filed Jan. 20, 2016).

[7] See *Hy-Brand Industrial Contractors, Ltd (Hy-Brand I),* 365 NLRB No. 156 (2017). In a departure from what had become established practice, the majority there also declined to issue a public notice seeking amicus briefing before attempting to reverse precedent. *See id.* at 38–40 (dissenting opinion).

[8] See *Hy-Brand Industrial Contractors, Ltd.,* 366 NLRB No. 26 (2018) (*Hy-Brand II*), granting reconsideration in part and vacating order reported at 365 NLRB No. 156 (2017) (*Hy-Brand I*). See also *Hy-Brand Industrial Contractors, Ltd.,* 366 NLRB No. 63 (2018) (*Hy-Brand III*) (order denying motion for reconsideration of order vacating).

[9] *Hy-Brand I* was decided by a majority comprising then-Chairman Miscimarra, Member Kaplan, and Member Emanuel (who was later determined to have been disqualified). The majority today, proposing what is essentially an identical standard in rulemaking, comprises Chairman Ring, Member Kaplan, and Member Emanuel. Thus, a majority of today's majority has considered and endorsed the proposed outcome of this rulemaking process before.

[10] The majority observes that under the proposed rule, ''fewer employers may be alleged as joint employers, resulting in lower costs to some small entities.''

[11] See *The Boeing Company,* 365 NLRB No.154, slip op. at 33–34 (2017) (dissenting opinion); *Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel & Casino,* Case 28–CA–060841, Notice & Invitation to File Briefs (Aug. 1, 2018) (dissenting opinion), available at *www.nlrb.gov.*

[12] After *Hy-Brand I* was vacated (in *Hy-Brand II*) and after reconsideration of the order vacating was denied (in *Hy-Brand III*), the Chairman announced that the Board was contemplating rulemaking on the joint-employer standard, as reflected in a submission to the Unified Agenda of Federal Regulatory and Deregulatory Actions. See NLRB Press Release, *NLRB Considering Rulemaking to Address Joint-Employer Standard* (May 9, 2018), available at *www.nlrb.gov.* That step did not reflect my participation or that of then-Member Pearce, as the press release discloses.

[13] *See, e.g.,* May 29, 2018 Letter from Senators Warren, Gillibrand, and Sanders to Chairman Ring, available at *https://www.warren.senate.gov/imo/media/doc/2018.05.29%20Letter%20to%20NLRB%20on%20Joint%20Employer%20Rulemaking.pdf* (expressing concern that the rulemaking effort could be an attempt ''to evade the ethical restrictions that apply to adjudications''). Chairman Ring has provided assurances ''that any notice-and-comment rulemaking undertaken by the NLRB will never be for the purpose of evading ethical restrictions.'' See June 5, 2018 Letter from Chairman Ring to Senators Warren, Gillibrand, and Sanders at 1, available at *https://www.nlrb.gov/news-outreach/news-story/nlrb-chairman-provides-response-senators-regarding-joint-employer-inquiry.*

Notably, under the Standards of Ethical Conduct for Executive Branch Employees, rulemaking implicates different recusal considerations than does case adjudication, because a rulemaking of general scope is not regarded as a ''particular matter'' for purposes of determining disqualifying financial interests. See 5 CFR 2635.402. By

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It is common knowledge that the Board's limited resources are severely taxed by undertaking a rulemaking process.[14] But whatever the rationale, and whatever process the Board may use, the fact remains that there is no good reason to revisit *Browning-Ferris,* much less to propose replacing its joint-employer standard with a test that fails the threshold test of consistency with the common law and that defies the stated goal of the National Labor Relations Act: ''encouraging the practice and procedure of collective bargaining.'' [15]

A. The Majority's Justification for Revisiting Browning-Ferris Is Inadequate.

Since August 2015, the joint-employer standard announced in *Browning-Ferris* has been controlling Board law. It remains so today, and the majority properly acknowledges as much.[16] After laying out the checkered history of the effort to overrule *Browning-Ferris,* the majority points to the ''continuing uncertainty in the labor-management community created by these adjudicatory variations in defining the appropriate joint-employer standard'' as the principal reason for proposing to codify not *Browning-Ferris* (existing Board law) but the pre-*Browning-Ferris* standard resurrected in *Hy-Brand I.* The majority cites no evidence of ''continuing uncertainty in the labor-management community,'' [17] and to the extent such uncertainty exists, it has only itself to blame for the series of missteps undertaken in seeking to hurriedly reverse *BFI.*

More to the point, the best way to end uncertainty over the Board's joint-employer standard would be to adhere to existing law, not to upend it. The majority's decision to pursue rulemaking ensures the Board's standard will remain in flux as the Board develops a final rule and as that rule, in all likelihood, is challenged in the federal courts. And, of course, any final rule could not be given retroactive effect, a point that distinguishes rulemaking from adjudication.[18] Thus, cases arising before a final rule is issued will nonetheless have to be decided under the *Browning-Ferris* standard.

The majority's choice here is especially puzzling given that *Browning-Ferris* remains under review in the District of Columbia Circuit. When the court's decision issues, it will give the Board relevant judicial guidance on the contours of a permissible joint-employer standard under the Act. The Board would no doubt benefit from that guidance, even if it was not required to follow it. Of course, if the majority's final rule could not be reconciled with the District of Columbia Circuit's *Browning-Ferris* decision, it presumably would not survive judicial review in that court.[19] The Board majority thus proceeds at its own risk in essentially treating *Browning-Ferris* as a dead letter.

B. The Proposed Rule Is Inconsistent With Both the Common Law and the Goals of the NLRA

No court has held that *Browning-Ferris* does not reflect a reasonable interpretation of the National Labor Relations Act. Nor does the majority today assert that its own, proposed joint-employer standard is somehow compelled by the Act. As the majority acknowledges, the ''Act does not contain the term 'joint employer,' much less define it.'' The majority also acknowledges, as it must, that ''it is clear that the Board's joint-employer standard . . . must be consistent with common law agency doctrine.'' The joint-employer standard adopted in *Browning-Ferris,* of course, is predicated on common-law agency doctrine, as the decision explains in careful detail.[20] As the *Browning-Ferris* Board observed:

> In determining whether a putative joint employer meets [the] standard, the initial inquiry is *whether there is a common-law employment relationship with the employees in question.* If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

362 NLRB No. 186, slip op. at 2 (emphasis added).[21]

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pursuing rulemaking rather than adjudication with respect to the joint-employer standard, the Board is perhaps able to avoid what might otherwise be difficult ethical issues, as the *Hy-Brand* case illustrates. See generally Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking,* 80 Columbia L. Rev. 990 (1980); Administrative Conference of the United States, *Decisional Officials' Participation in Rulemaking Proceedings,* Recommendation 80–4 (1980).

[14] See Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals,* 5 FIU L. Rev. 437, 457 (2010) (explaining that rulemaking at the Board would consume significant resources, especially ''given that the NLRB is banned from hiring economic analysts'').

What is striking here is that the Board majority has opted to use this resource-intensive process to address an issue that has never been addressed through rulemaking before, and that the majority observes is implicated in *fewer than one percent* of Board filings and (by the majority's own analysis) directly affects only ''.028% of all 5.9 million business firms.'' The majority observes that the number of employers affected is ''very small.'' In contrast for example, consider the standards governing employer rules and handbooks at issue in *Boeing, supra,* which presumably affect the overwhelming number of private-sector employers in the country, but which the Board majority chose to establish by adjudication and without public participation.

[15] National Labor Relations Act, Sec. 1, 29 U.S.C. 151.

[16] As the Board recently observed in *Hy-Brand II,* because the original *Hy-Brand* decision and order was vacated, the ''overruling of the *Browning-Ferris* decision is of no force or effect.'' 366 NLRB No. 26, slip op. at 1. The majority here states that ''[i]n February 2018, the Board vacated its December 2017 decision [in *Hy-Brand*], effectively changing the law back again to the relaxed standard of *Browning-Ferris.*''

[17] To the extent that the majority is relying on anything other than anecdotal evidence of this alleged uncertainty, it is required to let the public know the evidentiary basis of its conclusion. ''It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, to a critical degree, is known only to the agency.'' *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F.2d 375, 393 (D.C. Cir. 1973).

[18] See generally *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204 (1988). There is no indication in Sec. 6 of the National Labor Relations Act that Congress intended to give the Board authority to promulgate retroactive rules. Sec. 6 authorizes the Board ''to make . . . in the manner prescribed by [the Administrative Procedure Act] . . . such rules and regulations as may be necessary to carry out the provisions of'' the National Labor Relations Act. 29 U.S.C. 156. The Administrative Procedure Act defines a ''rule'' as an ''agency statement of general or particular applicability and *future effect.* . . .'' 5 U.S.C. 551(4) (emphasis added). *See also* See June 5, 2018 Letter from Chairman Ring to Senators Warren, Gillibrand, and Sanders at 2, available at *https://www.nlrb.gov/news-outreach/news-story/nlrb-chairman-provides-response-senators-regarding-joint-employer-inquiry* (acknowledging that ''final rules issued through notice-and-comment rulemaking are required by law to apply prospectively only'').

[19] If the District of Columbia Circuit were to uphold the Board's *Browning-Ferris* standard (in whole or in part) as compelled by—or at least consistent with—the Act, but the Board, through rulemaking, rejected *Browning-Ferris* (in whole or in part) as *not* permitted by the Act, then the Board's final rule would be premised on a legal error. Moreover, insofar as the court might hold the *Browning-Ferris* standard to be permitted by the Act, then the reasons the Board gave for *not* adopting that standard would have to be consistent with the court's understanding of statutory policy and common-law agency doctrine insofar as they govern the joint-employer standard.

[20] 362 NLRB No. 186, slip op. at 12–17. Notably, the *Browning-Ferris* Board rejected a broader revision of the joint-employer standard advocated by the General Counsel because it might have suggested ''that the applicable inquiry is based on 'industrial realities' rather than the common law.'' 362 NLRB No. 186, slip op. at 13 fn. 68. The General Counsel had urged the Board to find joint-employer status:

> where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationships, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful collective bargaining could not occur in its absence.

Id.

[21] This approach, as the *Browning-Ferris* Board explained, was consistent with the Board's traditional joint-employer doctrine, as it existed

In contrast, the Board's prior standard (which the majority revives today) had never been justified in terms of common-law agency doctrine. For the 31 years between 1984 (when the Board, in two decisions, narrowed the traditional joint-employer standard) [22] and 2015 (when *Browning-Ferris* was decided), the Board's approach to joint-employer cases was not only unexplained, but also inexplicable with reference to the principles that must inform the Board's decision-making. Common-law agency doctrine simply does not require the narrow, pre-*Browning-Ferris* standard to which the majority now seeks to return. Nor is the ''practice and procedure of collective bargaining'' encouraged by adopting a standard that reduces opportunities for collective bargaining and effectively shortens the reach of the Act.

Thus, it is not surprising that two labor-law scholars have endorsed *Browning-Ferris* as ''the better approach,'' ''predicated on common law principles'' and ''consistent with the goals of employment law, especially in the context of a changing economy.'' [23] *Browning-Ferris,* the scholars observe, ''was not a radical departure from past precedent;'' rather, despite ''reject[ing] limitations added to the joint employer concept from a few cases decided in the 1980s,'' it was ''consistent with earlier precedents.'' [24] The crux of the *Browning-Ferris* decision, and the current majority's disagreement with it, is whether the joint-employer standard should require: (1) That a joint employer ''not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority;'' (2) that the employer's control ''must be exercised directly and immediately;'' and (3) that control not be ''limited and routine.'' [25] The *Browning-Ferris* Board carefully explained that none of these limiting requirements is consistent with common-law agency doctrine, as the *Restatement (Second) of Agency* makes clear.[26] It is the *Restatement* on which the Supreme Court has relied in determining the existence of a common-law employment relationship for purposes of the National Labor Relations Act.[27] The Court, in turn, has observed that the ''Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, [may] render[] its interpretation [of the Act] unreasonable.'' [28]

Hy-Brand I impermissibly departed from the common law of agency as the dissent there demonstrated,[29] and the majority's proposed rule does so again. Remarkably, the majority makes no serious effort here to refute the detailed analysis of common-law agency doctrine advanced in *Browning-Ferris* and in the *Hy-Brand I* dissent. The majority fails to confront the *Restatement (Second) of Agency,* for example, or the many decisions cited in *Browning-Ferris* (and then in the *Hy-Brand I* dissent) that reveal that at common law, the existence of an employment relationship does *not* require that the putative employer's control be (1) exercised (rather than reserved); (2) direct and immediate (rather than indirect, as through an intermediary); *and* not (3) limited and routine (rather than involving routine supervision of at least some details of the work). None of these restrictions, much less all three imposed together, is consistent with common-law agency doctrine.[30]

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before 1984. 362 NLRB No. 186, slip op. at 8–11. In tracing the evolution of the Board's joint-employer standard, the *Browning-Ferris* Board observed that:

> Three aspects of that development seem clear. First, the Board's approach has been consistent with the common-law concept of control, within the framework of the National Labor Relations Act. Second, before the current joint-employer standard was adopted, the Board (with judicial approval) generally took a broader approach to the concept of control. Third, the Board has never offered a clear and comprehensive explanation for its joint-employer standard, either when it adopted the current restrictive test or in the decades before.

Id. at 8.

[22] *TLI, Inc.,* 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation,* 269 NLRB 324 (1984).

[23] Charlotte Garden & Joseph E. Slater, *Comments on Restatement of Employment Law (Third), Chapter 1,* 21 Employee Rights & Employment Policy Journal 265, 276 (2017).

[24] Id. at 276–277.

Id.

[25] *Browning-Ferris,* supra, 362 NLRB No. 186, slip op. at 2 (emphasis in original).

[26] Id. at 13–14. See also *Hy-Brand I,* supra, 365 NLRB No. 156, slip op. at 42–45 (dissenting opinion).

As to whether authority must be exercised, Section 220(1) of the *Restatement (Second) of Agency* defines a ''servant'' as a ''person employed to perform services . . . who with respect to the physical conduct in the performance of the services is subject to the other's control *or right to control*'' (emphasis added). Section 220(2), in turn, identifies as a relevant factor in determining the existence of an employment relationship ''the extent of control which, *by the agreement,* the master *may* exercise over the details of the work'' (emphasis added). See, *e.g., Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 751 (1989) (''In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.''); *Singer Mfg. Co.* v. *Rahn,* 132 U.S. 518, 523 (1889) (observing that the ''relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done'').

As to whether control must be direct and immediate, the *Restatement* observes that the ''control needed to establish the relation of master and servant may be very attenuated.'' *Restatement (Second) of Agency* Section 220(l), comment d. The *Restatement* specifically recognizes the common-law ''subservant'' doctrine, addressing cases in which one employer's control is or may be exercised indirectly, while a second employer directly controls the employee. *Restatement (Second) of Agency* Sections 5, 5(2), comment e. See, *e.g., Kelley* v. *Southern Pacific Co.,* 419 U.S. 3218, 325 (1974) (recognizing subservant doctrine for purposes of Federal Employers' Liability Act); *Allbritton Communications Co.* v. *NLRB,* 766 F.2d 812, 818–819 (3d Cir. 1985) (applying subservant doctrine under National Labor Relations Act), cert. denied, 474 U.S. 1081 (1986).

As to the issue of control that is limited and routine, the *Restatement* makes clear that if an entity routinely exercises control ''over the details of the work,'' it is more likely to be a common-law employer. See *Restatement (Second) of Agency* Section 220(2)(a). That control might be routine, in the sense of not requiring special skill, does not suggest the absence of an employment relationship; to the contrary, an unskilled worker is *more* likely to be an employee, rather than an independent contractor. See *id.,* Section 220(2)(d) and comment i.

[27] See, *e.g., NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256–258 (1968) (interpreting Act's exclusion of independent contractors from coverage).

[28] *NLRB* v. *Town & Country Electric, Inc.,* 516 U.S. 85, 94 (1995), citing *United Insurance,* supra, 390 U.S. at 256.

[29] See *Hy-Brand I,* supra, 365 NLRB No. 156, slip op. at 42–47 (dissenting opinion).

[30] The majority observes that in some cases, courts have upheld the Board's application of the ''direct and immediate''-control restriction. But as the *Hy-Brand I* dissent explained, no federal appellate court has addressed the argument that this restriction is inconsistent with common-law agency principles. 365 NLRB No. 156, slip op. at 46.

Nor, as the majority suggests, is the restriction supported by the Supreme Court's decision in *NLRB* v. *Denver Building & Construction Trades Council,* 341 NLRB 675 (1951). As the *Hy-Brand I* dissent explained:

> The issue in . . . *Denver Building & Construction Trades Council* . . . was whether (as the Board had found) a labor union violated Sec. 8(b)(4)(A) of the Act ''by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a certain subcontractor on the project.'' Id. at 677. The relevant statutory language prohibits a strike ''where an object thereof is . . . forcing or requiring . . . any employer or other person . . . to cease doing business with any other person.'' Id. at 677 fn. 1 (citing 29 U.S.C. 158(b)(4)(A), current version at 29 U.S.C. 158(b)(4)(i)(B)). The Court agreed with the Board's conclusion that the general contractor and the subcontractor were ''doing business'' with each other. Id. at 690.
>
> It was in that context that the Court observed that ''the fact that the contractor and the subcontractor were engaged on the same construction project, and that the contactor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other,'' such that the ''doing business'' element could not be satisfied. Id. at 689–690. The Court's decision in no way implicated the common-law test for an employment relationship or the Board's joint-employer standard. As a general matter, to say that a general contractor and a subcontractor are

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Instead of demonstrating that its proposed rule is consistent with the common law (an impossible task), the majority simply asserts that it is—and then invites public comment on the ''current state of the common law on joint-employment relationships'' and whether the ''common law dictate[s] the approach of the proposed rule or of *Browning-Ferris*'' or instead ''leave[s] room for either approach.'' The answers to these questions have been clear for quite some time: The restrictive conditions for finding joint-employer status proposed by the majority simply restore the pre-*Browning Ferris* standard, which the Board had never presented as consistent with, much less compelled by, common-law agency doctrine.[31] The majority, in short, seeks help in finding a new justification for an old (and unsupportable) standard. But the proper course is for the Board to *start* with first principles, as the *Browning-Ferris* decision did, and then to derive the joint-employer standard from them.

Just as the majority fails to reconcile the proposed rule with common-law agency doctrine—a prerequisite for any viable joint-employer standard under the National Labor Relations Act—so the majority fails to explain how its proposed standard is consistent with the actual policies of the Act. There should be no dispute about what those policies are. Congress has told us. Section 1 of the Act states plainly that:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. 151 (emphasis added). The Supreme Court has explained that:

> Congress' goal in enacting federal labor legislation was to create a framework within which labor and management can establish the mutual rights and obligations that govern the employment relationship. ''The theory of the act is *that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace* and may bring about the adjustments and agreements which the act in itself does not attempt to compel.''

NLRB v. *J. Weingarten, Inc.,* 420 U.S. 251, 271 (1975) (emphasis added), quoting *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45 (1937).

The *Browning-Ferris* standard—current Board law—clearly ''encourage[s] the practice and procedure of collective bargaining'' (in the words of the Act) by eliminating barriers to finding joint-employer relationships that have no basis in the common-law agency doctrine that Congress requires the Board to apply. The predictable result is that more employees will be able to engage in ''free opportunities for negotiation'' (in the Supreme Court's phrase) with the employers who actually control the terms and conditions of their employment—as Congress intended—and that orderly collective bargaining, not strikes, slowdowns, boycotts, or other ''obstructions to the free flow of commerce'' will prevail in joint-employer settings.

The question for the majority is why it would preliminarily choose to abandon *Browning-Ferris* for a standard that, by its own candid admission, is intended to—and will—result in *fewer* joint employer findings and thus in a greater likelihood of economically disruptive labor disputes. Where collective bargaining under the law is not an option, workers have no choice but to use other means to improve their terms and conditions of employment. Economic pressure predictably will be directed at the business entities that control a workplace, whether or not the Board recognizes them as employers. History shows that when employees' right to have effective union representation is obstructed, they engage in alternative and more disruptive means of improving their terms of employment.[32] Resort to such economic weapons is hardly a relic of the past. Recent examples include nationwide strikes by employees unable to gain representation in fast food, transportation, retail, and other low-pay industries, often directed at parent companies, franchisors, investors, or other entities perceived by the workers as having influence over decisions that ultimately impact the workers' well-being.[33] Congress enacted the NLRA in order to minimize the disruption of commerce and to provide employees with a structured, non-disruptive alternative to such action. In blocking effective representation by unreasonably narrowing the definition of joint employer, the majority thwarts that goal and invites disruptive economic activity.

The majority does not explain its choice in any persuasive way. It asserts that codifying the *Hy-Brand I,* pre-*Browning-Ferris* standard ''will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability, one of the principal purposes of the Act.'' But, as already suggested, ''predictability and consistency'' with respect to the Board's joint-employer standard could be achieved just as well by codifying the *Browning-Ferris* standard—which, crucially, is both consistent with common-law agency doctrine and promotes the policy of the Act (in contrast to the *Hy-Brand I* standard).

As for ''labor-management stability,'' that notion does *not* mean the perpetuation of a state in which workers in joint-employer situations remain

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independent entities (*e.g.,* not a ''single employer'') is not to say that they can *never* be joint employers, *if* it is proven that the general contractor retains or exercises a sufficient degree of control over the subcontractor's workers to satisfy the common-law test of an employment relationship.

Hy-Brand I, supra, 365 NLRB No. 156, slip op. at 46 fn. 63 (dissenting opinion).

[31] With respect to the issue of reserved control, the majority acknowledges that ''[o]ver time, the Board shifted position, without expressly overruling precedent, and held that joint-employer status could not be established by the mere existence of a clause in a business contract reserving to one company authority over its business partner's employees absent evidence that such authority had ever been exercised.'' The Board, however, is required to adhere to its precedent or to explain why it chooses to deviate from it. See, *e.g., ABM Onsite Services-West, Inc.* v. *NLRB,* 849 F.3d 1137, 1146 (D.C. Cir. 2017). Here, too, the Board's pre-*Browning-Ferris* approach fell short of the standard for reasoned decision-making.

[32] Between 1936 and 1939, when the NLRA was in its infancy and still meeting massive resistance from employers, American employees engaged in 583 sit-down strikes of at least one day's duration. Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935—1938,* Law and History Review, Vol. 24, No. 1 at 45, 46 (Spring 2006). See also *NLRB* v. *Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939). For many years after plant occupations were found illegal by the Supreme Court, employees resorted to wildcat, ''quickie,'' ''stop-and-go,'' and partial strikes; slowdowns; and mass picketing. *Id* at 108–111.

[33] E.g., Michael M. Oswalt, *The Right to Improvise in Low-Wage Work,* 38 Cardozo L. Rev. 959, 961–986 (2017); Steven Greenhouse and Jana Kasperkevic, *Fight For $15 Swells Into Largest Protest By Low-wage Workers in US History,* The Guardian/U.S. News (April 15, 2015); Dominic Rushe, *Fast Food Workers Plan Biggest US Strike to Date Over Minimum Wage,* The Guardian/U.S. News (September 1, 2014). Strikes, walkouts, and other demonstrations of labor unrest have also been seen in recent years in the college and university setting among graduate teaching assistants and similar workers responding to their academic employers' refusal to recognize unions and engage in collective bargaining. See, *e.g.,* Danielle Douglas-Gabrielle, *Columbia Graduate Students Strike Over Refusal to Negotiate a Contract,* The Washington Post (April 24, 2018); David Epstein, *On Strike: In a showdown over TA unions at private universities, NYU grad students walk off the job,* Inside Higher Ed (November 10, 2005). Here, again, the common thread is workers resort to more disruptive channels when they are denied the ability to negotiate directly about decisions impacting their employment.

unrepresented, despite their desire to unionize, because Board doctrine prevents it. ''The object of the National Labor Relations Act is industrial peace and stability, *fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employe[r]s.*'' [34] Congress explained in Section 1 of the Act that it is the ''denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining'' that ''lead to strikes and other forms of industrial strife or unrest.'' [35] A joint-employer standard that predictably and consistently frustrates the desire of workers for union representation is a recipe for workplace instability—for just the sort of conflict that Congress wanted to eliminate. Whether it proceeds by adjudication or by rulemaking, the Board is not free to substitute its own idea of proper labor policy for the Congressional policy embodied in the statute.

The majority expresses the ''preliminary belief . . . that absent a requirement of proof of some 'direct and immediate' control to find a joint-employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers.'' But any such difficulty is a function of applying common-law agency doctrine, which the Board is not free to discard, whether in the interests of administrative convenience or a so-called predictability that insulates employers from labor-law obligations. In holding that Congress had made common-law agency doctrine controlling under the Act, the Supreme Court itself has noted the ''innumerable situations which arise in the context of the common law where it is difficult to say whether a particular individual is an employee or an independent contractor.'' [36] To quote the *Hy-Brand I* majority, ''[t]he Board is not Congress.'' [37] It is not free to decide that the common law is simply too difficult to apply, despite the Congressional instruction to do so.

Notably, the majority's proposed inclusion of a ''direct and immediate'' control requirement in the joint-employer standard would hardly result in an easy-to-apply test. The majority takes pains to say that while the exercise of ''direct and immediate'' control is *necessary* to establish a joint-employer relationship, it is not *sufficient.*[38] As for the ''examples'' set forth in the proposed rule, they are ''intended to be illustrative and not as setting the outer parameters of the joint-employer doctrine established in the proposed rule.'' [39] Even with respect to those examples that illustrate the exercise of ''direct and immediate'' control, the proposed rule does not actually state that a joint-employer relationship is demonstrated. Here, too, the majority's ostensible goal of predictability is elusive. The proposed rule, if ultimately adopted by the Board, will reveal its true parameters only over time, as it is applied case-by-case through adjudication. What purpose, then, does codifying the *Hy-Brand I* standard via rulemaking actually serve?

The majority's examples, rather than helping ''clarify'' what constitutes ''direct and immediate control,'' confirm that joint employment cannot be determined by any simplistic formulation, let alone the majority's artificially restrictive one. This is because additional circumstances in each of the provided examples could change the result. In example 1(a), the majority declares that under its proposed rule a ''cost-plus'' service contract between two businesses that merely establishes a maximum reimbursable labor expense does not, by itself, justify finding that the user business exercises direct control. But if, under that contract, the user also imposes hiring standards; prohibits individual pay to exceed that of the user's own employees; determines the provider's working hours and overtime; daily adjusts the numbers of employees to be assigned to respective production areas; determines the speed of the worksite's assembly or production lines; conveys productivity instructions to employees through the provider's supervisors; or restricts the period that provided employees are permitted to work for the user—all as in *Browning-Ferris*—does the result change? Would some but not all of these additional features change the result? If not, under common-law principles, why not?

In example 2(a), the majority declares that under its proposed rule, a user business does not exercise direct control over the provider's employees simply by complaining that the product coming off its assembly line worked by those employees is defective. Does the result change if the user also indicates that it believes certain individual employees are partly responsible for the defects? Or if it also demands those employees' reassignment, discipline, or removal? Or if it demands that provided employees be allocated differently to different sections of the line?

And in example 6(a), the majority declares that where a service contract reserves the user's right to discipline provided employees, but the user has never exercised that authority, the user has not exercised direct control. Again, does the result change if the user indicates to the supplier which employees deserve discipline, and/or how employees should be disciplined? And, assuming that the actual exercise of control is necessary, when is it sufficient to establish a joint-employer relationship? How many times must control be exercised, and with respect to how many employees and which terms and conditions of employment?

The majority's simplified examples, meanwhile, neither address issues of current concern implicating joint employment—such as, for example—the recent revelation that national fast-food chains have imposed ''no poaching'' restrictions on their franchisees that limit the earnings and mobility of franchise employees [40]—nor accurately

[34] *Auciello Iron Works, Inc.* v. *NLRB,* 517 U.S. 781, 785 (1996) (emphasis added).

[35] 29 U.S.C. 151.

[36] *United Insurance,* supra, 390 U.S. at 258. See also *Restatement (Second) of Agency* Section 220, comment c (''The relation of master and servant is one not capable of exact definition. . . . [I]t is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation.'').

[37] *Hy-Brand I,* supra, 365 NLRB No. 156, slip op. at 33.

[38] ''Direct and immediate'' control ''will be insufficient,'' the majority observes, ''where the degree of a putative employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer).'' In comparison, *Browning-Ferris* explained that a joint employer ''will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful.'' 362 NLRB No. 186, slip op. at 2 fn. 7. The decision acknowledged that a ''putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.'' Id. at 16. The difference between the proposed rule and *Browning-Ferris* is that the former treats joint employment as an all-or-nothing proposition, while the latter permits joint-employer determinations that are tailored to particular working arrangements, allowing collective bargaining to the extent that it can be effective.

[39] Of course, illustrating a legal standard is not the same as explaining it: In this case, demonstrating that the proposed joint-employer standard, as illustrated by a particular example, is consistent with common-law agency doctrine and promotes statutory policies.

[40] ''AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide,'' Press Release, Office of the Attorney General, Washington State (July 12, 2018) (explaining that ''seven large corporate fast-foods chains will immediately end a nationwide practice that restricts worker mobility and decreases competition for labor by preventing workers from moving among the chains' franchise locations''), available at *www.atg.wa.gov/news/news-releases;* ''AG Ferguson: Eight More Restaurant Chains Will

Continued

reflect the complicated circumstances that the Board typically confronts in joint-employer cases, where the issue of control is raised with respect to a range of employment terms and conditions and a variety of forms of control.[41]

The majority's examples and their possible variations therefore illustrate why the issue of joint employment is particularly suited to individual adjudication under common-law principles. As the majority acknowledges, ''[t]here are myriad relationships between employers and their business partners, and the degree to which particular business relationships impact employees' essential terms and conditions of employment varies widely.'' This being true, the majority's simplistic examples are of limited utility in providing guidance, and merely serve to illustrate the impossibility of predetermining with ''clarity'' all of the situations in which a joint employment relationship does or does not exist. This is why the Board's best course of action may well be to continue to define the contours of the correct standard, re-established in *Browning-Ferris,* through the usual process of adjudication. This process will provide a more nuanced understanding of the contours of potential joint employment relationships that is difficult to achieve in the abstract via rulemaking.

C. The Majority's Proposed Rulemaking Process Is Flawed

For all of these reasons, I dissent from the majority's decision to issue the notice of proposed rulemaking (NPRM). To be sure, if the majority is determined to revisit *Browning-Ferris,* then permitting public participation in the process is preferable to the approach taken in the now-vacated *Hy-Brand I,* where the majority overruled *Browning-Ferris* sua sponte and without providing the parties or the public with notice and an opportunity to file briefs on that question. Having chosen to proceed, however, the majority should at the very least encourage greater public participation in the rulemaking process, by holding one or more public hearings.

There is no indication that the Board intends to hold a public hearing on the proposed rule, in addition to soliciting written comments. In the past, the Board has held such hearings to enhance public participation in the rulemaking process,[42] and there is no good reason why it should not do so again. Despite the Chairman's publicly professed desire to hear from ''thousands of commentators . . . including individuals and small businesses that may not be able to afford to hire a law firm to write a brief for them, yet have valuable insight to share from hard-won experience,'' [43] the process outlined by the majority—with limited time for public comment and no public hearings—seems ill-designed to provide the broad range of public input the majority purportedly seeks.

Regardless of my views on the desirability of rulemaking on the joint-employer standard in the wake of *Hy-Brand I,* I will give careful consideration to the public comments that the Board receives and to the views of my colleagues. It is worth recalling that the *Hy-Brand I* majority, in overruling *Browning-Ferris,* asserted that the decision ''destabilized bargaining relationships and created unresolvable legal uncertainty,'' ''dramatically changed labor law sales and successorship principles and discouraged efforts to rescue failing companies and preserve employment,'' ''threatened existing franchising arrangements,'' and ''undermined parent-subsidiary relationships.'' [44] The *Hy-Brand I* majority cited no actual examples from the Board's case law applying *BFI,* or empirical evidence of any sort, to support its hyperbolic claims, instead recycling Member Miscimarra's dissent in *Browning-Ferris* practically verbatim.[45] *Browning-Ferris* was issued more than 3 years ago, on August 27, 2015. Today's notice specifically solicits empirical evidence from the public: information about real-world experiences, not desk-chair hypothesizing. And so the question now is whether the record in this rulemaking ultimately will support the assertions made about *Browning-Ferris* and its supposed consequences—or, instead, will reveal them to be empty rhetoric.

V. Regulatory Procedures

The Regulatory Flexibility Act

A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (''RFA''), 5 U.S.C. 601, *et seq.* ensures that agencies ''review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].'' [46] It requires agencies promulgating proposed rules to prepare an Initial Regulatory Flexibility Analysis (''IRFA'') and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial

End No-Poach Practices Nationwide,'' Press Release, Office of the Attorney General, Washington State (Aug. 20, 2018), available at *www.atg.wa.gov/news/news-releases.* See also generally Rachel Abrams, ''Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue,'' *The New York Times* (Sept. 27, 2017); Alan B. Krueger & Orley C. Ashenfelter, ''Theory and Evidence on Employer Collusion in the Franchise Sector,'' Princeton University Working Paper No. 614 (Sept. 28, 2017), available at *http://arks.princeton.edu/ark:/88435/dsp014f16c547g.*

[41] In *Browning-Ferris,* for example, the Board found that BFI Newby Island Recyclery (BFI) was a joint employer with Leadpoint Business Services (Leadpoint) of sorters, screen cleaners, and housekeepers at a recycling facility. That finding was based on a range of evidence reflecting both direct and indirect control, both reserved and exercised, over various terms and conditions of employment.

First, the Board found that under its agreement with Leadpoint, BFI ''possesse[d] significant control over who Leadpoint can hire to work at its facility,'' with respect to both hiring and discipline, and at least occasionally exercised that authority in connection with discipline. 362 NLRB No. 16, slip op. at 18.

Second, BFI ''exercised control over the processes that shape the day-to-day work'' of the employees, particularly with respect to the ''speed of the [recycling] streams and specific productivity standards for sorting,'' but also by assigning specific tasks that need to be completed, specifying where Leadpoint workers were to be positioned, and exercising oversight of employees' work performance.'' Id. at 18–19. (footnote omitted).

Third, BFI ''played a significant role in determining employees' wages'' by (1) ''prevent[ing] Leadpoint from paying employees more than BFI employees performing comparable work; and (2) entering into a cost-plus contract with Leadpoint coupled with an ''apparent requirement of BFI approval over employee pay raises.'' Id. at 19.

Example 1(a) of the proposed rule suggests that the majority would give no weight to BFI's cost-plus contract, but it is not clear how the majority would analyze BFI's veto power over pay raises. Example 1(b) suggests that this power might be material. Example 2(b), meanwhile, suggests that BFI's control over day-to-day work processes supports a joint-employer finding. Finally, Example 6(b), apparently would support finding that BFI exercised direct and immediate disciplinary control over Leadpoint employees. Ironically, then, it is far from clear that adoption of the majority's proposed rule would lead to a different result in *Browning-Ferris.*

[42] See Representation-Case Procedures, 79 FR 74308 (2014) (the Board held four days of oral hearings with live questioning by Board members that resulted in over 1,000 pages of testimony); Union Dues Regulations, 57 FR 43635 (1992) (the Board held one hearing); Collective-Bargaining Units in the Health Care Industry, 53 FR 33900 (1988), (the Board held four hearings—two in Washington, DC, one in Chicago, IL, and one in San Francisco, CA—that over the course of 14 days resulted in the appearance of 144 witnesses and 3,545 pages of testimony).

[43] See June 5, 2018 Letter from Chairman Ring to Senators Warren, Gillibrand, and Sanders, available at *https://www.nlrb.gov/news-outreach/news-story/nlrb-chairman-provides-response-senators-regarding-joint-employer-inquiry.*

[44] *Hy-Brand I,* supra, 365 NLRB No.156, slip op. at 20, 26, 27, and 29.

[45] The relationship between Member Miscimarra's dissent in *Browning-Ferris* and the majority opinion in *Hy-Brand* is examined in a February 9, 2018 report issued by the Board's Inspector General, which is posted on the Board's website (''OIG Report Regarding *Hy-Brand* Deliberations'' available at *www.nlrb.gov*).

[46] E.O. 13272, Sec. 1, 67 FR 53461 (''Proper Consideration of Small Entities in Agency Rulemaking'').

number of small entities. However, an agency is not required to prepare an IRFA for a proposed rule if the agency head certifies that, if promulgated, the rule will not have a significant economic impact on a substantial number of small entities.[47] The RFA does not define either ''significant economic impact'' or ''substantial number of small entities.''[48] Additionally, ''[i]n the absence of statutory specificity, what is 'significant' will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations.''[49]

The Board has elected to prepare an IRFA to provide the public the fullest opportunity to comment on the proposed rule. An IRFA describes why an action is being proposed; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule would apply; any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; any overlapping, duplicative, or conflicting Federal rules; and any significant alternatives to the proposed rule that would accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant adverse economic impacts of the proposed rule on small entities. Descriptions of this proposed rule, its purpose, objectives, and the legal basis are contained earlier in the **SUMMARY** and **SUPPLEMENTAL INFORMATION** sections and are not repeated here.

The Board believes that this rule will likely not have a significant economic impact on a substantial number of small entities. While we assume for purposes of this analysis that a substantial number of small employers and small entity labor unions will be impacted by this rule, we anticipate low costs of compliance with the rule, related to reviewing and understanding the substantive changes to the joint-employer standard. There may be compliance costs that are unknown to the Board; perhaps, for example, employers may incur potential increases in liability insurance costs. The Board welcomes comments from the public that will shed light on potential compliance costs or any other part of this IRFA.

[47] 5 U.S.C. 605(b).

[48] 5 U.S.C. 601.

[49] Small Business Administration Office of Advocacy, ''A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act'' (''SBA Guide'') at 18, *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

B. Description and Estimate of Number of Small Entities to Which the Rule Applies

In order to evaluate the impact of the proposed rule, the Board first identified the entire universe of businesses that could be impacted by a change in the joint-employer standard. According to the United States Census Bureau, there were approximately 5.9 million business firms with employees in 2015.[50] Of those, the Census Bureau estimates that about 5,881,267 million were firms with fewer than 500 employees.[51] While this proposed rule does not apply to employers that do not meet the Board's jurisdictional requirements, the Board does not have the data to determine the number of excluded entities.[52] Accordingly, the Board assumes for purposes of this analysis that the great majority of the 5,881,267 million small business firms could be impacted by the proposed rule.

The proposed rule will only be applied as a matter of law when small businesses are alleged to be joint employers in a Board proceeding. Therefore, the frequency that the issue comes before the Board is indicative of the number of small entities most directly impacted by the proposed rule. A review of the Board's representation petitions and unfair labor practice (ULP) charges provides a basis for estimating the frequency that the joint-employer issue comes before the Agency. During the five-year period between January 1, 2013 and December 31, 2017, a total of 114,577 representation and unfair labor practice cases were initiated with the Agency. In 1,598 of those filings, the representation petition or ULP charge filed with the Agency asserted a joint-employer relationship between at least two employers.[53] Accounting for repetitively alleged joint-employer relationships in these filings, we identified 823 separate joint-employer relationships involving an estimated 1,646 employers.[54] Accordingly, the joint-employer standard most directly impacted approximately .028% of all 5.9 million business firms (including both large and small businesses) over the five-year period. Since a large share of our joint-employer cases involves large employers, we expect an even lower percentage of small businesses to be most directly impacted by the Board's application of the rule.

Irrespective of an Agency proceeding, we believe the proposed rule may be more relevant to certain types of small employers because their business relationships involve the exchange of employees or operational control.[55] In addition, labor unions, as organizations representing or seeking to represent employees, will be impacted by the

[50] ''Establishments'' refer to single location entities—an individual ''firm'' can have one or more establishments in its network. The Board has used firm level data for this IRFA because establishment data is not available for certain types of employers discussed below. Census Bureau definitions of ''establishment'' and ''firm'' can be found at *https://www.census.gov/programs-surveys/susb/about/glossary.html.*

[51] The Census Bureau does not specifically define small business, but does break down its data into firms with 500 or more employees and those with fewer than 500 employees. *See* U.S. Department of Commerce, Bureau of Census, 2015 Statistics of U.S. Businesses (''SUSB'') Annual Data Tables by Establishment Industry, *https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html* (from downloaded Excel Table entitled ''U.S., 6-digit NAICS''). Consequently, the 500-employee threshold is commonly used to describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS), which we set forth below.

[52] Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB* v. *Fainblatt,* 306 U.S. 601, 606–07 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of $500,000 or more. *Carolina Supplies & Cement Co.,* 122 NLRB 88 (1959). But shopping center and office building retailers have a lower threshold of $100,000 per year. *Carol Management Corp.,* 133 NLRB 1126 (1961). The Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least $50,000. *Siemons Mailing Service,* 122 NLRB 81 (1959).

The following employers are excluded from the NLRB's jurisdiction by statute:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations. 29 U.S.C. 152(2).
- Employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities, or prepare commodities for delivery. 29 U.S.C. 153(3).
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines. 29 U.S.C. 152(2).

[53] This includes initial representation case petitions (RC petitions) and unfair labor practice charges (CA cases) filed against employers.

[54] Since a joint-employer relationship requires at least two employers, we have estimated the number of employers by multiplying the number of asserted joint-employer relationships by two. Some of these filings assert more than two joint employers; but, on the other hand, some of the same employers are named multiple times in these filings. Additionally, this number is certainly inflated because the data does not reveal those cases where joint-employer status is not in dispute.

[55] The Board acknowledges that there are other types of entities and/or relationships between entities that may be affected by a change in the joint-employer rule. Such relationships include but are not limited to: Lessor/lessee, and parent/subsidiary. However, the Board does not believe that entities involved in these relationships would be impacted more than the entities discussed below.

Board's change in its joint-employer standard. Thus, the Board has identified the following five types of small businesses or entities as those most likely to be impacted by the rule: Contractors/subcontractors, temporary help service suppliers, temporary help service users, franchisees, and labor unions.

(1) Businesses commonly enter into contracts with vendors to receive a wide range of services that may satisfy their primary business objectives or solve discrete problems that they are not qualified to address. And there are seemingly unlimited types of vendors who provide these types of contract services. Businesses may also subcontract work to vendors to satisfy their own contractual obligations—an arrangement common to the construction industry. Businesses that contract to receive or provide services often share workspaces and sometimes share control over workers, rendering their relationships subject to application of the Board's joint-employer standard. The Board does not have the means to identify precisely how many businesses are impacted by contracting and subcontracting within the U.S., or how many contractors and subcontractors would be small businesses as defined by the SBA.[56]

(2) Temporary help service suppliers (North American Industry Clarification System (''NAICS'') #561320), are primarily engaged in supplying workers to supplement a client employer's workforce. To be defined as a small business temporary help service supplier by the SBA, the entity must generate receipts of less than $27.5 million annually.[57] In 2012, there were 13,202 temporary service supplier firms in the U.S.[58] Of these business firms, 6,372 had receipts of less than $1,000,000; 3,947 had receipts between $1,000,000 and $4,999,999; 1,639 had receipts between $5,000,000 and $14,999,999; and 444 had receipts between $15,000,000 and $24,999,999. In aggregate, at least 12,402 temporary help service supplier firms (93.9% of total) are definitely small businesses according to SBA standards. Since the Board cannot determine how many of the 130 business firms with receipts between $25,000,000–$29,999,999 fall below the $27.5 million annual receipt threshold, it will assume that these are small businesses as defined by the SBA. For purposes of this IRFA, the Board assumes that 12,532 temporary help service suppliers firms (94.9% of total) are small businesses.

(3) Entities that use temporary help services in order to staff their businesses are widespread throughout many types of industries, and include both large and small employers. A 2012 survey of business owners by the Census Bureau revealed that at least 266,006 firms obtained staffing from temporary help services in that calendar year.[59] This survey provides the only gauge of employers that obtain staffing from temporary help services and the Board is without the means to estimate what portion of those are small businesses as defined by the NAICS. For purposes of this IRFA, the Board assumes that all users of temporary services are small businesses.

(4) Franchising is a method of distributing products or services, in which a franchisor lends its trademark or trade name and a business system to a franchisee, which pays a royalty and often an initial fee for the right to conduct business under the franchisor's name and system.[60] Franchisors generally exercise some operational control over their franchisees, which renders the relationship subject to application of the Board's joint-employer standard. The Board does not have the means to identify precisely how many franchisees operate within the U.S., or how many are small businesses as defined by the SBA. A 2012 survey of business owners by the Census Bureau revealed that at least 507,834 firms operated a portion of their business as a franchise. But, only 197,204 of these firms had paid employees.[61] In our view, only franchisees with paid employees are potentially impacted by the joint-employer standard. Of the franchisees with employees, 126,858 (64.3%)) had sales receipts totaling less than $1 million. Based on this available data and the SBA's definitions of small businesses, which generally define small businesses as having receipts well over $1 million, we assume that almost two-thirds of franchisees would be defined as small businesses.[62]

(5) Labor unions, as defined by the NLRA, are entities ''in which employees participate and which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'' [63] By defining which employers are joint employers under the NLRA, the proposed rule impacts labor unions generally, and more directly impacts those labor unions that organize the specific business sectors discussed above. The SBA's ''small business'' standard for ''Labor Unions and Similar Labor Organizations'' (NAICS #813930) is $7.5 million in annual receipts.[64] In 2012, there were 13,740 labor union firms in the U.S.[65] Of these firms, 11,245 had receipts of less than $1,000,000; 2,022 labor unions had receipts between $1,000,000 and $4,999,999, and 141 had receipts between $5,000,000 and $7,499,999. In aggregate, 13,408 labor union firms (97.6% of total) are small businesses according to SBA standards.

Based on the foregoing, the Board assumes there are 12,532 temporary help supplier firms, 197,204 franchise firms, and 13,408 union firms that are small businesses; and further that all 266,006 temporary help user firms are small businesses. Therefore, among these four categories of employers that are most interested in the proposed rule, 489,150 business firms are assumed to be small businesses as defined by the

[56] The only data known to the Board relating to contractor business relationships involve businesses that contract with the Federal Government. In 2014, the Department of Labor reported that approximately 500,000 federal contractor firms were registered with the General Services Administration. *Establishing a Minimum Wage for Contractors,* 79 FR 60634, 60697. However, the Board is without the means to identify the precise number of firms that actually receive federal contracts or to determine what portion of those are small businesses as defined by the SBA. Even if these data were available, given that the Board does not have jurisdiction over government entities, business relationships between federal contractors and the federal agencies will not be impacted by the Board's joint-employer rule. The business relationships between federal contractors and their subcontractors could be subject to the Board's joint-employer rule. However, we also lack the means for estimating the number of businesses that subcontract with federal contractors or determine what portion of those would be defined as small businesses. Input from the public in this regard is welcome.

[57] 13 CFR 121.201.

[58] The Census Bureau only provides data about receipts in years ending in 2 or 7. The 2017 data has not been published, so the 2012 data is the most recent available information regarding receipts. *See* U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, NAICS classification #561320, *https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx.*

[59] *See* U.S. Department of Commerce, Bureau of Census, 2012 Survey of Business Owners, *https://factfinder.census.gov/bkmk/table/1.0/en/SBO/2012/00CSCB46.*

[60] *See* International Franchising Establishments FAQs, found at *https://www.franchise.org/faqs-about-franchising.*

[61] *See* U.S. Department of Commerce, Bureau of Census, 2012 Survey of Business Owners, *https://factfinder.census.gov/bkmk/table/1.0/en/SBO/2012/00CSCB67.*

[62] *See* 13 CFR 121.201.

[63] 29 U.S.C. 152(5).

[64] 13 CFR 121.201.

[65] *See* U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, NAICS classification #722513, *https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx.*

SBA. We believe that all of these small businesses, and also those businesses regularly engaged in contracting/subcontracting, have a general interest in the rule and would be impacted by the compliance costs discussed below, related to reviewing and understanding the rule. But, as previously noted, employers will only be directly impacted when they are alleged to be a joint employer in a Board proceeding. Given our historic filing data, this number is very small relative to the number of small employers in these five categories.

C. Recordkeeping, Reporting, and Other Compliance Costs

The RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities.[66] Thus, the RFA requires the Agency to determine the amount of ''reporting, recordkeeping and other compliance requirements'' imposed on small entities.[67]

We conclude that the proposed rule imposes no capital costs for equipment needed to meet the regulatory requirements; no costs of modifying existing processes and procedures to comply with the proposed rule; no lost sales and profits resulting from the proposed rule; no changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; and no costs of hiring employees dedicated to compliance with regulatory requirements.[68] The proposed rule also does not impose any new information collection or reporting requirements on small entities.

Small entities may incur some costs from reviewing the rule in order to understand the substantive changes to the joint-employer standard. We estimate that a labor compliance employee at a small employer who undertook to become generally familiar with the proposed changes may take at most one hour to read the summary of the rule in the introductory section of the preamble. It is also possible that a small employer may wish to consult with an attorney which we estimated to require one hour as well.[69] Using the Bureau of Labor Statistics' estimated wage and benefit costs, we have assessed these labor costs to be $124.37.[70]

As for other potential impacts, it is possible that liability and liability insurance costs may increase for small entities because they may no longer have larger entities with which to share the cost of any NLRA backpay remedies ordered in unfair labor practice proceedings. Such a cost may arguably fall within the SBA Guide's category of ''extra costs associated with the payment of taxes or fees associated with the proposed rule.'' Conversely, fewer employers may be alleged as joint employers, resulting in lower costs to some small entities. The Board is without the means to quantify such costs and welcomes any comment or data on this topic.[71] Nevertheless, we believe such costs are limited to very few employers, considering the limited number of Board proceedings where joint-employer status is alleged, as compared with the number of employers subject to the Board's jurisdiction. Moreover, the proposed rule may make it easier for employers to collectively bargain without the complications of tri-partite bargaining, and further provide greater certainty as to their bargaining responsibilities. We consider such positive impacts as either indirect, or impractical to quantify, or both.

As to the impact on unions, we anticipate they may also incur costs from reviewing the rule. We believe a union would consult with an attorney, which we estimate to require no more than one hour of time ($80.26, *see* n.45) because union counsel should already be familiar with the pre-*Browning-Ferris* standard. Additionally, the Board expects that the additional clarity of the proposed rule will serve to reduce litigation expenses for unions and other small entities. Again, the Board welcomes any data on any of these topics.

The Board does not find the estimated $124.37 cost to small employers and the estimated $80.26 cost to unions in order to review and understand the rule to be significant within the meaning of the RFA. In making this finding, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected.[72] Other criteria to be considered are the following:

—Whether the rule will cause long-term insolvency, *i.e.,* regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;

—Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.[73]

The minimal cost to read and understand the rule will not generate any such significant economic impacts.

Since the only quantifiable impact that we have identified is the $124.37 or $80.26 that may be incurred in reviewing and understanding the rule, we do not believe there will be a significant economic impact on a substantial number of small entities associated with this proposed rule.

D. Duplicate, Overlapping, or Conflicting Federal Rules

The Board has not identified any federal rules that conflict with the proposed rule. It welcomes comments that suggest any potential conflicts not noted in this section.

E. Alternatives Considered

Pursuant to 5 U.S.C. 603(c), agencies are directed to look at ''any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.'' The Board considered two primary alternatives to the proposed rules.

First, the Board considered taking no action. Inaction would leave in place the *Browning-Ferris* joint-employer standard to be applied in Board decisions. However, for the reasons

[66] *See Mid-Tex Elec. Co-op* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985) (''[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities.'').

[67] *See* 5 U.S.C. 603(b)(4), 604(a)(4).

[68] *See* SBA Guide at 37.

[69] We do not believe that more than one hour of time by each would be necessary to read and understand the rule. This is because the new standard constitutes a return to the pre-*Browning-Ferris* standard with which most employers are already knowledgeable if relevant to their businesses, and with which we believe labor-management attorneys are also familiar.

[70] For wage figures, see May 2017 National Occupancy Employment and Wage Estimates, found at *https://www.bls.gov/oes/current/oes_nat.htm.* The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2017, average hourly wages for labor relations specialists (BLS #13–1075) were $31.51. The same figure for a lawyer (BLS #23–1011) is $57.33. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

[71] The RFA explains that in providing initial and final regulatory flexibility analyses, ''an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, *or more general descriptive statements if quantification is not practicable or reliable.*'' 5 U.S.C. 607 (emphasis added).

[72] *See* SBA Guide at 18.

[73] *Id.* at 19.

stated in Sections II and III above, the Board finds it desirable to revisit the *Browning-Ferris* standard and to do so through the rulemaking process. Consequently, we reject maintaining the status quo.

Second, the Board considered creating exemptions for certain small entities. This was rejected as impractical, considering that an exemption for small entities would substantially undermine the purpose of the proposed rule because such a large percentage of employers and unions would be exempt under the SBA definitions. Moreover, as this rule often applies to relationships involving a small entity (such as a franchisee) and a large enterprise (such as a franchisor), exemptions for small businesses would decrease the application of the rule to larger businesses as well, potentially undermining the policy behind this rule. Additionally, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it fell within a particular exempt category might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers.[74] As the Supreme Court has noted, ''[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.'' [75] As such, this alternative is contrary to the objectives of this rulemaking and of the NLRA.

Neither of the alternatives considered accomplished the objectives of proposing this rule while minimizing costs on small businesses. Accordingly, the Board believes that proceeding with this rulemaking is the best regulatory course of action. The Board welcomes public comment on any facet of this IRFA, including issues that we have failed to consider.

Paperwork Reduction Act

The NLRB is an agency within the meaning of the Paperwork Reduction Act (PRA). 44 U.S.C. 3502(1) and (5). This Act creates rules for agencies when they solicit a ''collection of information.'' 44 U.S.C. 3507. The PRA defines ''collection of information'' as ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format.'' 44 U.S.C. 3502(3)(A). The PRA only applies when such collections are ''conducted or sponsored by those agencies.'' 5 CFR 1320.4(a).

The proposed rule does not involve a collection of information within the meaning of the PRA; it instead clarifies the standard for determining joint-employer status. Outside of administrative proceedings (discussed below), the proposed rule does not require any entity to disclose information to the NLRB, other government agencies, third parties, or the public.

The only circumstance in which the proposed rule could be construed to involve disclosures of information to the Agency, third parties, or the public is when an entity's status as a joint employer has been alleged in the course of Board administrative proceedings. However, the PRA provides that collections of information related to ''an administrative action or investigation involving an agency against specific individuals or entities'' are exempt from coverage. 44 U.S.C. 3518(c)(1)(B)(ii). A representation proceeding under section 9 of the NLRA as well as an investigation into an unfair labor practice under section 10 of the NLRA are administrative actions covered by this exemption. The Board's decisions in these proceedings are binding on and thereby alter the legal rights of the parties to the proceedings and thus are sufficiently ''against'' the specific parties to trigger this exemption.[76]

For the foregoing reasons, the proposed rule does not contain information collection requirements that require approval by the Office of Management and Budget under the PRA.

Congressional Review Act

The provisions of this rule are substantive. Therefore, the Board will submit this rule and required accompanying information to the Senate, the House of Representatives, and the Comptroller General as required by the Small Business Regulatory Enforcement Fairness Act (Congressional Review Act or CRA), 5 U.S.C. 801–808.

This rule is a ''major rule'' as defined by Section 804(2) of the CRA because it will have an effect on the economy of more than $100 million, at least during the year it takes effect. 5 U.S.C. 804(2)(A).[77] Accordingly, the rule will become effective no earlier than 60 days after publication of the final rule in the **Federal Register**.

List of Subjects in 29 CFR Part 103

Colleges and universities, Health facilities, Joint-employer standard, Labor management relations, Military personnel, Music, Sports.

Text of the Proposed Rule

For the reasons discussed in the preamble, the Board proposes to amend 29 CFR part 103 as follows:

PART 103—OTHER RULES

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

■ 2. Add § 103.40 to read as follows:

§ 103.40: Joint employers.

An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the

[74] However, there are standards that prevent the Board from asserting authority over entities that fall below certain jurisdictional thresholds. This means that extremely small entities outside of the Board's jurisdiction will not be affected by the proposed rule. *See* CFR 104.204.

[75] *NLRB* v. *Nat. Gas Util. Dist. of Hawkins Cty., Tenn.,* 402 U.S. 600, 603–04 (1971) (quotation omitted).

[76] Legislative history indicates Congress wrote this exception to broadly cover many types of administrative action, not just those involving ''agency proceedings of a prosecutorial nature.'' *See* S. REP. 96–930 at 56, *as reprinted in* 1980 U.S.C.C.A.N. 6241, 6296. For the reasons more fully explained by the Board in prior rulemaking, 79 FR 74307, 74468–69 (2015), representation proceedings, although not qualifying as adjudications governed by the Administrative Procedure Act, 5 U.S.C. 552b(c)(1), are nonetheless exempt from the PRA under 44 U.S.C. 3518(c)(1)(B)(ii).

[77] A rule is a ''major rule'' for CRA purposes if it will (A) have an annual effect on the economy of $100 million or more; (B) cause a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (C) result in significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States–based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804. The proposed rule is a ''major rule'' because, as explained in the discussion of the Regulatory Flexibility Act above, the Board has estimated that the average cost of compliance with the rule would be approximately $124.37 per affected employer and approximately $80.26 per union. Because there are some 5.9 million employers and 13,740 unions that could potentially be affected by the rule, the total cost to the economy of compliance with the rule will exceed $100 million ($733,783,000 + $1,102,772.4 = $734,885,772.4) in the first year after it is adopted. Since the costs of compliance are incurred in becoming familiar with the legal standard adopted in the proposed rule, the rule would impose no additional costs in subsequent years. Additionally, the Board is confident that the rule will have none of the effects enumerated in 5 U.S.C. 804(2)(B) and (C), above.

employees' essential terms and conditions of employment in a manner that is not limited and routine.

Example 1 to § 103.40. Company A supplies labor to Company B. The business contract between Company A and Company B is a ''cost plus'' arrangement that establishes a maximum reimbursable labor expense while leaving Company A free to set the wages and benefits of its employees as it sees fit. Company B does not possess and has not exercised direct and immediate control over the employees' wage rates and benefits.

Example 2 to § 103.40. Company A supplies labor to Company B. The business contract between Company A and Company B establishes the wage rate that Company A must pay to its employees, leaving A without discretion to depart from the contractual rate. Company B has possessed and exercised direct and immediate control over the employees' wage rates.

Example 3 to § 103.40. Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. On-site managers employed by Company B regularly complain to A's supervisors about defective products coming off the assembly line. In response to those complaints and to remedy the deficiencies, Company A's supervisors decide to reassign employees and switch the order in which several tasks are performed. Company B has not exercised direct and immediate control over Company A's lineworkers' essential terms and conditions of employment.

Example 4 to § 103.40. Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. Company B also employs supervisors on site who regularly require the Company A supervisors to relay detailed supervisory instructions regarding how employees are to perform their work. As required, Company A supervisors relay those instructions to the line workers. Company B possesses and exercises direct and immediate control over Company A's line workers. The fact that Company B conveys its supervisory commands through Company A's supervisors rather than directly to Company A's line workers fails to negate the direct and immediate supervisory control.

Example 5 to § 103.40. Under the terms of a franchise agreement, Franchisor requires Franchisee to operate Franchisee's store between the hours of 6:00 a.m. and 11:00 p.m. Franchisor does not participate in individual scheduling assignments or preclude Franchisee from selecting shift durations. Franchisor has not exercised direct and immediate control over essential terms and conditions of employment of Franchisee's employees.

Example 6 to § 103.40. Under the terms of a franchise agreement, Franchisor and Franchisee agree to the particular health insurance plan and 401(k) plan that the Franchisee must make available to its workers. Franchisor has exercised direct and immediate control over essential employment terms and conditions of Franchisee's employees.

Example 7 to § 103.40. Temporary Staffing Agency supplies 8 nurses to Hospital to cover during temporary shortfall in staffing. Over time, Hospital hires other nurses as its own permanent employees. Each time Hospital hires its own permanent employee, it correspondingly requests fewer Agency-supplied temporary nurses. Hospital has not exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

Example 8 to § 103.40. Temporary Staffing Agency supplies 8 nurses to Hospital to cover for temporary shortfall in staffing. Hospital manager reviewed resumes submitted by 12 candidates identified by Agency, participated in interviews of those candidates, and together with Agency manager selected for hire the best 8 candidates based on their experience and skills. Hospital has exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

Example 9 to § 103.40. Manufacturing Company contracts with Independent Trucking Company (''ITC'') to haul products from its assembly plants to distribution facilities. Manufacturing Company is the only customer of ITC. Unionized drivers—who are employees of ITC—seek increased wages during collective bargaining with ITC. In response, ITC asserts that it is unable to increase drivers' wages based on its current contract with Manufacturing Company. Manufacturing Company refuses ITC's request to increase its contract payments. Manufacturing Company has not exercised direct and immediate control over the drivers' terms and conditions of employment.

Example 10 to § 103.40. Business contract between Company and a Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. Company has never actually exercised its authority under this provision. Company has not exercised direct and immediate control over the Contractor's employees' terms and conditions of employment.

Example 11 to § 103.40. Business contract between Company and Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. The business contract also permits either party to terminate the business contract at any time without cause. Company has never directly disciplined Contractor's employees. However, Company has with some frequency informed Contractor that particular employees have engaged in misconduct or performed poorly while suggesting that a prudent employer would certainly discipline those employees and remarking upon its rights under the business contract. The record indicates that, but for Company's input, Contractor would not have imposed discipline or would have imposed lesser discipline. Company has exercised direct and immediate control over Contractor's employees' essential terms and conditions.

Example 12 to § 103.40. Business contract between Company and Contractor reserves a right to Company to discipline Contractor's employees for misconduct or poor performance. User has not exercised this authority with the following exception. Contractor's employee engages in serious misconduct on Company's property, committing severe sexual harassment of a coworker. Company informs Contractor that offending employee will no longer be permitted on its premises. Company has not exercised direct and immediate control over offending employee's terms and conditions of employment in a manner that is not limited and routine.

Dated: September 10, 2018.

Roxanne Rothschild,

Deputy Executive Secretary.

[FR Doc. 2018–19930 Filed 9–13–18; 8:45 am]

BILLING CODE 7545–01–P

NLRB FACT SHEET

Proposed Rule Regarding the Standard for Determining Joint-Employer Status

OVERVIEW

The National Labor Relations Board's (NLRB) proposed rule would change the standard for determining whether one employer can be found to be a joint employer of another employer's employees.

AT-A-GLANCE

- The proposed rule reflects a return to the previously longstanding standard that an employer may be considered a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.

- The intent of the proposed rule is to foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability.

- Since 2015, there has been instability in the law regarding whether a company shares or codetermines the essential terms and conditions of another employer's employees when it indirectly influences those terms and conditions, has never invoked a contractual reservation of authority to set them, or has exercised authority that is merely "limited and routine," such as by instructing employees where and when to perform work, but not how to perform it.

- The change to current law that would be effectuated by the proposed rule, should it become final after notice and comment, would be that a company could no longer be deemed to be a joint employer of another employer's workers based solely on its indirect influence, a contractual reservation of authority that the company has never exercised, or its exercise of only "limited and routine" authority.

- Under the National Labor Relations Act, the legal consequences of a joint-employer finding are significant. The Board may compel a joint employer to bargain over the terms and conditions of employees employed by another employer. Also, each company comprising the joint employer may be found jointly and severally liable for the other's unfair labor practices. And a finding of joint-employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful.

- The proposed rule reflects the Board's initial view, subject to potential revision in response to comments, that the Act's purposes would not be furthered by drawing into a collective-bargaining relationship, or exposing to joint-and-several liability, the business partner of an employer where the business partner does not actively participate in decisions setting the employees' wages, benefits, and other essential terms and conditions of employment.

ADDITIONAL INFORMATION

The Board seeks public comment on all aspects of its proposed rule. As specified in the Notice of Proposed Rulemaking, published in the Federal Register on September 14, 2018, public comments may be submitted electronically or in hard copy.

The proposed rule may be found at:
https://www.federalregister.gov/documents/2018/09/14/2018-19930/definition-of-joint-employer

The Board will review the public comments and work to promulgate a final rule that clarifies the joint-employer standard in a way that promotes meaningful collective bargaining and advances the purposes of the Act.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
1015 Half Street, S.E.
Washington, DC 20570

December 10, 2018

Members of the Board:

This comment is submitted by the General Counsel of the National Labor Relations Board in response to the National Labor Relations Board's Notice of Proposed Rulemaking, Request for Comments dated September 14, 2018.

I. Introduction.

The General Counsel of the National Labor Relations Board (NLRB) believes that the joint employer standard enunciated in *Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (Aug. 27, 2015), *petition for review docketed*, No. 16-1028 (D.C. Cir. filed Jan. 20, 2016) (hereinafter "*BFI*") should be overturned and that the proposed rule should be adopted to replace it. The joint employer standard articulated in the *BFI* decision both departs from decades of Board law and conflicts with federal and state statutory and common law. The General Counsel also believes that rulemaking is the appropriate vehicle, rather than decisional law, to address this important issue that has ramifications for numerous businesses throughout the United States.

As discussed below, while the proposed rule goes a long way to ameliorate the problems created by the *BFI* standard, it does not go far enough in providing clarity concerning the appropriate application of the new joint employer standard. For instance, the proposed rule does not provide sufficient guidance to entities or factfinders concerning the combination of factors that determine joint employer status. The proposed rule seems to create a "one size fits all" standard without addressing how this approach will affect specific industry concerns or business realities. Equally important, the proposed rule does not address the circumstances in which a joint employer analysis is necessary or permissible, nor the legal or practical consequences to an entity that is found to be a joint employer. Thus, the proposed rule should also clarify that application of the joint employer analysis should be limited to situations where the alleged joint employer has committed an unfair labor practice itself or a joint-employer finding is necessary to effectuate a

remedial order of the Board. In the sections below, we address these concerns and issues. Given the far-reaching ramifications of a joint employer definition, we suggest that the Board in its final rule provide further guidance as outlined in this comment.

II. The Board's Proposed Rule is Necessary to Overturn the Ill-Considered Decision of the Board Majority in *BFI*.

We fully support the adoption of this much-needed proposed rule. Put simply, the decision of the majority in *BFI* was mistaken as a matter of labor law and misguided as a matter of labor policy. That decision abandoned a longstanding test that had provided a significant measure of certainty and predictability and replaced it with a vague and ambiguous standard that allows the possibility of imposing unworkable bargaining obligations on multiple entities in a wide variety of business relationships. This change has subjected countless entities to previously unknown joint bargaining obligations, to potential joint liability for discriminatory actions of their putative joint employers or for breaches of collective-bargaining agreements to which they do not know they are bound, and to primary strikes, boycotts, and picketing that would previously have been unlawful secondary activity.

Indeed, under the rule of *BFI*, virtually all user employers, franchisors, subsidiaries, etc., would meet the joint employer test simply because their contracts with the entities that actually employ the employees at issue almost always have the *potential* to control the employees' working conditions -- even if only because the user employer or franchisor can always simply cancel the contract if it is not satisfied with the supplier employer's or franchisee's terms and conditions of employment. Thus, the Board's proposed rule is much needed to avoid the almost limitless indirect control/right-to-control standard in *BFI* that creates joint employer relationships in nearly every contractual business relationship. Under the current standard, parties to such contracts can never know if they will ultimately be considered joint employers at some time in the future. Therefore, a more rational standard based on actual "substantial direct and immediate control" is critically necessary.

A. The Board's proposed rule would promote industrial stability.

For decades, the long-standing pre-*BFI* Board criteria for determining joint employer status that would be re-established by the proposed rule provided employers with substantial stability and predictability in entering into labor supply arrangements in response to fluctuating market needs, served to reduce the scope of labor disputes, and limited the circumstances in which non-employing entities could be responsible for participating in bargaining. In this regard, we emphasize that, while the Act encourages collective bargaining, it does so only as to an actual

"employer" in direct relation to its employees. The Board majority in *BFI* expanded the objective of collective bargaining far beyond what Congress intended, and far beyond what promotes industrial stability. Rather, the *BFI* test fosters substantial bargaining *instability* by requiring the nonconsensual inclusion of entities with diverse and conflicting interests on the "employer" side of the bargaining table. Indeed, the very commencement of good faith bargaining may often be delayed by disputes over whether the correct "employer" parties are present, the respective legal and bargaining obligations of the various "employer" parties, and the bargaining proposals to be offered at the table. The outcome of this unpredictability is irreconcilable with the Act's overriding policy to "eliminate the causes of certain substantial obstructions to the free flow of commerce." 29 U.S.C. § 151.

BFI greatly expanded who can be found to be a joint-employer without adequately considering the practical implications for real-world business and collective-bargaining relationships. This is contrary to the Act's goal of "achieving industrial peace by promoting *stable* collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (emphasis added). *See also Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.").

The decision in *BFI* has had the effect of disrupting thousands, if not hundreds of thousands, of business relationships, contractual relationships, and, ultimately, bargaining relationships because the new joint employer standard now extends its reach to decades-old business relationships, as well as business partners that have never before been thrust into their customers' or vendors' labor disputes and whose presence in them can only serve to impede the likelihood of their resolution. The majority in *BFI* purported to revisit the Board's joint employer standard because of the supposed great expansion in use of temporary help services agencies starting in the 1990s and the increasing number of individuals who work for such agencies, even though the majority could point to no pressing labor problem in need of correction that had arisen from either the supposed expansion of this type of workforce or the application of the traditional joint employer standard to this workforce situation. 362 NLRB No. 186, slip op. at 11. Nevertheless, the resulting *BFI* joint employer standard is now being applied expansively well beyond the claimed increased temporary help services agencies and their clients to multiple well-settled business and contractual relationships with stable labor relationships -- such relationships are now being destabilized by these new legal obligations that did not exist when the relationships were established.

Further, the current legal standard, by extending joint employer status to entities with "indirect" or "potential" control, not only expands the scope of putative joint employer entities in the NLRA context but potentially creates conflicts with other federal and state statutory schemes. To the extent that the *BFI* joint

employer standard diverges from such other schemes, such divergence will inevitably create inconsistencies and conflicts for businesses in their attempts to comply with the various federal and state employment and related laws. This is especially true here where courts in fashioning standards for analysis under Title VII and other federal employment laws have looked to the NLRA for guidance. *In re Enterprise Rent–A–Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469-70 (3d Cir. 2012) (discussing the standards used in FLSA, ADEA, and Title VII cases).

Thus, as the dissent in *BFI* predicted, the number of contractual relationships now encompassed within the new standard is "virtually unlimited" and includes, among others, franchisors, any company that negotiates specific quality or product requirements, any company that has provisions in its contracts concerning the quality of contracted services, any company that has input on who provides services to it, or that monitors performance, and any "consumers or small businesses who dictate times, manner, and some methods of performance of contractors." 362 NLRB No. 186, slip op. at 37 (Members Miscimarra and Johnson, dissenting). The need to return to a reasonable joint employer legal standard that more closely conforms to extant federal, state, and common law is thus pressing.

B. The Board's proposed rule would resolve other problems presented by the Board majority's decision in *BFI*.

The Board's proposed rule would resolve other problems presented by the Board majority's decision in *BFI*, including unwarranted vagueness and uncertainty, unworkable collective-bargaining requirements, and allowing the spread of economic coercion to additional business entities not otherwise involved in labor disputes. The *BFI* rule imposes no meaningful limit on who can be deemed a joint employer of another's workers. It eliminated the appropriate emphasis on whether a putative joint employer has actual direct and immediate control of essential terms of employment, which establishes a discernible and rational line between what does and does not constitute an employer-employee relationship under the Act. The Agency discretion afforded by this change means that no contracting business entity can ever be certain that it will not be faced with some future Board determination that it is a joint employer based on the incomprehensible view that bargaining would somehow be more effective if more parties are forced to be at the table.

The vague and ambiguous *BFI* standard lacks clarity and provides minimal, if any, guidance as to what factors are significant for evaluating joint-employer status. For example, a user employer receiving employees from a supplier employer always exercises ultimate control over the supplier's employees at its facility, if only to retain the potential to take action to prevent disruption of its own operations, to prevent unlawful conduct, or to ensure that it is obtaining the level and quality of services it has contracted for, at the cost for which it contracted. *See, e.g., Southern*

California Gas, 302 NLRB 456, 461 (1991). Efforts by a user employer to monitor, evaluate, and improve the performance of supplied employees, as opposed to controlling the manner and means of their performance (and especially the details of that performance), are typical of the relationship between a company and its supplier and should not make the supplier's workers employees of the user employer. The existence of this kind of oversight, therefore, cannot be an appropriate basis for finding that the user employer is a joint employer of its supplier's employees.

Nevertheless, under the *BFI* standard, countless entities are potentially subject to significant financial liabilities for merely ensuring that they are receiving the services for which they contracted. Under *BFI*, collective bargaining also appears to be required wherever there is some modicum of interdependence between or among employers. This requirement is much more likely to obstruct the free flow of commerce, rather than promote it. Such outcomes are likely because of the virtually limitless discretion to make decisions in this area given by *BFI* to after-the-fact factfinders, even though the factfinders may have no grounding in the realities of business contracting or the logistical necessities of efficient, effective, and productive collective bargaining.

The *BFI* majority decision required that the Board would look at every aspect of a business relationship on a case-by-case basis and then decide the joint employer question after the fact. Because of this, the uncertainty created by *BFI*'s vague standard created an unreasonable risk that parties may only discover subsequently, following years of costly litigation, that they have been unlawfully absent from negotiations in which they were legally required to participate, or conversely that they unlawfully injected themselves into collective bargaining between another employer and its union(s) based on a relationship that ultimately turned out to be insufficient to result in a joint-employer finding. As the dissenters in *BFI* put it, the Board owed a "greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that 'we'll see how it floats.'" *BFI*, 362 NLRB No. 186, slip op. at 48 (Members Miscimarra and Johnson, dissenting). The lack of concern for the real-world consequences of the changes set forth in *BFI* does a disservice to the parties that have to function under the Board's decisions in the real world.

Moreover, collective bargaining was intended by Congress to be a process that could conceivably produce labor agreements. One of the key analytical problems in widening the net of who must bargain is that, at some point, agreements will *not* be achievable because the different parties involuntarily thrown together as negotiators under the *BFI* test predictably have widely divergent interests. For example, under the *BFI* joint employer test, a company that contracts with another to supply labor at a fixed price per hour may be considered a joint employer and have an obligation to bargain over wages, even

though the supplier employer is the actual employer of the employees and payer of the wages. Should the user company be compelled to bargain over wages of the supplier's employees, the joint employers may have irreconcilable differences over wage rates since any wage increase will not affect the user employer but will affect the supplier's costs of performing the contract. Injecting an additional party into the collective bargaining process with interests that do not align with the co-employer's concerning a critical element of collective bargaining, such as wages, will make achieving agreement much less likely. Thus, *BFI's* expansion of bargaining obligations to additional business entities will have the effect of destabilizing existing bargaining relationships and complicate new ones.

Further, this expansion of a joint employer finding to require additional business entities to be at the bargaining table, or potentially face liability for violation of Section 8(a)(5) and 8(d) of the Act, conflicts with 80 years of Board precedent. By requiring a joint employer to be at the bargaining table along with the co-employer, the NLRB for the first time is, in effect, dictating who must sit at the bargaining table. The Board has never previously required entities that are not the employer or certified labor representative to be a party to collective bargaining, even if that party has control over certain terms and conditions of employment. The Board has not required this of international unions that control their locals' bargaining authority; nor should the Board require bargaining by a joint employer that may control certain terms and conditions of employment. Such applications of the current joint employer standard yield legal obligations that are a gross departure from Board precedent and practicality.

Not only did the *BFI* test impermissibly expand and confuse bargaining obligations under Section 8(a)(5) and 8(d), it also did violence to other provisions of the Act that depend on a determination of who is, and who is not, the "employer." Chief among them is Section 8(b)(4)(ii)(B), which prohibits secondary economic protest activity, such as strikes, boycotts, and picketing. That section of the Act "prohibits labor organizations from threatening, coercing, or restraining a neutral employer with the object of forcing a cessation of business between the neutral employer and the employer with whom a union has a dispute," *Teamsters Local 560 (County Concrete Corp.)*, 360 NLRB 1067, 1067 (2014), but does not prohibit striking or picketing the primary employer, i.e., the employer with whom the union does have a dispute, *Steelworkers v. NLRB (Carrier Corp.)*, 376 U.S. 492, 499 (1964). An entity that is a joint employer with the employer involved in a labor dispute is equally subject to union economic protest activities. *See, e.g., Teamsters Local 688 (Fair Mercantile)*, 211 NLRB 496, 496-97 (1974) (union's picketing of a retailer did not violate Section 8(b)(4)(ii)(B) because retailer was the joint employer of employees of a delivery contractor with which the union had a labor dispute). To put this in practical terms, before *BFI*, a union in a labor dispute with a supplier employer typically could not picket a user entity to urge that entity's customers to cease doing business with the user, with the object of forcing the user employer to

cease doing business with the supplier employer. *BFI*s expansion of the joint-employer doctrine swept many more entities into primary-employer status as to labor disputes that are not directly their own. As a result, unions may be permitted to lawfully picket or apply other coercive pressure to either or both joint employers as they chose, even though the targeted joint employer may not have direct control or even *any* control over the particular terms or conditions of employment that are the subject of the labor dispute. This result is clearly contrary to the Act's object of limiting the spread of economic coercion beyond the entities actually involved in a labor dispute.

II. The Board's Proposed Rule is an Important Step in the Right Direction, But More Clarity and Predictability are Needed.

We agree that the proposed rule is decidedly a positive and constructive step towards establishing a sensible, workable, comprehensive definition of a joint employer, although more explanation and elucidation are needed. Thus, as noted above, the broad strokes of the rule, particularly requiring a finding that a joint employer's substantial actual control of employees' terms and conditions of employment be direct and immediate, and not limited and routine, are an important step towards re-establishing predictability, stability, and appropriate statutory labor policy as to this definition. The proposed rule certainly takes great strides towards eliminating the chance that a business entity will be erroneously determined to be a joint employer based solely on indirect and potential control, such as merely based on an unexercised contractual reservation of control. The proposed rule also clearly decreases uncertainty about who will be a joint employer, thus promoting industrial stability and allowing business entities to better anticipate their legal and operational obligations.

However, without additional comments, explanation, rulemaking, and/or adjudication from the Board clarifying several related aspects of the Board's joint-employer doctrine, the proposed rule necessarily fails to resolve many of the extant issues in joint employer jurisprudence, and thereby fails to provide sufficient clarity for employers, employees, unions, and business partners as well as the factfinders adjudicating this issue. In this regard, we particularly emphasize that: (1) the proposed rule still leaves questions as to which employment terms are "essential," which of those "essential" terms are critical in determining whether an entity is a joint employer, and how many (and to what extent) terms must actually be subject to the putative joint employer's direct and immediate control in order to establish joint employer status; (2) the critical terms in the joint employer standard -- "substantial," "limited," and "routine" remain insufficiently defined in the proposed rule; and (3) the examples the Board has given provide insufficient guidance in delineating joint employer status. The final rule should therefore clarify and answer these open issues. Below are some suggested changes to the proposed rule to provide greater guidance in all of these areas.

A. Defining essential employment terms.

As to further clarifying what employment terms are essential in determining joint employer status, and the appropriate weight to be given such terms, we note that the Board stated in its seminal *Laerco* and *TLI* decisions that the focus of "essential" terms is whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Laerco*, 269 NLRB 324, 325 (1984); *TLI*, 271 NLRB 798, 798 (1984), *enforced sub nom., Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985). Notably, employees' wages and benefits are not expressly on this list, even though these particular terms are seen as the most significant and essential subjects of employees' terms and conditions of employment and, typically, the most central subjects of collective bargaining. Indeed, the Board looks primarily at who provides wages and benefits in determining employer status in other contexts. *See, e.g., Management Training Corp.*, 317 NLRB 1355, 1360 (1995) (in determining whether to assert jurisdiction over a private employer who is arguably controlled by an exempt entity, the Board looks to whether the employer "lacks control over essential terms and conditions of employment, e.g., wages and benefits"), *reconsideration denied*, 320 NLRB 131 (1995). The seeming limitation of consideration of "essential" terms and conditions of employment in the proposed rule to "hiring, firing, discipline, supervision and direction," without including compensation and benefits is inconsistent with prior Board law. *See, e.g.*, *TLI,* 271 NLRB at 799 (finding no joint employer status because, among other reasons, the putative joint employer had input in, but did not control, the "economics of the relationship" such as wages and other economic benefits). Under other federal statutes, factors normally used in determining whether an entity is a joint employer include (1) authority to hire and fire employee, (2) authority to promulgate work rules and assignments and set conditions of employment such as compensation and benefits, and (3) possession of day-to-day supervision of employees, including employee discipline. *In re Enterprise Rent–A–Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469-70 (3d Cir. 2012) (discussing the standards used in FLSA, ADEA, and Title VII cases).

In the final rule, the Board should list the "essential terms and conditions of employment" factors necessary to determine whether a joint employer relationship exists. These factors should include control over (1) the determination of wages and benefits, (2) hiring and firing of employees, and (3) discipline, supervision and direction of employees. Such a list will better guide all parties as to what their obligations are.

The Board should also clarify whether the factors enumerated are or are not an exhaustive list of all potentially relevant employment conditions that may determine joint employer status. Further, the Board should also provide additional

guidance on how the factors should be analyzed and the weight to be given to particular factors individually or in combination.

In the final rule, the General Counsel suggests that, for an entity to be deemed a joint employer subject to a bargaining obligation or for vicarious liability for a co-employer's violation of a bargaining obligation, that entity must control *all* listed essential terms and conditions of employment factors. Given the grave concerns about subjecting an arm's-length business partner to a bargaining obligation with another employer's employees' bargaining representative, the threshold for a finding of a joint employer relationship in this context should be high and such findings of joint employer status should be rare. Indeed, it makes no sense for an entity that may control all terms of employment other than wages and benefits to be compelled to appear at the bargaining table. For the reasons discussed in Section II.A. above, requiring such entity to bargain would be an exercise in futility with respect to achieving, let alone quickly achieving, a collective-bargaining agreement.

On the other hand, for possible liability with respect to different types of unfair labor practice allegations engaged in by a co-employer such as unlawful discipline or discharge for protected activity, control of less than *all* of these employment terms may be sufficient to establish joint employer liability. In these types of circumstances, the Board and courts generally do not impose liability on a joint employer, unless the joint employer was the bad actor or knew or should have known about the unlawful activity and did nothing to prevent or mitigate it. *See Capitol EMI Music*, 311 NLRB 997, 1000 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 471 (1993), *enforced,* 44 F.3d 516 (7th Cir. 1995).

In any event, the final rule should enumerate the employment terms and conditions that should be factored into the joint employer determination, state the weight to be accorded to different factors, and address the number of factors necessary to make such a determination with respect to the context in which such determination is being made.

B. Clarifying the requisite level of control.

The Board should also provide greater guidance as to what constitutes "substantial actual control" of employees' terms and conditions of employment that is direct and immediate and not "limited and routine." Is direct control over just any one term enough? Does it matter what term, or how substantial or significant the putative joint employer's control is over that term? If extremely limited control is not sufficient, more elaboration is needed to indicate how much direct control is necessary, and over how many and what terms.

Similarly, while the Board's proposed rule certainly is based on key common law principles such as "the extent of actual *supervision* exercised by a putative employer over the 'means and manner' of the workers' performance," *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990) (emphasis in original), the Board should clarify the parameters of what kinds of actual supervision and direction of employees is only "limited and routine" and insufficient to establish joint employer status. *See, e.g., Laerco*, 269 NLRB at 326; *TLI*, 271 NLRB at 799; *Flagstaff Medical Center, Inc.,* 357 NLRB 659, 667 (2011) (daily supervision of housekeeping employees was "limited and routine"), *enforcement denied on other grounds*, 715 F.3d 928 (D.C. Cir. 2013); *Teamsters Local 776 (Pennsylvania Supply)*, 313 NLRB 1148, 1154 (1994) (assignment of drivers' loads and destinations and, in some instances, requiring drivers to follow specified routes and dealing with permit problems was "limited and routine"). The Board should also clarify whether "limited and routine" supervision merely means that "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," *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007), *enforced in pertinent part*, 647 F.3d 435 (2d Cir. 2011), or whether the term has wider application. In this context, more explanation is surely needed to provide the clarity and predictability that is at the heart of this rulemaking effort.

To guide the public, the final rule should explicitly state what "limited and routine" control is or is not. Further, with respect to "control" over other terms and conditions of employment, the Board should explicitly state in the body of the final rule, as it has done in the explanatory commentary to the proposed rule, that provisions in a contractual agreement between two business entities that provide for employment terms of one of the entities employees do not in and of themselves indicate the joint possession of control over such terms and conditions of employment. As discussed in Section III.C. below, the examples contained in the proposed rule seem inconsistent with this premise, which is a critical element of the new joint employer rule -- that control must be "possess[ed] and actually exercise[d]" -- for an entity to be a joint employer. The General Counsel therefore suggests an explicit provision in the final rule clarifying that the exercise of control of a term and condition of employment is not met merely because a contract between two entities dictates a particular employment term for the individuals performing services under that contract.

C. The hypothetical examples accompanying the proposed rule.

As to the hypothetical examples set forth in the proposed rule, we recognize that they offer some guidance by setting forth simple illustrative contrasts that shed light on the Board's intent. Providing simple examples with only one or two contrasting differences in the terms of a business relationship, however, perhaps unintentionally suggests that the exercise of control over a single term of

employment, without regard to the significance of that particular term, could create a joint employer relationship. We believe that this suggestion is unintentional given the Board's indication in its introduction to the proposed rule that "it will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition)."[1] In any case, the Board should clarify that control of a single term of employment or a combination of terms of employment is not sufficient for a joint employer finding, and that a joint employer must have direct and immediate control over each essential term of employment. See discussion in Section III.A. above.

While the proposed rule does not include wages and benefits and other economic terms in the list of "essential terms" of employment, as noted above, Examples 1 and 2 contain contrasting examples of control or lack of control of wage rates and benefits. As discussed above, the rule should therefore be modified to list such terms as wage rates and benefits as examples of "essential" employment terms under the NLRA.

In addition, there are other problems with these two examples that seem to contradict rather than support the stated meaning of the proposed rule. First, the conclusion in Example 2 that Company B possesses control over Company A's employees' wage rate simply because the contract between Company A and Company B establishes a wage rate contradicts the proposed rule's import that a contractual relationship that lacks any actual exercise of "direct and immediate control" does not establish a joint employer relationship. Second, these examples do not provide guidance as to the impact of a finding of control of the wage rate.

As to Examples 3 and 4, the only difference between them is that, in Example 4, Company B supervisors tell Company A supervisors how Company A's employees are to perform the work on Company B's work site, rather than just complaining to Company A about product deficiencies and letting Company A figure out how to fix the quality of their employees' work. This appears to be a wholly artificial distinction that ignores the realities of work places and working relationships among contracting parties. Here, as well, the examples give no guidance on the consequences to Company B of the exercise of such supervisory control with respect to any potential obligations it may have under the NLRA.

[1] Basing a determination of joint employer on control of a single term and condition of employment would be inconsistent with the weight of authority and prior Board law. *See, e.g.*, *NLRB v. Browning-Ferris Indus. of Pa.,* 691 F.2d 1117, 1123 (3d Cir. 1982); *TLI,* 271 NLRB at 799 (no joint employer finding based on lack of sufficient control over a combination of terms and conditions of employment).

Similarly, in Example 8, the Hospital is deemed to have exercised "direct and immediate control over temporary nurses' essential terms and conditions of employment" merely because the Hospital manager participated in reviewing the nurse applicants' resumes and selected the proposed candidates for placement at the Hospital. A client/user company's selection of individuals for placement at a work site is commonplace and, in certain industries, may even be required by law. Such decisions by a client company of which temporary staffing agency employee works on its premises should not in and of itself create any joint employer relationship or bargaining obligation with respect to the staffing agency's employees.

To provide better guidance and more consistency in analyzing these relationships, the Board will certainly need to provide more granular, nuanced, and useful indications of the exact parameters of the joint employer definition in the final rule itself, in comments or explanation attendant to the rule, or in future adjudication or rulemaking. We support the Board's determination to attempt to provide useful guidance, and we strongly urge the Board to expand such guidance beyond these examples. Indeed, we urge the Board to refine its final rule, as suggested in this comment, to achieve the goal of the rulemaking process, which is to provide comprehensive guidance concerning joint employer status so as to prevent, given the various configurations in which this issue may emerge, the endless litigation and piecemeal decisions necessary to achieve something approaching equivalent guidance.

IV. The Board Needs to Address the Differing Concerns of Different Industries and Employment Settings.

In its Notice of Proposed Rulemaking, the Board wisely sought input from employees, unions, and employers regarding their experience in different workplaces where multiple employers might have some authority. Notably, if commenters raise the need for the proposed rule to more adequately consider, or explicitly deal with, different concerns in different industries, the Board should attempt to fully and comprehensively address those concerns. Without adequately addressing these industry specific requirements or concerns, the application of these rules may conflict with other federal laws and will put businesses in unstable labor or impossible compliance situations. A company's steps taken to comply with industry regulations or to monitor its own contracts should not be deemed to be the type of control of essential employment terms as to create a joint employer relationship. The mere attempt by a regulated company to police its own compliance and the compliance of its suppliers with third party regulations should not be sufficient to form a joint employer relationship with a service provider's employees. As discussed in the examples below, the Board should thus consider the needs and compliance obligations of businesses in particular industries in fashioning its final rule.

A. Franchise relationships.

In the application of the joint employer definition to franchising industries, the Board may need to expressly address the myriad legal and everyday realities of franchising, or at least consider the issue of how to assess the "control" a franchisor exerts as part of its attempts to protect its trademark, service mark, or "brand," but which also may have some tangential effect on the franchisee's labor relations.

In this regard, we note that, under the Lanham Act, 15 U.S.C. §§ 1051-1141, the owner of a trademark who licenses a mark's use to a "related company" can be deemed to have "abandoned" the trademark by engaging in "any course of conduct . . . including acts or omissions" that "causes the mark to lose its significance." 15 U.S.C § 1127 (2006). *See also, e.g., Drexel v. Union Prescription Ctrs., Inc.*, 582 F.2d 781, 786 (3d Cir. 1978) (under the Lanham Act, a holder of a trademark must take steps to preserve its value or risk abandonment).

Similarly, the Federal Trade Commission Franchise Rule includes in its definition of "franchise" that "[t]he franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation . . ." FTC Franchise Rule, 16 C.F.R. Part 436, §§ 436.1(h). FTC staff elaborated upon this definition by stating, "to be deemed 'significant,' the control or assistance must relate to the franchisee's overall method of operation -- not a small part of the franchisee's business . . . Significant types of control [or assistance] include: . . . [h]ours of operation; [p]roduction techniques; . . . [p]ersonnel policy; . . . [f]urnishing management, marketing, or personnel advice; . . . and [f]urnishing a detailed operating manual." FTC Franchise Rule Compliance Guide, at 2-3.

Thus, federal law clearly expresses an intent to foster "brand" uniformity, and requires trademark and/or service mark licensors -- which includes every franchisor -- to impose standards and controls upon their licensees -- which includes every franchisee -- to ensure that the licensed mark serves the purpose of the mark: goods or services provided uniformly, at a certain type and level of quality, with a uniformity of appearance, and supported by a uniformity of operations. If a franchisor/licensor does not impose upon franchisees/licensees such standards, that franchisor's or licensor's trademark/service mark may be deemed abandoned, as it could be viewed as standing for nothing. *See, e.g., Oberlin v. Marlin Am. Corp.*, 596 F.2d 1322, 1327 (7th Cir. 1979); *Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589 (9th Cir. 2002) ("where the licensor fails to exercise adequate quality control over the licensee, 'a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark'"). The proposed rule does not adequately address the concern that a licensor's direct and immediate control of another employer's operations in this manner may not be for the purpose of inserting itself in the

licensee's labor relations, or even have that effect, but may just be for the necessary purpose of ensuring the protection of its most valuable asset -- its trademark or service mark. *See, e.g., Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959) ("[t]he only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees." Otherwise, "the public will be deprived of its most effective protection against misleading uses of a trademark," and "the risk that the public will be unwittingly deceived will be increased.") The Board should make clear that the operational control required by other federal law is not sufficient to establish joint employer status in the absence of evidence that the franchisor or licensor has actively attempted to further control employees' terms and conditions beyond such legal requirements.

B. Hospitals.

Similarly, a more nuanced and different approach is likely necessary for hospitals, which are subject to extensive regulation and potential liability, and necessarily involve a unique exercise of professional expertise. All of these characteristics raise significant issues in determining joint employer status, as the Board has long recognized. Thus, for example, in *Lee Hospital*, 300 NLRB 947, 950 (1990), the Board found that a professional corporation/independent contractor operating one department of a hospital was not a joint employer with the hospital, in part, because its day-to-day supervision and direction of hospital employees was "related to the physician-nurse relationship and patient care issues," rather than to generally-applicable employment matters. The unique setting of hospitals can also be seen in other areas of Board law, including the express statutory protections regarding picketing set forth in Section 8(g) of the Act, 29 U.S.C. § 158(g), the special rules concerning health care bargaining units, 29 C.F.R. § 103.30; 284 NLRB 1580 (1987), and the Board's recognition of the special circumstances that permit hospitals to limit otherwise-protected conduct in patient care areas, *see, e.g.*, *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 785-86 (1979) (special circumstances validated the applicability of a hospital's no-solicitation rule to immediate patient care areas, patient ward corridors, and waiting areas). Similarly, in this context, the Board should clarify how the joint employer standard applies to hospitals, in order to avoid the possibility of interfering with the provision and oversight of important patient care services, entangling unnecessary parties in inefficient bargaining, and subjecting additional business entities providing medical services to disruptive picketing in labor disputes that are not their own.

V. The Board Should Make Clear that the Rule Is Only a Definitional Standard.

The Board should make clear that a joint employer analysis is unnecessary and should not be reached unless the putative joint employer was involved in the

alleged unfair labor practice or an alleged unfair labor practice cannot be adequately remedied without the participation of the joint employer or to comply with a remedial order. A joint employer finding should rarely, if ever, be used to create a bargaining obligation with the labor representative of its co-employer's employees.

Current Board law specifies that a supplier-joint employer, who merely provides employees to a user-joint employer and takes no part in the daily direction or oversight of the relevant employees, should not be found liable for acts of employment discrimination that violate Section 8(a)(3) of the Act committed by the user-joint employer, unless: (1) the non-acting supplier-joint employer knew or should have known that the user-joint employer acted against the employee for unlawful reasons, and (2) the non-acting supplier-joint employer acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it may have possessed to resist the action. *See Capitol EMI Music*, 311 NLRB 997, 1000 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994); *America's Best Quality Coatings Corp*., 313 NLRB 470, 471 (1993), *enforced,* 44 F.3d 516 (7th Cir. 1995).

In cases brought under other federal anti-discrimination statutes, the courts similarly have "'held explicitly that establishing a 'joint employer' relationship does not create liability in the co-employer for actions taken by the other employer.'" *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 228-29 (5th Cir. 2015) (Americans with Disabilities Act) (quoting *Whitaker v. Milwaukee County,* 772 F.3d 802, 811 (7th Cir. 2014) (same), citing *Torres-Negron v. Merck & Co.,* 488 F.3d 34, 41 n.6 (1st Cir. 2007) (Title VII)); *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 935-40 (D.S.C. 1997) (no liability under Title VII for lack of knowledge of discriminatory conduct of co-employer). In addition to such circuit court approval, the EEOC also agrees that a joint employer must bear some responsibility for the discriminatory act to be liable for a violation of the law:

> The [staffing] firm is liable if it participates in the client's discrimination. For example, if the firm honors its client's request to remove a worker from a job assignment for a discriminatory reason and replace him or her with an individual outside the worker's protected class, the firm is liable for the discriminatory discharge. The firm also is liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control.[2]

[2] EEOC, No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, at 2260 (1997), *available at* https://www.eeoc.gov/policy/docs/conting.html.

The Board should expand this analysis beyond solely Section 8(a)(3) discrimination cases or otherwise alter the standard to match the circumstances of the actual business relationship between joint employers.

Moreover, where the issue is whether an otherwise neutral business entity is a primary employer or a neutral entity for the purposes of determining whether a union's picketing or other coercion violated Section 8(b)(4) of the Act, a finding of joint employer status should not make an otherwise neutral entity a "primary" employer lawfully subject to picketing, unless the entity is directly and substantially involved in controlling the issue in dispute. A mere finding of joint employer status should not be sufficient to enmesh a truly neutral business entity in a labor dispute in which it is not otherwise involved. Such limitation of the joint employer analysis would be more consistent with the Act's clear purpose to shield unoffending employers and others from pressures in controversies not their own. *See, e.g., NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951).

Similarly, a joint employer should not be required to participate in bargaining or have a bargaining obligation. Bargaining with two or more employers at the table may simply be unworkable even under the Board's proposed rule, because joint employers necessarily have different business interests. The Board should not be dictating to employers, even where there is a joint employer relationship, which entity must be sitting at the bargaining table with a union. The Board has never dictated who should be the actual bargaining representatives for employers or unions, and it should not do so now under the guise of joint employment. As discussed above, even where international unions have had control over the bargaining strategy of local unions and dictated the terms to which the local unions can agree, the Board has never required that the international union sit at the bargaining table or otherwise act as a bargaining representative in a collective bargaining negotiation. In such situations, the international union is in the same position as a corporate parent company or other alleged joint employer that can control some of the terms and conditions of employment of bargaining unit employees. If the Board does not require an international union to be a party to collective bargaining because of control of certain terms of employment, neither should it force a putative joint employer to collectively bargain. Thus, to promote productive and effective collective bargaining, it is to the advantage of unions as well as employers to focus bargaining by limiting the parties at the table to one of the joint employers, even where a joint employer finding may be warranted. Under such circumstances, the joint employer entity that is involved in bargaining is nonetheless unavoidably responsible for working with the other joint employer entity on issues raised in bargaining that the other entity is primarily responsible for establishing.

That is not to say that a joint employer finding should be meaningless as to collective bargaining. Each of the joint employers is fully responsible for employees'

terms and conditions of employment. Thus, for example, both joint employers are prohibited from unilaterally changing terms and conditions for bargaining unit employees in the absence of an impasse or on some other lawful basis. That is, the only way bargaining can be effective is for there to be *one* employer at the table bargaining over *all* terms and conditions. The concept, set out for the first time in the majority opinion in *BFI*, that each employer must somehow bargain over only the terms it directly controls is simply unworkable and doesn't practically fit with the kind of give-and-take and trade-offs among employment terms that are an essential element of actual collective bargaining. *Compare Central Transport*, 306 NLRB 166, 166 (1992) ("[t]he parties having stipulated that [user] is a joint employer with [supplier], it follows under well-established Board law that [user's] bargaining duty is equal to that of [supplier]"), *enforcement denied on other grounds*, 997 F.2d 1180 (7th Cir. 1993), *with BFI*, 362 NLRB No. 186, slip op. at 2 n.7, 16 ("a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful"). We of course recognize that, even under current law, one joint employer can (and likely will) designate the other as its representative in bargaining. *See, e.g., General Electric Co. v. NLRB*, 412 F.2d 512, 516-17 (2d Cir. 1969) (noting that the "right of employees and the corresponding right of employers . . . to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme"). For this reason, the statement in *BFI* that both employers are subject to a "bargaining obligation" makes no sense both as a practical matter and under Board law. Therefore, the Board should expressly recognize that a joint employer does not have a formal "bargaining obligation" even though it can be held "jointly responsible" for conduct violative of Section 8(a)(5).

Similarly, in the representation petition context, the petition must name the employer that is being organized. The entity that is the proper employer for certification purposes should be the entity that directly controls the essential terms and conditions of employment such as wages, benefits, and other economic terms of employment. Once a bargaining unit of workers of a single entity is certified, there is no need for a finding of joint employer status with respect to another entity for the purpose of collective bargaining, even if the other entity directly controls some of the essential terms of employment. Thus, if a representation petition is filed naming two employer entities for the same bargaining unit, the Board should determine which *one* of the putative joint employers should be required to bargain (i.e., the entity most in charge of employees' terms and conditions of employment). *See, e.g., Interstate Warehousing of Ohio*, 333 NLRB 682, 683 (2001); *Professional Facilities Management*, 332 NLRB 345, 345-46 & n.4 (2000). *Cf. Management Training Corp.*, 317 NLRB at 1358-59. In such cases, the Board should designate one employer as the organized entity and should not complicate the representation process to include multiple employers with differing interests who are, at least to some extent, in a form of competition or tension with each other.

VI. Conclusion.

Given the scope and complexities of the issue and the need for clear guidance, it is appropriate to define the joint employer standard and the scope of its application in the NLRA context through rulemaking rather than by decisional law. We support and applaud the Board's recognition of the unworkability of the *BFI* standard, and its proposal to revert to a joint employer standard in greater conformity with long standing Board precedent and federal, state, and common law. The proposed rule nevertheless needs more refinement to guide the public and factfinders on how to evaluate the standards articulated in the proposed rule, and in the legal and practical consequences of a joint employer finding. We strongly urge the Board to articulate explicitly in its final rule that a joint employer finding in and of itself does not create legal liability for the unfair labor practices of its co-employer business partner and does not create a bargaining obligation or an obligation to sit at the bargaining table with its co-employer's employees' labor representative. The Board should make clear that a joint employer analysis and finding is only necessary where the alleged joint employer participated in the claimed unlawful conduct or is necessary to effectuate a remedial Board order.

Respectfully submitted,

/s/ Peter B. Robb
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General Counsel

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Joint Employer Status Under the Fair Labor Standards Act

This Proposed Rule document was issued by the **Wage and Hour Division** (WHD)

For related information, **Open Docket Folder**

Comment Period Closed
Jun 25 2019, at 11:59 PM ET

ID: WHD-2019-0003-0001

View original printed format: PDF

Action

Notice of proposed rulemaking and request for comments.

Summary

This proposed rulemaking is intended to update and clarify the Department of Labor's (Department) interpretation of joint employer status under the Fair Labor Standards Act (FLSA or Act), which has not been significantly revised in over 60 years. The proposed changes are designed to promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy.

Dates

Submit written comments on or before June 10, 2019.

Addresses

You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA26, by either of the following methods: *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. *Mail:* Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Please submit only one copy of your comments by only one method. All submissions must include the agency name and RIN, identified above, for this rulemaking. Please be advised that comments received will become a matter of public record and will be posted without change to *http://www.regulations.gov,* including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this rulemaking. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Submit only one copy of your comments by only one method. *Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

For Further Information Contact

Melissa Smith, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this Notice of Proposed Rulemaking (NPRM) may be obtained in alternative formats (Large Print, Audio Tape, or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats. Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website for a nationwide listing of WHD district and area offices at *http://www.dol.gov/whd/america2.htm.*

Supplementary Information

I. Executive Summary

The FLSA requires covered employers to pay nonexempt employees at least the federal minimum wage for all hours worked and overtime for all hours worked over 40 in a workweek. [(1)] Although the FLSA does not use the term “joint employer,” the Act contemplates situations where additional persons [(2)] are jointly and severally liable with the employer for the employee's wages due under the Act.

Document Information

Date Posted:
Apr 9, 2019

RIN:
1235-AA26

CFR:
29 CFR Part 791

Federal Register Number:
2019-06500

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Comments

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, I strongly oppose the proposed rule on the standard for determining joint-employer status which is now being considered by the Department of Labors Wage and...
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Docket Information

This document is contained in
WHD-2019-0003

Over 60 years ago, in 1958, the Department promulgated a regulation, codified at part 791 of Title 29, Code of Federal Regulations (CFR), interpreting joint employer status under the Act. [3] The Department has not meaningfully revised this regulation since its promulgation. Under part 791, multiple persons can be joint employers of an employee if they are "not completely disassociated" with respect to the employment of the employee. [4] Part 791 does not adequately explain what it means to be "not completely disassociated" in one of the joint employer scenarios—where the employer suffers, permits, or otherwise employs the employee to work one set of hours in a workweek, and that work simultaneously benefits another person. In that scenario, the employer and the other person are almost never "completely disassociated," and the real question is not whether they are associated but whether the other person's actions in relation to the employee merit joint and several liability under the Act. Additional guidance could therefore be helpful. Accordingly, the Department proposes to revise part 791 to provide additional guidance for determining whether the other person is a joint employer in that scenario. [5]

The Department proposes that if an employee has an employer who suffers, permits, or otherwise employs the employee to work and another person simultaneously benefits from that work, the other person is the employee's joint employer under the Act for those hours worked only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. [6] To make that determination simpler and more consistent, the Department proposes to adopt a four-factor balancing test derived (with one modification) from *Bonnette* v. *California Health & Welfare Agency*. [7] A plurality of circuit courts use or incorporate *Bonnette'* s factors in their joint-employer test. The Department's proposed test would assess whether the potential joint employer:

Hires or fires the employee;
Supervises and controls the employee's work schedule or conditions of employment;
Determines the employee's rate and method of payment; and
Maintains the employee's employment records.

These factors are consistent with section 3(d) of the FLSA, which defines an "employer" to "include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d), and with Supreme Court precedent. They are clear and easy to understand. They can be used across a wide variety of contexts. And they are highly probative of the ultimate inquiry in determining joint employer status: Whether a potential joint employer, as a matter of economic reality, actually exercises sufficient control over an employee to qualify as a joint employer under the Act.

As mentioned above, the Department proposes to modify the first *Bonnette* factor to explain that a person's ability, power, or reserved contractual right to act with respect to the employee's terms and conditions of employment would not be relevant to that person's joint employer status under the Act. Only actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the Act. Requiring the actual exercise of power ensures that the four-factor test is consistent with the provision of 3(d) that determines joint employer status, which requires an employer to be "acting . . . in relation to an employee." [8]

The Department also proposes to explain that additional factors may be relevant to this joint employer analysis, but only if they are indicia of whether the potential joint employer is:

Exercising significant control over the terms and conditions of the employee's work; or
Otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

The Department further proposes to explain that, in determining the economic reality of the potential joint employer's status under the Act, whether an employee is economically dependent on the potential joint employer is not relevant. [9] As such, the Department proposes to identify certain "economic dependence" factors that are not relevant to the joint employer analysis. Those factors would include, but would not be limited to, whether the employee:

Is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight;
Has the opportunity for profit or loss based on his or her managerial skill; and
Invests in equipment or materials required for work or for the employment of helpers.

In addition, the Department's proposal would note that a joint employer may be any "person" as defined by the Act, which includes "any organized group of persons." [10] It would also explain that a person's business model (such as a franchise model), certain business practices (such as allowing an employer to operate a store on the person's premises or participating in an association health or retirement plan), and certain business agreements (such as requiring an employer in a business contract to institute sexual harassment policies), do not make joint employer status more or less likely under the Act.

In the other joint employer scenario under the Act—where multiple employers suffer, permit, or otherwise employ the employee to work separate sets of hours in the same workweek—the Department is proposing only non-substantive revisions that better reflect the Department's longstanding practice. Part 791's current focus on the association between the potential joint employers is useful for determining joint employer status in this scenario. If the multiple employers are joint employers in this scenario, then the employee's separate hours worked for them in the workweek are aggregated for purposes of complying with the Act's overtime pay requirement.

Related Dockets:
None

Related RINs:
None

Related Documents:
Joint Employer Status Under the Fair Labor Standards Act

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Finally, the Department's proposed rule would include several other provisions. First, it would reiterate that a person who is a joint employer is jointly and severally liable with the employer and any other joint employers for all wages due to the employee under the Act. (11) Second, it would provide a number of illustrative examples that apply the Department's proposed joint employer rule. Third, it would contain a severability provision.

Employee earnings and overtime pay under the Act would not be affected by the proposed rule. Employers would remain obligated to comply with the FLSA in all respects, including its minimum-wage and overtime provisions.

The Department believes that all of the above proposals would be consistent with the text of the Act and supported by judicial precedent. The Department further believes that these proposals would clarify the scope of joint employer status under the Act, thereby reducing litigation and compliance costs, easing administration of the law, and offering guidance to courts, which may result in greater uniformity among court decisions.

This proposed rule is expected to be an Executive Order (E.O.) 13771 deregulatory action. Discussion of the estimated reduced burdens and cost savings of this proposed rule can be found in the NPRM's economic analysis. The Department welcomes comments from the public on any aspect of this NPRM.

II. Background

The FLSA requires covered employers to pay their employees at least the federal minimum wage for every hour worked and overtime for every hour worked over 40 in a workweek. (12) The FLSA defines the term “employee” in section 3(e)(1) to mean “any individual employed by an employer,” (13) and defines the term “employ” to include “to suffer or permit to work.” (14) “Employer” is defined in section 3 (d) to “include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee.” (15)

One year after the FLSA's enactment, in July 1939, WHD issued Interpretative Bulletin No. 13 addressing, among other topics, whether two or more companies could be jointly and severally liable for a single employee's hours worked under the Act. (16) The Bulletin acknowledged the possibility of joint employer liability and provided an example where two companies arranged “to employ a common watchman” who had “the duty of watching the property of both companies concurrently for a specified number of hours each night.” (17) The Bulletin concluded that the companies “are not each required to pay the minimum rate required under the statute for all hours worked by the watchman . . . but . . . should be considered as a joint employer for purposes of the [A]ct.” (18)

The Bulletin also set forth a second example where an employee works 40 hours for company A and 15 hours for company B during the same workweek. (19) The Bulletin explained that if A and B are “acting entirely independently of each other with respect to the employment of the particular employee,” they are not joint employers and may “disregard all work performed by the employee for the other company” in determining their obligations to the employee under the Act for that workweek. (20) On the other hand, if “the employment by A is not completely disassociated from the employment by B,” they are joint employers and must consider the hours worked for both as a whole to determine their obligations to the employee under the Act for that workweek. (21) Relying on section 3(d), the Bulletin concluded by saying that, “at least in the following situations, an employer will be considered as acting in the interest of another employer in relation to an employee: If the employers make an arrangement for the interchange of employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company.” (22)

In 1958, the Department published a regulation, codified in 29 CFR part 791, that expounded on Interpretative Bulletin No. 13. (23) Section 791.2(a) reiterated that joint employer status depends on whether multiple persons are “not completely disassociated” or “acting entirely independently of each other” with respect to the employee's employment. (24) Section 791.2(b) explained, “Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek,” they are generally considered joint employers:

(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. (25)

In 1961, the Department amended a footnote in the regulation to clarify that a joint employer is also jointly liable for overtime pay. (26) Since this 1961 update, the Department has not published any other updates to part 791.

In 1973, the Supreme Court decided a joint employer case in *Falk* v. *Brennan*. [27] *Falk* did not cite or rely on part 791, but instead used section 3(d) to determine whether an apartment management company was a joint employer of the employees of the apartment buildings that it managed. [28] The Court held that, because the management company exercised "substantial control [over] the terms and conditions of the [employees'] work," the management company was an employer under 3(d), and was therefore jointly liable with the building owners for any wages due to the employees under the FLSA. [29]

In 1983, the Ninth Circuit issued a seminal joint employer decision, *Bonnette* v. *California Health & Welfare Agency*. [30] In *Bonnette,* seniors and individuals with disabilities receiving state welfare assistance (the "recipients") employed home care workers as part of a state welfare program. [31] Taking an approach similar to *Falk,* the court addressed whether California and several of its counties (the "counties") were joint employers of the workers under section 3(d). [32] In determining whether the counties were jointly liable for the home care workers under 3(d), the court found "four factors [to be] relevant": "whether the alleged [joint] employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." [33] The court noted that these four factors "are not etched in stone and will not be blindly applied" and that the determination of joint employer status depends on the circumstances of the whole activity. [34] Applying the four factors, the court concluded that the counties "exercised considerable control" and "had complete economic control" over "the nature and structure of the employment relationship" between the recipients and home care workers, and were therefore "employers" under 3(d), jointly and severally liable with the recipients to the home care workers. [35]

In 2014, the Department issued Administrator's Interpretation No. 2014-2, concerning joint employer status in the context of home care workers. [36] The Home Care AI described, consistent with § 791.2, a joint employer as an additional employer who is "not completely disassociated" from the other employer (s) with respect to a common employee, and further explained that section 3(g) determines the scope of joint employer status. [37] The Home Care AI opined that "the focus of the joint employer regulation is the degree to which the two possible joint employers share control with respect to the employee and the degree to which the employee is economically dependent on the purported joint employers." [38] The Home Care AI opined that "a set of [joint employer] factors that addresses only control is not consistent with the breadth of [joint] employment under the FLSA" because section 3(g)'s "suffer or permit" language governs FLSA joint employer status. [39] However, the Home Care AI applied the four *Bonnette* factors as part of a larger multi-factor analysis that provided specific guidance about joint employer status in the home care industry. [40]

In 2016, the Department issued Administrator's Interpretation No. 2016-1 concerning joint employer status under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which the Department intended to be "harmonious" and "read in conjunction with" the Home Care AI's discussion of joint employer status. [41] The Joint Employer AI also described section 3(g) as determining the scope of joint employer status. [42] The Joint Employer AI opined that "joint employment, like employment generally, `should be defined expansively.' " [43] It further opined that, "joint employment under the FLSA and MSPA [is] notably broader than the common law . . . which look[s] to the amount of control that an employer exercises over an employee." [44] The Joint Employer AI concluded that, because "the expansive definition of `employ' " in both the FLSA and MSPA "rejected the common law control standard," "the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible." [45] The Department rescinded the Joint Employer AI effective June 7, 2017. [46]

Need for Rulemaking

As noted, the Department has not meaningfully revised its joint employer regulation, 29 CFR part 791, since its promulgation in 1958. The current regulation provides some helpful guidance for determining joint employer status, but as explained below, the Department believes that it is helpful to offer additional guidance on how to determine joint employer status in one of the joint employer scenarios under the Act—where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work.

Part 791 currently determines joint employer status by asking whether multiple persons are "not completely disassociated" with respect to the employment of a particular employee. [47] This standard, however, does not provide adequate guidance for resolving the situation where an employee's work for an employer simultaneously benefits another person (for example, where the employer is a subcontractor or staffing agency, and the other person is a general contractor or staffing agency client). In this scenario, the employer and the other person are almost never "completely disassociated." The "not completely disassociated" standard may therefore suggest—contrary to the Department's longstanding position—that these situations always result in joint employer status. Moreover, courts have generally not focused on the degree of association between the employer and potential joint employer in this scenario. Therefore, it would be helpful to clarify the standard for joint employer status in order to give the public more meaningful guidance and proper notice of what the regulation actually requires.

It would also be helpful to revise part 791 given the current judicial landscape. Circuit courts currently use a variety of multi-factor tests to determine joint employer status, and as a result, organizations operating in multiple jurisdictions may be subject to joint employer liability in one jurisdiction, but not in another, for the same business practices. The Department's proposed four-factor test, if adopted, would provide guidance to courts that may promote greater uniformity among court decisions. This would promote fairness and predictability for organizations and employees.

Additionally, revising the Department's regulation could promote innovation and certainty in business relationships. The modern economy involves a web of complex interactions filled with a variety of unique business organizations and contractual relationships. When an employer contemplates a business relationship with another person, the other person may not be able to assess what degree of association with the employer will result in joint and several liability for the employer's employees. Indeed, the other person may be concerned by such liability despite having insignificant control over the employer's employees. This uncertainty could impact the other person's willingness to engage in any number of business practices vis-à-vis the employer—such as providing a sample employee handbook, or other forms, to the employer as part of a franchise arrangement; allowing the employer to operate a facility on its premises; using or establishing an association health plan or association retirement plan that is also used by the employer; or jointly participating with the employer in an apprenticeship program. Uncertainty regarding joint liability could also impact that person's willingness to bargain for certain contractual provisions with the employer—such as requiring the employer to institute workplace safety practices, a wage floor, sexual harassment policies, morality clauses, or other measures intended to encourage compliance with the law or to promote other desired business practices. To provide more certainty when organizations are considering these and other business practices, it would be helpful for the Department to provide more clarity about what kinds of activities could result in joint employer status.

It would also be helpful for the Department to clarify that a person's business model does not make joint employer status more or less likely under the Act. Part 791 is currently silent on this point, and that silence may cause unnecessary confusion and uncertainty. For example, a business that contracts with a staffing agency to receive labor services is “not completely disassociated” from the staffing agency, but that business is not more or less likely to be a joint employer simply because it uses a staffing agency. Similarly, a franchisor and franchisee are “not completely disassociated.” However, when the Department investigates a typical franchisee for potential FLSA violations, the Department does not seek recovery from the franchisor as a joint employer simply because it has a franchise arrangement. It is therefore helpful for the Department to explain its longstanding position that a business model—such as the franchise model—does not itself indicate joint employer status under the FLSA. Under the FLSA, a person is a joint employer if it is “acting . . . in relation to” an employee of an employer—not simply because it has a certain business model. [(48)]

It would also be helpful to revise the current regulation to explain the statutory basis for joint employer status under the Act. It is axiomatic that any Department interpretation of the FLSA must begin with the text of the statute, following well-settled principles of statutory construction by “reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” [(49)] There are three terms defined in the Act (“employee,” “employ,” and “employer” [(50)]) that could potentially be relevant to the joint employer analysis, but the current part 791 does not clearly identify the textual basis for the scope of joint employer status under the Act. Clarifying the textual basis for joint employer status would help ensure that the Department's guidance on this subject is fully consistent with the text of the Act.

Finally, it would be helpful for the Department to update its guidance regarding joint employer status given public interest in the issue. Recently, the National Labor Relations Board (NLRB) issued decisions that altered its analysis for determining joint employer status under the National Labor Relations Act (NLRA) (a separate statute from the FLSA). [(51)] The NLRB is engaging in rulemaking regarding the joint employer standard under the NLRA. [(52)] In recent years, Congress has held hearings and considered legislation on joint employer status. [(53)] In addition, 84 U.S. Representatives and 26 Senators have expressed their concern and have urged the Department to update part 791. [(54)] These and other developments have generated a tremendous amount of attention, concern, and debate about joint employer status in every context, including the FLSA. Rulemaking would help bring clarity to this discussion.

III. Proposed Regulatory Revisions

The Department proposes to revise its existing joint employer regulation in part 791 to address these issues. In relevant part, and as discussed in greater detail below, the Department proposes:

To make non-substantive revisions to the introductory provision in section 791.1;
To replace the language of “not completely disassociated” as the standard in one of the joint employer scenarios—where an employer suffers, permits, or otherwise employs an employee to work one set of hours in a workweek, and that work simultaneously benefits another person—with a four-factor balancing test assessing whether the other person:

○ Hires or fires the employee;

○ Supervises and controls the employee's work schedules or conditions of employment;

○ Determines the employee's rate and method of payment; and

○ Maintains the employee's employment records;

To explain that additional factors may be used to determine joint employer status, but only if they are indicative of whether the potential joint employer is:

○ Exercising significant control over the terms and conditions of the employee's work; or

○ Otherwise acting directly or indirectly in the interest of the employer in relation to the employee;

To explain that the employee's "economic dependence" on the potential joint employer does not determine the potential joint employer's liability under the Act;
To identify three examples of "economic dependence" factors that are not relevant for determining joint employer status under the Act—including, but not limited to, whether the employee:

○ Is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;

○ Has the opportunity for profit or loss based on his or her managerial skill; and

○ Invests in equipment or materials required for work or the employment of helpers;

To explain that the potential joint employer's ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining the potential joint employer's liability under the Act;
To clarify that indirect action in relation to an employee may establish joint employer status under the Act;
To explain that FLSA section 3(d) only, not section 3(e)(1) or 3(g), determines joint employer status under the Act;
To clarify that a person's business model—for example, operating as a franchisor—does not make joint employer status more or less likely under the Act;
To explain that certain business practices—for example, providing a sample employee handbook to a franchisee; participating in or sponsoring an association health or retirement plan; allowing an employer to operate a facility on one's premises; or jointly participating with an employer in an apprenticeship program—do not make joint employer status more or less likely under the Act;
To explain that certain business agreements—for example, requiring an employer to institute workplace safety measures, wage floors, sexual harassment policies, morality clauses, or requirements to comply with the law or promote other desired business practices—do not make joint employer status more or less likely under the Act;
To make non-substantive clarifications to the joint employer standard for the other joint employer scenario under the Act—where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek; and
To provide illustrative examples demonstrating how the Department's proposed joint employer regulation would apply.

These proposed revisions to part 791 would significantly clarify how to determine joint employer status under the Act.

The Department welcomes comment on all aspects of its proposal.

A. Proposal To Replace the "Not Completely Disassociated" Standard With a Four-Factor Balancing Test for One of the Joint Employer Scenarios Under the Act (One Set of Hours)

Part 791 currently determines joint employer status by asking whether two or more persons are "not completely disassociated with respect to the employment of a particular employee." [(55)] This standard is not as helpful for determining joint employer status in one of the joint employer scenarios under the Act—where an employer suffers, permits, or otherwise employs an employee to work one set of hours in a workweek, and that work simultaneously benefits another person. [(56)] The Department therefore proposes to replace the "not completely disassociated" standard in this scenario with a four-factor balancing test derived (with one modification) from *Bonnette* v. *California Health & Welfare Agency*. The proposed test would assess whether the other person:

Hires or fires the employee;
Supervises and controls the employee's work schedules or conditions of employment;
Determines the employee's rate and method of payment; and
Maintains the employee's employment records. [(57)]

These proposed factors focus on the economic realities of the potential joint employer's exercise of control over the terms and conditions of the employee's work. [(58)] They closely track the language of *Bonnette,* with a modification to the first factor. [(59)] Whereas *Bonnette* describes the first factor as the "power" to hire and fire, the Department proposes rephrasing this factor to require actual exercise of power to ensure that its four-factor test is fully consistent with the text of section 3(d), which requires a person be "acting . . . in relation to an employee." [(60)] The Department's proposal would also clarify that, under 3(d), the potential joint employer's actions in relation to the employee may be "indirect." [(61)] The Department believes that its four proposed factors—which weigh the economic reality of the potential joint employer's active control, direct or indirect, over the employee—would be most relevant to the joint employer analysis for several reasons.

First, these four factors are fully consistent with the text of the section 3(d). When another person exercises control over the terms and conditions of the employee's work, that person is "acting . . . in the interest of" the employer "in relation to" the employee. [(62)] Recognizing this provision, *Bonnette* adopted an almost identical four-factor test to determine whether a potential joint employer is liable under 3(d). [(63)]

Second, these factors are consistent with Supreme Court precedent. The Supreme Court held in *Falk* v. *Brennan* that under 3(d) another person is jointly liable for an employee if that person exercises "substantial control" over the terms and conditions of the employee's work. [(64)] The Department's proposed four-factor balancing test, which weighs the potential joint employer's exercise of control over the terms and conditions of the employee's work, uses the same reasoning as *Falk* to determine joint employer status under 3(d).

Third, these factors are highly probative of joint employer status under the Act. Each factor weighs the potential joint employer's exercise of control over the more essential terms and conditions of employment. The potential joint employer's exercise of this control therefore has a direct relation to the employee's work. And this direct relation makes it reasonable to hold the potential joint employer liable for the employee's work. Accordingly, the Department's proposed test focuses on those facts that strongly indicate joint and several liability under the Act.

Fourth, these factors are simple, clear-cut, and easy to apply. The greater the number of factors in a multi-factor test, the more complex and difficult the analysis may be in any given case, and the greater the likelihood of inconsistent results in other similar cases. By using these factors that focus on the exercise of control over the more essential terms and conditions of employment, the Department believes its proposed test would determine FLSA joint employer status with greater ease and consistency. This simplicity would also provide greater certainty to the public, helping workers and organizations to determine more accurately who is and is not a joint employer under the Act before any investigation or litigation begins.

Fifth, these factors are generally applicable and are almost always present in the scenario where an employee's work for an employer simultaneously benefits another person. Therefore they should be helpful for determining joint employer status in a wide variety of contexts.

Sixth, the Department's proposed four-factor test finds considerable support in the plurality of circuit courts that already apply similar multi-factor, economic realities tests. The First and Fifth Circuits apply the *Bonnette* test, which is nearly identical to the Department's proposed test. [(65)] The Seventh Circuit uses this same test as a baseline to determine joint employer status under the FMLA, [(66)] and district courts in the Seventh Circuit apply it in FLSA cases. [(67)] Moreover, the Third Circuit applies a similar four-factor test that considers whether the potential joint employer:

> Has authority to hire and fire employees;
> Has authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours;
> Exercises day-to-day supervision, including employee discipline; and
> Controls employee records, including payroll, insurance, taxes, and the like. [(68)]

According to the Third Circuit, "[t]hese factors are not materially different from" the *Bonnette* factors. [(69)] Finally, additional precedent supports the Department's proposed factors. [(70)]

Although four other circuit courts apply different joint employer tests, each of them applies at least one factor that resembles one of the Department's proposed factors derived from the *Bonnette* test. [(71)] The Second and Fourth Circuits rejected the *Bonnette* test because they did not believe it could "be reconciled with the `suffer or permit' language in [FLSA section 3(g)], which necessarily reaches beyond traditional agency law." [(72)] But the Department believes that section 3(d), not section 3(g), is the touchstone for joint employer status and that its proposed four-factor balancing test is preferable and consistent with the text of that section.

B. Proposal To Explain What Additional Joint Employer Factors Could Be Relevant

The Department proposes to revise part 791 to address whether any additional factors may be relevant for determining joint employer status. Because joint employer status is determined by 3(d), the Department proposes to explain that any additional factors must be consistent with the text of 3(d). Thus, any additional factors indicating "significant control" [(73)] are relevant because the potential joint employer's exercise of significant control over the employee's work establishes its joint liability under 3 (d). [(74)] Finally, the Department proposes to explain that any factors that do not fit within these parameters—as indicative of significant control or otherwise consistent with the text of 3(d)—are not relevant to the joint employer analysis.

These proposals would not take away from the dynamic and fact-bound nature of the joint employer inquiry, but they would recognize that the text of 3(d) determines the scope of—and therefore places limitations on—joint liability. The Department believes that these proposals would provide workers and organizations with more certainty regarding joint employer status under the Act.

C. Proposal To Explain That Joint Employer Status Under the Act Is Not Determined by the Employee's "Economic Dependence" and To Identify Three Examples of "Economic Dependence" Factors That Are Not Relevant

The Department proposes to explain that joint employer status is not determined by the employee's "economic dependence" on the potential joint employer and to identify three examples of "economic dependence" factors that are not relevant to the Department's proposed multi-factor test and section 3(d). Identifying specific factors that are not relevant will help the public to have more certainty over what factors to apply when determining whether a person qualifies as a joint employer under the Act.

Because section 3(d) establishes joint liability for "any person acting directly or indirectly in the interest of an employer in relation to an employee," [(75)] joint employer status is determined by the actions of the potential joint employer—not by the actions of the employee or his or her employer. [(76)] As such, any factors that focus on the actions of the employee or his or her employer are not relevant to the joint employer inquiry, including those focusing on the employee's "economic dependence." The Department therefore proposes to explain that joint employer status is determined by the actions of the potential joint employer—not by the employee's economic dependence—and to identify three examples of economic dependence factors that are not relevant.

Specifically, the Department proposes to identify as not relevant whether the employee: (1) Is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight; (2) has the opportunity for profit or loss based on his or her managerial skill; and (3) invests in equipment or materials required for work or the employment of helpers. These three factors focus on whether the employee is correctly classified as such under the Act—and not on whether the potential joint employer is acting in the interest of the employer in relation to the employee. While courts have used these factors for determining whether a worker is an employee or independent contractor, they are not relevant for determining whether additional persons are jointly liable under the Act to a worker whose classification as an employee has already been established.

Finally, there is judicial precedent for specifically identifying factors that are not relevant to the joint employer inquiry. Notably, the Eleventh Circuit identified three factors—including the skill required and the opportunity for profit and loss—as not relevant to the joint employer inquiry. [(77)] The Eleventh Circuit explained that these factors "only distinguished whether [a worker] was an employee or an independent contractor," not whether an additional person was a joint employer of the worker. [(78)] Similarly, the courts have found that the "usefulness" of the traditional employment relationship test—which includes factors such as the skill required, opportunity for profit or loss, and investment in the business—is "significantly limited" in a joint employer case where the employee already has an employer and the question is whether an additional person is jointly liable with the employer for the employee. [(79)]

D. Proposal To Explain That Joint Employer Status Is Determined by FLSA Section 3(d) Only, Not by Section 3(e)(1) or 3(g)

The Department proposes to explain that the textual basis for FLSA joint employer status is section 3(d), not section 3(e)(1) or 3(g). While the FLSA does not use the term "joint employer," the FLSA contemplates joint liability in section 3(d). First, the FLSA defines the term "employee" in section 3(e)(1) to mean "any individual *employed* by an employer." [(80)] The FLSA, in turn, defines the term "employ" in section 3(g): " `[e]mploy' includes to suffer or permit to work." [(81)] Reading 3(e)(1) and 3(g) together, an employer is a person who suffers, permits, or otherwise employs an individual to work, and an employee is an individual whom another person suffers, permits, or otherwise employs to work. The FLSA further defines "employer" in section 3(d) to "include[ ]" joint employers—"any person acting directly or indirectly in the interest of an employer in relation to an employee." [(82)]

Sections 3(d), 3(e)(1), and 3(g) therefore work in harmony. If an employer suffers, permits, or otherwise employs an employee to work under 3(e)(1) and 3(g), and another person is acting directly or indirectly in the interest of the employer in relation to the employee under 3(d), then the employer and the other person are jointly and severally liable for the employee's hours worked. During that period, the employer is liable for the hours that it suffers, permits, or otherwise employs the employee to work, and the other person is a joint employer under 3(d), jointly and severally liable for those same hours worked.

Accordingly, 3(e)(1) and 3(g) determine whether there is an employment relationship between the potential employer and the worker for a specific set of hours worked, and 3(d) alone determines another person's joint liability for those hours worked. This delineation is confirmed by the structure of the text. A person who is, under 3(d), acting "*in the interest of an employer* in relation to an employee" is, by definition, a *second* employer. [(83)] Another person can become a joint employer of an employee under 3(d) only if an employer is already suffering, permitting, or otherwise employing that employee to work under sections 3(e)(1) and 3(g). [(84)] By contrast, sections 3(e)(1) and 3(g) do not expressly address the possibility of a second employment relationship. In fact, 3(e)(1) defines an "employee" as "any individual *employed* by *an employer*"—singular. [(85)] But 3(d)'s inclusion of "any person acting directly or indirectly in the interest of an employer in relation to an employee" encompasses any additional persons that may be held jointly liable for the employee's hours worked in a workweek. The Department's interpretation of sections 3(d), (e)(1), and (g) is therefore consistent with the text of the Act which expands employer liability beyond the initial employment relationship to additional persons.

This clear textual delineation is consistent with judicial precedent. In *Rutherford Food,* the Supreme Court identified the FLSA's definition of "employ" in section 3(g) in particular when determining whether

the workers at issue were employees or independent contractors. [86] The Court cited section 3(d) only in passing in a footnote. [87] By contrast, in *Falk* the Supreme Court relied on the FLSA's definition of "employer" in section 3(d) to determine joint employer status. [88] The Court in *Falk* found joint employer status under 3(d) because of the potential joint employer's exercise of control over the terms and conditions of the employee's work. [89] *Falk* did not cite 3(g). [90] In the same way, *Bonnette* determined joint employer status according to the text of 3(d) alone, without citing 3(g). [91]

Accordingly, the Department proposes to revise part 791 to better account for section 3(d), *Falk,* and *Bonnette* by explaining that joint employer status is determined by 3(d) alone—whether the potential joint employer is acting in the interest of an employer in relation to an employee. Explicitly tethering the joint employer standard in part 791 to section 3(d) will provide clearer guidance on how to determine joint employer status consistent with the text of the Act.

E. Proposal To Clarify That a Person's Business Model, Certain Business Practices, and Certain Contractual Provisions Do Not Make Joint Employer Status More or Less Likely

The Department proposes to clarify that a potential joint employer's business model does not make joint employer status more or less likely under the Act. Under the FLSA, a person is a joint employer if it is "acting . . . in relation to" an employee of an employer—not simply because it has a certain business model. [92] Accordingly, the mere fact that a potential joint employer enters into a franchise arrangement with an employer does not itself make that person jointly liable for the employer's employees. The potential joint employer must be acting, directly or indirectly, "in relation to" those employees to be jointly liable for them. [93]

The Department also proposes to clarify that certain business practices that the Department has encountered—such as providing a sample employee handbook or other forms to an employer as part of a franchise arrangement; allowing an employer to operate a facility on its premises; offering or participating in an association health or retirement plan; [94] or jointly participating with an employer in an apprenticeship program—do not make joint employer liability more or less likely under the Act. Of course, if a potential joint employer enforced the terms of a franchise handbook against a franchisee's employee, or directed an employer's employee to participate in a joint apprenticeship program, or exercised control over an employer's employee who worked on its premises, those actions "in relation to" the employee could indicate joint employer status. The mere business practices themselves—participating in the apprenticeship program, health plan, or retirement plan; sharing the premises; or providing the handbook—do not necessarily involve the potential joint employer "acting . . . in relation to" the employer's employee.

The Department also proposes to clarify that certain contractual provisions between an employer and another person—such as requiring the employer to institute workplace safety practices, a wage floor, sexual harassment policies, morality clauses, [95] or other measures to encourage compliance with the law or to promote desired business practices—do not make joint employer status more or less likely under the Act. Of course, if a potential joint employer enforced the terms of these provisions—for example, by directly firing one of the employer's employees for violating a sexual harassment policy—those actions "in relation to" the employee could indicate joint employer status. However, the provisions themselves merely require the employer to institute generic policies. They do not show control over any actual employment decisions. They do not involve the potential joint employer "acting . . . in relation to" any of the employer's employees.

F. Proposal To Replace the Phrase "Joint Employment"

The Department also proposes to replace the phrase "joint employment" with "joint employer status" throughout part 791. This change will help to focus the inquiry on whether the potential joint employer has taken sufficient action to be held jointly and severally liable under 3(d).

G. Proposal To Reiterate That a Joint Employer Can Be Any Legal Person Under the Act

Because section 3(d) "includes any *person* acting directly or indirectly in the interest of an employer in relation to an employee," [96] the Department proposes to add the Act's definition of "person" to part 791. [97] This addition would ensure that a joint employer under 3(d) broadly encompasses every kind of person contemplated by the Act.

H. Proposal To Make Non-Substantive Revisions to the Department's Current Joint Employer Standard in the Other Joint Employer Scenario (Separate Sets of Hours)

The Department believes that part 791's "not completely disassociated" standard provides clear and useful guidance in the other joint employer scenario, where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek. In this scenario, employer A suffers or permits the employee to work one set of hours in a workweek—for example, 30 hours Monday through Wednesday—and employer B suffers or permits the employee to work a second set of hours in the same workweek—for example, 20 hours Thursday and Friday. If employers A and B are "not completely disassociated" with respect to the employee's employment, then the employee's hours worked for them in the workweek are aggregated and A and B are jointly and severally liable to the employee for 40 hours plus 10 overtime hours.

Under part 791, employers A and B will generally be considered to be sufficiently associated if: (1) There is an arrangement between them to share the employee's services; (2) one employer is acting

directly or indirectly in the interest of the other employer in relation to the employee; or (3) they share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. The second of these three situations is simply a restatement of the statutory basis for joint liability in section 3(d), and the first and third situations—sharing an employee and exercising common control over that employee—involve the employers acting in each other's interest in relation to an employee in specific ways (establishing joint liability under 3(d)). The Department believes that this standard provides adequate clarity to determine joint employer status in this scenario, and to identify the statutory basis for that joint liability. Indeed, courts have applied the Department's current regulation in this scenario and have found it useful. [(98)] Additionally, the Department has issued opinion letters applying its current regulation to determine whether certain facts satisfy this joint employer scenario. [(99)] The Department accordingly proposes only non-substantive revisions to the current regulation with respect to this scenario.

I. Joint Employer Examples

The Department proposes to include several illustrative examples applying the Department's proposed analysis to determine joint employer status. The Department's proposed conclusions following each example are, like all illustrative examples, limited to substantially similar factual situations.

J. Severability

Finally, the Department proposes to include a severability provision in part 791 so that, if one or more of the provisions of part 791 is held invalid or stayed pending further agency action, the remaining provisions would remain effective and operative. The Department proposes to add this provision as § 791.3.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. This NPRM does not contain a collection of information subject to OMB approval under the Paperwork Reduction Act. The Department welcomes comments on this determination.

V. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of a regulation and to adopt a regulation only upon a reasoned determination that the regulation's net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity) justify its costs. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether a regulatory action is a “significant regulatory action,” which includes an action that has an annual effect of $100 million or more on the economy. Significant regulatory actions are subject to review by OMB. As described below, this proposed rule is economically significant. Therefore, the Department has prepared a preliminary Regulatory Impact Analysis (RIA) in connection with this NPRM as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the rule.

By simplifying the standard for determining joint employer status, this proposed rule would reduce the burden on the public. This proposed rule is accordingly expected to be an Executive Order 13771 deregulatory action. [(100)]

A. Introduction

1. BACKGROUND

The Fair Labor Standards Act (FLSA) requires a covered employer to pay its nonexempt employees at least the federal minimum wage for every hour worked and overtime premium pay of at least 1.5-times their regular rate of pay for all hours worked in excess of 40 in a workweek. The FLSA defines an “employer” to “include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee.” These persons are “joint” employers who are jointly and severally liable with the employer for every hour worked by the employee in a workweek. 29 CFR part 791 contains the Department's official interpretation of joint employer status under the FLSA. In this NPRM, the Department proposes to revise part 791 to adopt a four-factor balancing test to determine joint employer status in one of the joint employer scenarios under the Act—where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work. This proposed rule would explain what additional factors should and should not be considered, and provide guidance on how to apply this multi-factor test. The Department proposes no substantive changes to part 791's guidance in the other joint employer scenario—where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek. The Department believes that its proposals would make it easier to determine whether a person is or is not a joint employer under the Act, thereby promoting compliance with the FLSA.

2. NEED FOR RULEMAKING

For the reasons explained above, the Department has determined that its interpretation of joint employer status requires revision as it applies to the first joint employer scenario identified above (one set of hours worked in a workweek). The Department is concerned that the current regulation does not adequately address this scenario, and believes that its proposed revisions would provide needed clarity in this scenario. The Department also believes a proposed rule:

Could help bring clarity to the current judicial landscape, where different courts are applying different joint employer tests that have resulted in inconsistent treatment of similar worker situations, uncertainty for organizations, and increased compliance and litigation costs;
Would reduce the chill on organizations who may be hesitant to enter into certain relationships or engage in certain kinds of business practices for fear of being held liable for counterparty employees over which they have insignificant control;
Would better ground the Department's interpretation of joint employer status in the text of the FLSA; and
Would be responsive to the current public and Congressional interest in the joint employer issue.

The Department believes that the current regulation provides clear and useful guidance to determine joint employer status in the second scenario, but that non-substantive revisions to better reflect the Department's longstanding practice would be desirable.

B. Economic Impacts

The Department estimated the number of affected firms and quantified the costs associated with this proposed rule. The Department expects that all businesses and state and local government entities would need to review the text of this rule, and therefore would incur regulatory familiarization costs. However, on a per-entity basis, these costs would be small (see Section V.2 for detailed analysis of regulatory familiarization costs). Because this rule does not alter the standard for determining joint employer status in the second joint employer scenario where the employee works separate sets of hours for multiple employers in the same workweek, the Department believes that there would be no change in the aggregation of workers' hours to determine overtime hours worked. (101) Therefore, there would be no impact on workers in the form of lost overtime, and no transfers between employers and employees. Although this rule would alter the standard for determining joint employer status where the employee works one set of hours in a workweek that simultaneously benefits another person, the Department believes that there would still be no impact on workers' wages due under the FLSA. This proposed standard would not change the amount of wages the employee is due under the FLSA, but could reduce, in some cases, the number of persons who are liable for payment of those wages. To the extent this proposal provides a clearer standard for determining joint employer status where the employee works one set of hours for his or her employer that simultaneously benefits another person, this rule may make it easier to determine who is liable for earned wages.

1. COSTS

Updating the rules interpreting joint employer status will impose direct costs on private businesses and state and local government entities by requiring them to review the new regulation. To estimate these regulatory familiarization costs, the Department must determine: (1) The number of potentially affected entities, (2) the average hourly wage rate of the employees reviewing the regulation, and (3) the amount of time required to review the regulation.

It is uncertain whether private entities will incur regulatory familiarization costs at the firm or the establishment level. For example, in smaller businesses there might be just one specialist reviewing the regulation. Larger businesses might review the rule at corporate headquarters and determine policy for all establishments owned by the business, while more decentralized businesses might assign a separate specialist to the task in each of their establishments. To avoid underestimating the costs of this rule, the Department uses both the number of establishments and the number of firms to estimate a potential range for regulatory familiarization costs. The lower bound of the range is calculated assuming that one specialist per firm will review the regulation, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2016 Statistics of U.S. Businesses (SUSB), which reports 6.1 million private firms and 7.8 million private establishments with paid employees. (102) Additionally, the Department estimates 90,106 state and local governments (2012 Census of Governments) might incur costs under the proposal. (103)

The Department believes that even entities that do not currently have workers with one or more joint employers will incur regulatory familiarization costs, because they will need to confirm whether this proposed rule includes any provisions that may affect them or their employees.

The Department judges one hour per entity, on average, to be an appropriate review time for the rule. The relevant statutory definitions have been in the FLSA since its enactment in 1938, the Department has recognized the concept of joint employer status since at least 1939, and the Department already issued a rule interpreting joint employer status in 1958. Therefore, the Department expects that the standards applied by this proposed rule should be at least partially familiar to the specialists tasked with reviewing it. Additionally, the Department believes many entities are not joint employers and thus would spend significantly less than one hour reviewing the rule. Therefore, the one-hour review time represents an average of less than one hour per entity for the majority of entities that are not joint employers, and more than one hour for review by entities that might be joint employers. The

Department welcomes comments on the estimate of one hour of review time per entity, and data on the amount of time typically spent by small businesses in regulatory review.

The Department's analysis assumes that the proposed rule would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13-1141) or employees of similar status and comparable pay. The mean hourly wage for these workers is $32.29 per hour. [(104)] In addition, the Department also assumes that benefits are paid at a rate of 46 percent [(105)] and overhead costs are paid at a rate of 17 percent of the base wage, resulting in an hourly rate of $52.63.

Table 1—Total Regulatory Familiarization Costs, Calculation by Number of Firms and Establishments ($1000s)

NAICS sector	By firm	Firms	Cost [a]	By establishment	Establishments	Cost [a]
Agriculture, Forestry, Fishing and Hunting	21,830	$1,149	22,594	$1,189		
Mining, Quarrying, and Oil/Gas Extraction	20,309	1,069	27,234	1,433		
Utilities	5,893	310	18,159	956		
Construction	683,352	35,967	696,733	36,671		
Manufacturing	249,962	13,156	291,543	15,345		
Wholesale Trade	303,155	15,956	412,526	21,712		
Retail Trade	650,997	34,264	1,069,096	56,269		
Transportation and Warehousing	181,459	9,551	230,994	12,158		
Information	75,766	3,988	146,407	7,706		
Finance and Insurance	237,973	12,525	476,985	25,105		
Real Estate and Rental and Leasing	300,058	15,793	390,500	20,553		
Professional, Scientific, and Technical Serv	805,745	42,409	903,534	47,555		
Management of Companies and Enterprises	27,184	1,431	55,384	2,915		
Administrative and Support Services	340,893	17,942	409,518	21,554		
Educational Services	91,774	4,830	103,364	5,440		
Health Care and Social Assistance	661,643	34,824	890,519	46,870		
Arts, Entertainment, and Recreation	126,247	6,645	137,210	7,222		
Accommodation and Food Services	527,632	27,771	703,528	37,029		
Other Services (except Public Admin.)	690,329	36,334	754,229	39,697		
State and Local Governments	90,106	4,743	90,106	4,743		
All Industries	6,092,307	320,655	7,830,163	412,123		
Average Annualized Costs, 7 Percent Discount Rate						
Over 10 years	42,667		54,838			

NAICS sector	By firm	Firms	Cost [a]	By establishment	Establishments	Cost [a]
In perpetuity	20,977		26,961			
Average Annualized Costs, 3 Percent Discount Rate						
Over 10 years	36,496		46,906			
In perpetuity	9,339		12,004			

The Department estimates that the lower bound of regulatory familiarization cost range would be $320.7 million, and the upper bound, $412.1 million. Additionally, the Department estimates that the Retail Trade industry would have the highest upper bound ($56.3 million), while the Professional, Scientific and Technical Services industry would have the highest lower bound ($42.4 million). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimated average annualized costs of this rule over 10 years and in perpetuity. Over 10 years, this rule would have an average annual cost of $42.7 million to $54.8 million, calculated at a 7 percent discount rate ($36.5 million to $46.9 million calculated at a 3 percent discount rate). In perpetuity, this rule would have an average annual cost of $21.0 million to $27.0 million, calculated at a 7 percent discount rate ($9.3 million to $12.0 million calculated at a 3 percent discount rate).

2. POTENTIAL TRANSFERS

There are two joint employer scenarios under the FLSA: (1) Employees work one set of hours that simultaneously benefit the employer and another person, and (2) employees work separate sets of hours for multiple employers. The Department does not expect this rule to generate transfers to or from workers that currently have one or more joint employers under either of these scenarios.

Employees who work one set of hours for an employer that simultaneously benefit another person are not likely to see a change in the wages owed them under the FLSA as a result of this rule. In this scenario, the employee's employer is liable to the employee for all wages due under the Act for the hours worked. If a joint employer exists, then that person is jointly and severally liable with the employer for all wages due under the Act for those hours worked. To the extent that the proposed standard for determining joint employer status reduces the number of persons who are joint employers in this scenario, neither the wages due the employee under the Act nor the employer's liability for the entire wages due would change. If the person is no longer a joint employer as a result of the proposal, the employee would no longer have a legal right to collect the wages due under the Act from that person but would still be able to collect the entire wages due from the employer. In sum, changing the standard for determining whether a person is a joint employer in this scenario would not impact the wages due the employee under the Act, and assuming that all employers always fulfill their legal obligations under the Act, would not result in any reduction in wages received by the employee because the employer would pay the wages in full. The Department recognizes that there could be a transfer between the employer and any joint employers, but lacks information about how many individuals or entities would be affected and to what degree.

Employees who work separate sets of hours for multiple employers are not affected because the Department is not proposing any substantive revisions to the standard for determining joint employer status in this scenario. Therefore, no joint liability (or lack thereof) in this scenario will be altered by the promulgation of this rule.

3. OTHER POTENTIAL IMPACTS

To the extent revising the Department's regulation provides more clarity, the revision could promote innovation and certainty in business relationships, which also benefits employees. The modern economy involves a web of complex interactions filled with a variety of unique business organizations and contractual relationships. When an employer contemplates a business relationship with another person, the other person may not be able to assess what degree of association with the employer will result in joint and several liability for the employer's employees. Indeed, the other person may be concerned with such liability despite having insignificant control over the employer's employee. This uncertainty could impact the other person's willingness to engage in any number of business practices vis-à-vis the employer—such as providing a sample employee handbook, or other forms, to the employer as part of a franchise arrangement; allowing the employer to operate a facility on its premises; using or establishing an association health plan or association retirement plan used by the employer; or jointly participating with an employer in an apprenticeship program—even though these business practices could benefit the employer's employees. Similarly, uncertainty regarding joint liability could also impact that person's willingness to bargain for certain contractual provisions with the employer, such as requiring workplace safety practices, a wage floor, sexual harassment policies, morality clauses, or other measures intended to encourage compliance with the law or to promote other desired business practices. The Department's proposal may provide additional certainty as businesses consider whether to adopt such business practices.

The Department expects that this proposed rule would reduce burdens on organizations. After initial rule familiarization, this proposal may reduce the time spent by organizations to determine whether they

are joint employers. Likewise, clarity may reduce FLSA-related litigation regarding joint employer status, and reduce litigation among organizations regarding allocation of FLSA-related liability and damages. The rule may also promote greater uniformity among court decisions, providing clarity for organizations operating in multiple jurisdictions. This uniformity could reduce organizations' costs because they would not have to consider multiple, jurisdiction-specific legal standards before entering into economic relationships.

Because the Department does not have data on the number of joint employers, and the number of joint employer situations that could be affected, cost-savings attributable to this proposed rule have not been quantified. The Department requests comments, studies, and data on the prevalence of joint employers, how this proposed rule would affect members of the public, and how to quantify those impacts, if such quantification is possible. The Department also requests comments and data on any additional potential benefits of this proposed rule.

VII. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The agency is also required to respond to public comment on the NPRM. The Chief Counsel for Advocacy of the Small Business Administration was notified of this proposed rule upon submission of the rule to OMB under Executive Order 12866. The Department invites commenters to provide input on data analysis and/or methodology used throughout this IRFA.

A. Reasons Why Action by the Agency Is Being Considered

The Department has determined that its interpretation of joint employer status requires revision as it applies to one of the joint employer scenarios under the Act (one set of hours worked for an employer that simultaneously benefits another person). The Department is concerned that the current regulation does not adequately address this scenario, and the Department believes that its proposed revisions would provide needed clarity and ensure consistency with the Act's text.

B. Statement of Objectives and Legal Basis for the Proposed Rule

29 CFR part 791 contains the Department's official interpretations for determining joint employer status under the FLSA. It is intended to serve as a practical guide to employers and employees as to how the Department will look to apply it. However, the Department has not meaningfully revised this part since its promulgation in 1958, over 60 years ago.

The Department's objective is to update its joint employer rule in 29 CFR part 791 to provide guidance for determining joint employer status in one of the joint employer scenarios under the Act (one set of hours worked for an employer that simultaneously benefits another person) in a manner that is clear and consistent with section 3(d) of the Act.

C. Description of the Number of Small Entities to Which the Proposed Rule Will Apply

The RFA defines a “small entity” as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by SBA, in effect as of October 1, 2017, to classify entities as small. SBA establishes separate standards for 6-digit NAICS industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets (small defined as less than $550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.

The Department obtained data from several sources to determine the number of small entities. However, the Statistics of U.S. Businesses (SUSB, 2012) was used for most industries (the 2012 data is the most recent SUSB data that includes information on receipts). Industries for which the Department used alternative sources include credit unions, [(106)] commercial banks and savings institutions, [(107)] agriculture, [(108)] and public administration. [(109)] The Department used the latest available data in each case, so data years differ between sources.

For each industry, the SUSB data tabulates total establishment and firm counts by both enterprise employment size (*e.g.,* 0-4 employees, 5-9 employees) and receipt size (*e.g.,* less than $100,000, $100,000-$499,999). [(110)] The Department combined these categories with the SBA size standards to estimate the proportion of establishments and firms in each industry that are considered small. The general methodological approach was to classify all establishments or firms in categories below the SBA cutoff as a “small entity.” If a cutoff fell in the middle of a defined category, the Department assumed a uniform distribution of employees across that bracket to determine what proportion should be classified as small. The Department assumed that the small entity share of credit card issuing and other depository credit intermediation institutions (which were not separately represented in FDIC asset data), is similar to that of commercial banking and savings institutions.

D. Costs for Small Entities Affected by the Proposed Rule

Table 2 presents the estimated number of small entities affected by the proposed rule. Based on the methodology described above, the Department found that 5.9 million of the 6.1 million firms (99 percent) and 6.3 million of the 7.8 million establishments (81 percent) qualify as small by SBA standards. As discussed in Section V.B, these do not exclude entities that currently do not have joint employees, as those will still need to familiarize themselves with the text of the new rule. Moreover, we assume that the cost structure of regulatory familiarization will not differ between small and large entities (*i.e.,* small entities will need the same amount of time for review and will assign the same type of specialist to the task).

Table 2—Regulatory Familiarization Costs for Small Entities, Average by Firm and Establishment ($1000s)

NAICS sector	By firm	Firms	Percent oftotal	Cost perfirm [a]	By establishment	Establishments	Percent oftotal	Cost perestab [a]
Agric./Forestry/Fishing/Hunting	18,307	83.9	$53	18,930	83.8	$53		
Mining/Quarrying/Oil & Gas Extraction	19,625	96.6	53	21,974	80.7	53		
Utilities	5,487	93.1	53	7,762	42.7	53		
Construction	673,521	98.6	53	676,913	97.2	53		
Manufacturing	241,932	96.8	53	264,112	90.6	53		
Wholesale Trade	292,615	96.5	53	328,327	79.6	53		
Retail Trade	636,069	97.7	53	688,835	64.4	53		
Transportation & Warehousing	174,523	96.2	53	183,810	79.6	53		
Information	73,288	96.7	53	83,559	57.1	53		
Finance and Insurance	229,002	96.2	53	269,991	56.6	53		
Real Estate & Rental & Leasing	293,693	97.9	53	310,740	79.6	53		
Prof., Scientific, & Technical Services	790,834	98.1	53	819,115	90.7	53		
Management of Companies & Ent	18,004	66.2	53	34,124	61.6	53		
Administrative & Support Services	332,072	97.4	53	347,167	84.8	53		
Educational Services	87,566	95.4	53	90,559	87.6	53		
Health Care & Social Assistance	638,699	96.5	53	726,524	81.6	53		
Arts, Entertainment, & Recreation	123,530	97.8	53	126,281	92.0	53		
Accommodation & Food Services	520,690	98.7	53	556,588	79.1	53		
Other Services	681,696	98.7	53	700,496	92.9	53		
State & Local Governments [b]	72,844	80.8	53	72,844	80.8	53		
All Industries	5,923,996	97.2	53	6,328,653	80.8	53		
Average Annualized Costs, 7 Percent Discount Rate								
Over 10 years	7		7					
In perpetuity	3		3					
Average Annualized Costs, 3 Percent Discount Rate								
Over 10 years	6		6					
In perpetuity	2		2					

The Department estimates that in Year 1, small entities will incur a minimum of approximately $312 million in total regulatory familiarization costs, and a maximum of approximately $333 million. Professional, Scientific, and Technical Services is the industry that will incur the highest total costs ($41.6 million to $43.1 million).

Additionally, the Department estimated average annualized costs to small entities of this rule over 10 years and in perpetuity. Over 10 years, this rule will have an average annual cost of $41.5 million to $44.3 million, calculated at a 7 percent discount rate ($35.5 million to $37.9 million calculated at a 3 percent discount rate). In perpetuity, this rule will have an average annual cost of $20.4 million to $21.8 million, calculated at a 7 percent discount rate ($9.1 million to $9.7 million calculated at a 3 percent discount rate).

Based on the analysis above, the Department does not expect that small entities will incur large individual costs as a result of this rule. Even though all entities will incur familiarization costs, these

costs will be relatively small on a per-entity basis (an average of $52.63 per entity). Furthermore, no costs will be incurred past the first year of the promulgation of this rule. As a share of revenues, costs do not exceed 0.003 percent on average for all industries (Table 3). The industry where costs are the highest percent of revenues is Management of Companies and Enterprises where costs range from a lower bound of 0.015 percent to an upper bound of 0.028 percent of revenues. Additionally, the Department calculated the revenue per firm/establishment for entities with 0 to 4 employees, as per SUSB data. The industry that has had the smallest revenue per entity is Accommodation and Food Services (NAICS 72)—$221,600 per firm and $221,100 per establishment, in 2017 dollars. In both cases, the per-entity cost ($53) is approximately 0.024% of revenue. Accordingly, the Department does not expect that the proposed rule would have a significant economic cost impact on a substantial number of small entities.

Table 3—Total Regulatory Familiarization Costs for Small Entities, as Share of Revenues

NAICS sector	Totalrevenuefor smallentities (millions) [a]	Cost as percent ofrevenue [c]	By firms	Byestablishments
Agriculture, Forestry, Fishing & Hunting	$21,978	0.004	0.005	
Mining, Quarrying, & Oil/Gas Extraction	183,236	0.001	0.001	
Utilities	124,928	0.000	0.000	
Construction	754,055	0.005	0.005	
Manufacturing	1,836,516	0.001	0.001	
Wholesale Trade	2,584,835	0.001	0.001	
Retail Trade	1,419,180	0.002	0.003	
Transportation & Warehousing	235,647	0.004	0.004	
Information	198,347	0.002	0.002	
Finance & Insurance	260,753	0.005	0.005	
Real Estate & Rental & Leasing	195,889	0.008	0.008	
Professional, Scientific, & Technical Services	636,424	0.007	0.007	
Management of Companies & Enterprises	6,492	0.015	0.028	
Administrative & Support Services	259,794	0.007	0.007	
Educational Services	79,796	0.006	0.006	
Health Care & Social Assistance	628,701	0.005	0.006	
Arts, Entertainment, & Recreation	92,957	0.007	0.007	
Accommodation & Food Services	367,996	0.007	0.008	
Other Services (except Public Administration)	368,806	0.010	0.010	
State & Local Governments	([b])	([b])	([b])	
All Industries	10,256,328	0.003	0.003	

E. Analysis of Regulatory Alternatives

In developing this NPRM, the Department considered proposing alternative tests for the first joint employer scenario—where an employee works one set of hours that simultaneously benefits another person. Those alternative tests, such as the Second and Fourth Circuits' joint employer tests, have more factors than the Department's proposed test, may have a second step, and rely substantially on the "suffer or permit" language in FLSA section 3(g). [(111)] The Department, however, believes that section 3(d), not section 3(g), is the touchstone for joint employer status and that its proposed four-factor balancing test is preferable, in part because it is consistent with section 3(d). The Department's

proposed test is simpler and easier to apply because it has fewer factors and only one step, whereas the alternative tests involve a consideration of additional factors and are therefore more complex and indeterminate.

The Department also considered applying the four-factor balancing test in *Bonnette* without modification. The Department instead proposes a four-factor test that closely tracks the language of *Bonnette* with a modification to the first factor. Whereas the *Bonnette* test considers whether the potential joint employer had the "power" to hire and fire, the Department proposes a test that considers whether the employer actually exercised the power to hire and fire. The Department believes that this modification will help ensure that its joint employer test is fully consistent with the text of section 3(d), which requires a potential joint employer to be "acting . . . in relation to an employee." [(112)] By rooting the joint employer standard in the text of the statute, the Department believes that its proposal could provide workers and organizations with more clarity in determining who is a joint employer under the Act, thereby promoting innovation and certainty in businesses relationships.

VIII. Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 (UMRA) [(113)] requires agencies to prepare a written statement for rules for which a general notice of proposed rulemaking was published and that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $161 million ($100 million in 1995 dollars adjusted for inflation) or more in at least one year. This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

A. Authorizing Legislation

This proposed rule is issued pursuant to the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*

B. Assessment of Quantified

For purposes of the UMRA, this rule includes a federal mandate that is expected to result in increased expenditures by the private sector of more than $161 million in at least one year, but the rule will not result in increased expenditures by state, local, and tribal governments, in the aggregate, of $161 million or more in any one year.

Based on the cost analysis from this proposed rule, the Department determined that the proposed rule will result in Year 1 total costs for state and local governments totaling $4.7 million, all of them incurred for regulatory familiarization (*see* Table 1). There will be no additional costs incurred in subsequent years.

The Department determined that the proposed rule will result in Year 1 total costs for the private sector between $315.9 million and $407.4 million, all of them incurred for regulatory familiarization. There will be no additional costs incurred in subsequent years.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material. [(115)] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of $48.5 billion to $97.0 billion (using 2017 GDP). A regulation with smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this proposed rule.

The Department's PRIA estimates that the total costs of the proposed rule will be between $320.7 million and $412.1 million (*see* Table 1). All costs will occur in the first year of the promulgation of this rule, and there will be no additional costs in subsequent years. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

C. Least Burdensome Option Explained

This Department believes that it has chosen the least burdensome but still cost-effective methodology to revise its rule for determining joint employer status under the FLSA consistent with the Department's statutory obligation. Although the proposed regulation would impose costs for regulatory familiarization, the Department believes that its proposal would reduce the overall burden on organizations by simplifying the standard for determining joint employer status. The Department believes that, after familiarization, this rule may reduce the time spent by organizations to determine whether they are joint employers. Additionally, revising the Department's guidance to provide more clarity could promote innovation and certainty in business relationships.

IX. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the national

government and the States, or on the distribution of power and responsibilities among the various levels of government.

X. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 29 CFR Part 791

Wages.

For the reasons set forth in the preamble, the Department proposes to revise part 791 of Title 29 of the Code of Federal Regulations as follows:

Part 791 Joint Employer Status Under the Fair Labor Standards Act

Sec
791.1
Introductory statement
791.2
Determining Joint Employer Status under the FLSA
791.3
Severability

Authority

52 Stat. 1060, as amended; 29 U.S.C. 201-219; Reorganization Plan No. 6 of 1950; Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77527.

§ 791.1
Introductory statement.

This part contains the Department of Labor's general interpretations of the text governing joint employer status under the Fair Labor Standards Act. *See* 29 U.S.C. 201-19. The Administrator of the Wage and Hour Division intends that these interpretations will serve as "a practical guide to employers and employees as to how [the Wage and Hour Division] will seek to apply [the Act]." *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 138 (1944). The Administrator believes that they are correct interpretations of the law and will accordingly use them to guide the performance of his or her duties under the Act until he or she concludes upon reexamination that they are incorrect or is otherwise directed by an authoritative judicial decision. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to joint employer status under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded. These interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251-262, so long as the Department does not modify, amend, or rescind them, and judicial authority does not determine that they are incorrect.

§ 791.2
Determining Joint Employer Status under the FLSA.

There are two joint employer scenarios under the FLSA.

(a)(1) In the first joint employer scenario, the employee has an employer who suffers, permits, or otherwise employs the employee to work, *see* 29 U.S.C. 203(e)(1), (g), but another person simultaneously benefits from that work. The other person is the employee's joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. *See* 29 U.S.C. 203(d). In this situation, the following four factors are relevant to the determination. Those four factors are whether the other person:

(i) Hires or fires the employee;

(ii) Supervises and controls the employee's work schedule or conditions of employment;

(iii) Determines the employee's rate and method of payment; and

(iv) Maintains the employee's employment records.

(2) The potential joint employer must actually exercise—directly or indirectly—one or more of these indicia of control to be jointly liable under the Act. *See* 29 U.S.C. 203(d). The potential joint employer's ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining joint employer status. No single factor is dispositive in determining the economic reality of the potential joint employer's status under the Act. Whether a person is a joint employer under the Act will depend on all the facts in a particular case, and the appropriate weight to give each factor will vary depending on the circumstances.

(b) Additional factors may be relevant for determining joint employer status in this scenario, but only if they are indicia of whether the potential joint employer is:

(1) Exercising significant control over the terms and conditions of the employee's work; or

(2) Otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

(c) Whether the employee is economically dependent on the potential joint employer is not relevant for determining the potential joint employer's liability under the Act. Accordingly, to determine joint employer status, no factors should be used to assess economic dependence. Examples of factors that are not relevant because they assess economic dependence include, but are not limited to, whether the employee:

(1) Is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;

(2) Has the opportunity for profit or loss based on his or her managerial skill; and

(3) Invests in equipment or materials required for work or the employment of helpers.

(d) (1) A joint employer may be an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons. *See* 29 U.S.C. 203(a), (d).

(2) The potential joint employer's business model—for example, operating as a franchisor—does not make joint employer status more or less likely under the Act.

(3) The potential joint employer's contractual agreements with the employer requiring the employer to, for example, set a wage floor, institute sexual harassment policies, establish workplace safety practices, require morality clauses, adopt similar generalized business practices, or otherwise comply with the law, do not make joint employer status more or less likely under the Act.

(4) The potential joint employer's practice of providing a sample employee handbook, or other forms, to the employer; allowing the employer to operate a business on its premises (including “store within a store” arrangements); offering an association health plan or association retirement plan to the employer or participating in such a plan with the employer; jointly participating in an apprenticeship program with the employer; or any other similar business practice, does not make joint employer status more or less likely under the Act.

(e)(1) In the second joint employer scenario, one employer employs a worker for one set of hours in a workweek, and another employer employs the same worker for a separate set of hours in the same workweek. The jobs and the hours worked for each employer are separate, but if the employers are joint employers, both employers are jointly and severally liable for all of the hours the employee worked for them in the workweek.

(2) In this second scenario, if the employers are acting independently of each other and are disassociated with respect to the employment of the employee, each employer may disregard all work performed by the employee for the other employer in determining its own responsibilities under the Act. However, if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining compliance with the Act. The employers will generally be sufficiently associated if:

(i) There is an arrangement between them to share the employee's services;

(ii) One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or

(iii) They share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. Such a determination depends on all of the facts and circumstances. Certain business relationships, for example, which have little to do with the employment of specific workers—such as sharing a vendor or being franchisees of the same franchisor—are alone insufficient to establish that two employers are sufficiently associated to be joint employers.

(f) For each workweek that a person is a joint employer of an employee, that joint employer is jointly and severally liable with the employer and any other joint employers for compliance with all of the applicable provisions of the Act, including the overtime provisions, for all of the hours worked by the employee in that workweek. In discharging this joint obligation in a particular workweek, the employer and joint employers may take credit toward minimum wage and overtime requirements for all payments made to the employee by the employer and any joint employers.

(g) The following illustrative examples demonstrate the application of the principles described in paragraphs (a)-(f) of this section under the facts presented and are limited to substantially similar factual situations:

(1)(i) *Example.* An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee. Are they joint employers of the cook?

(ii) *Application.* Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

(2)(i) *Example.* An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Are they joint employers of the cook?

(ii) *Application.* Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.

(3)(i) *Example.* An office park company hires a janitorial services company to clean the office park building after-hours. According to a contractual agreement with the office park and the janitorial company, the office park agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial employees in their performance of those cleaning services. However, office park personnel do not set the janitorial employees' pay rates or individual schedules and do not in fact supervise the workers' performance of their work in any way. Is the office park a joint employer of the janitorial employees?

(ii) *Application.* Under these facts, the office park is not a joint employer of the janitorial employees because it does not hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. The office park's reserved contractual right to control the employee's conditions of employment does not demonstrate that it is a joint employer.

(4)(i) *Example.* A country club contracts with a landscaping company to maintain its golf course. The contract does not give the country club authority to hire or fire the landscaping company's employees or to supervise their work on the country club premises. However, in practice a club official oversees the work of employees of the landscaping company by sporadically assigning them tasks throughout each workweek, providing them with periodic instructions during each workday, and keeping intermittent records of their work. Moreover, at the country club's direction, the landscaping company agrees to terminate an individual worker for failure to follow the club official's instructions. Is the country club a joint employer of the landscaping employees?

(ii) *Application.* Under these facts, the country club is a joint employer of the landscaping employees because the club exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The country club directly supervises the landscaping employees' work and determines their schedules on what amounts to a regular basis. This routine control is further established by the fact that the country club indirectly fired one of landscaping employees for not following its directions.

(5)(i) *Example.* A packaging company requests workers on a daily basis from a staffing agency. The packaging company determines each worker's hourly rate of pay, supervises their work, and uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the packaging company a joint employer of the staffing agency's employees?

(ii) *Application.* Under these facts, the packaging company is a joint employer of the staffing agency's employees because it exercises sufficient control over their terms and conditions of employment by setting their rate of pay, supervising their work, and controlling their work schedules.

(6)(i) *Example.* An Association, whose membership is subject to certain criteria such as geography or type of business, provides optional group health coverage and an optional pension plan to its members to offer to their employees. Employer B and Employer C both meet the Association's specified criteria, become members, and provide the Association's optional group health coverage and pension plan to their respective employees. The employees of both B and C choose to opt in to the health and pension plans. Does the participation of B and C in the Association's health and pension plans make the Association a joint employer of B's and C's employees, or B and C joint employers of each other's employees?

(ii) *Application.* Under these facts, the Association is not a joint employer of B's or C's employees, and B and C are not joint employers of each other's employees. Participation in the Association's optional plans does not involve any control by the Association, direct or indirect, over B's or C's employees. And while B and C independently offer the same plans to their respective employees, there is no indication that B and C are coordinating, directly or indirectly, to control the other's employees. B and C are therefore not acting directly or indirectly in the interest of the other in relation to any employee.

(7(i)) *Example.* Entity A, a large national company, contracts with multiple other businesses in its supply chain. As a precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws. Employer B contracts with A and signs the code of conduct. Does A qualify as a joint employer of B's employees?

(ii) *Application.* Under these facts, A is not a joint employer of B's employees. Entity A is not acting directly or indirectly in the interest of B in relation to B's employees—hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment. Nor is A exercising significant control over Employer B's rate or method of pay—although A requires B to maintain a wage floor, B retains control over how and how much to pay its employees. Finally, because there is no indication that

A's requirement that B commit to comply with all applicable federal, state, and local law exerts any direct or indirect control over B's employees, this requirement has no bearing on the joint employer analysis.

(8)(i) *Example.* Franchisor A is a global organization representing a hospitality brand with several thousand hotels under franchise agreements. Franchisee B owns one of these hotels and is a licensee of A's brand. In addition, A provides B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise. The licensing agreement is an industry-standard document explaining that B is solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment. Is A a joint employer of B's employees?

(ii) *Application.* Under these facts, A is not a joint employer of B's employees. A does not exercise direct or indirect control over B's employees. Providing samples, forms, and documents does not amount to direct or indirect control over B's employees that would establish joint liability.

(9)(i) *Example.* A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide the shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises. Is the retail company a joint employer of the repair company's employees?

(ii) *Application.* Under these facts, the retail company is not a joint employer of the cell phone repair company's employees. The retail company's requirement that the repair company provide specific shirts to its employees and establish a policy that its employees to wear those shirts does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on its premises does not make joint employer status more or less likely under the Act. There is no indication that the retail company hires or fires the repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records.

§ 791.3
Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from part 791 and shall not affect the remainder thereof.

Signed at Washington, DC, this 29th day of March, 2019.
Keith E. Sonderling,
Acting Administrator, Wage and Hour Division.

[FR Doc. 2019-06500 Filed 4-8-19; 8:45 am]
BILLING CODE 4510-27-P

Footnotes

(1) *See* 29 U.S.C. 206(a), 207(a).

(2) Under the Act, “person” means “any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.” 29 U.S.C. 203(a).

(3) *See* 23 FR 5905 (Aug. 5, 1958).

(4) 29 CFR 791.2(a).

(5) The Department's current regulation identifies two distinct joint employer scenarios, which is consistent with its enforcement experience. *See* 29 CFR 791.2(b) (one scenario is “[w]here the employee performs work which simultaneously benefits two or more employers”; the other is where the employee “works for two or more employers at different times during the workweek”).

(6) *See* 29 U.S.C. 203(d) (“ `Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . .”).

(7) 704 F.2d 1465 (9th Cir. 1983), *abrogated on other grounds, Garcia* v. *San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985).

(8) 29 U.S.C. 203(d).

(9) As explained below, economic dependence only measures whether a worker is an employee under the Act or an independent contractor.

(10) 29 U.S.C. 203(a).

(11) This means that for every workweek that they are joint employers, the employer and all joint employers are each fully responsible for the entire amount of minimum wages and overtime pay due to the employee in that workweek. If one of them is unable or unwilling to pay, the others are responsible for the full amount owed.

(12) *See* 29 U.S.C. 206(a), 207(a).

(13) 29 U.S.C. 203(e)(1).

(14) 29 U.S.C. 203(g).

(15) 29 U.S.C. 203(d).

(16) *See* Interpretative Bulletin No. 13, "Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938," ¶¶ 16-17. In October 1939 and October 1940, the Department revised other portions of the Bulletin that are not pertinent here.

(17) *Id.* ¶ 16.

(18) *Id.*

(19) *See id.* ¶ 17.

(20) *Id.*

(21) *Id.*

(22) *Id.*

(23) *See* 23 FR 5905 (Aug. 5, 1958).

(24) 29 CFR 791.2(a).

(25) 29 CFR 791.2(b) (footnotes omitted).

(26) *See* 26 FR 7732 (Aug. 18, 1961).

(27) *See* 414 U.S. 190.

(28) *See id.* at 195.

(29) *Id.*

(30) *See* 704 F.2d 1465. Although the Ninth Circuit later adopted a thirteen-factor test in *Torres-Lopez* v. *May,* 111 F.3d 633, 639-41 (9th Cir. 1997), *Bonnette* remains relevant because many courts have treated it as the baseline for their own joint employer tests.

(31) *See* 704 F.2d at 1467-68.

(32) *See id.* at 1469-70.

(33) *Id.* at 1470.

(34) *Id.*

(35) *Id.*

(36) WHD Administrator's Interpretation No. 2014-2, "Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act" [hereinafter Home Care AI], available at *http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf.*

(37) *Id.*

(38) *Id.*

(39) *Id.*

(40) *See id.*

(41) WHD Administrator's Interpretation No. 2016-1, "Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act" [hereinafter Joint Employer AI].

(42) *See id.*

(43) *Id.* (quoting *Torres-Lopez,* 111 F.3d at 639).

(44) *Id.*

(45) *Id.*

(46) *See* U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance, (2017), available at *https://www.dol.gov/newsroom/releases/opa/opa20170607.*

(47) *See* 29 CFR 791.2(a).

(48) 29 U.S.C. 203(d).

(49) *See Kasten* v. *Saint-Gobain Performance Plastics Corp.,* 563 U.S. 1, 7 (2011) (interpreting the FLSA) (internal quotation marks and citation omitted).

(50) *See* 29 U.S.C. 203(d), (e)(1), (g).

(51) *See Browning-Ferris Indus. of California, Inc.,* 362 NLRB No. 186 (Aug. 27, 2015).

(52) *See* The Standard for Determining Joint-Employer Status, 83 FR 46,681, 46,686 (Sept. 14, 2018).

(53) *See* House Cmte. on Educ. & the Workforce, Hearing: "Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship" (July 12, 2017), *https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=106218;* Senate Cmte. on Health, Educ., Labor, & Pensions, Hearing: "Who's the Boss? The `Joint Employer' Standard and Business Ownership (Feb. 5, 2015), *https://www.govinfo.gov/content/pkg/CHRG-114shrg93358/pdf/CHRG-114shrg93358.pdf;* H.R. 3441, 115th Congress (2017-2018), Save Local Business Act.

(54) *See* Byrne Leads Bipartisan Letter Asking Acosta to Act on Joint Employer, (2018), *https://byrne.house.gov/media-center/press-releases/byrne-leads-bipartisan-letter-asking-acosta-to-act-on-joint-employer.* On September 28, 2018, Senator Isakson sent a similar letter to the Department, signed by 25 other Senators.

(55) *See* 29 CFR 791.2. The regulation similarly advises that joint employer liability does not exist where "two or more employers are acting entirely independently of each other." *Id.*

(56) Under the Act, "person" means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. 203(a).

(57) *Cf.* 704 F.2d at 1470 (considering "whether the alleged [joint] employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (quotation marks omitted)).

(58) *Cf. id.* ("The appellants exercised considerable control over the nature and structure of the employment relationship.").

(59) *See id.* (considering whether the potential joint employer "had the power to hire and fire the employees," rather than whether the potential joint employer actually hired or fired them).

(60) *See* 29 U.S.C. 203(d).

(61) *See id.* (" 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . .").

(62) *Id.*

(63) *See* 704 F.2d at 1469-70 ("We conclude that, under the FLSA's liberal definition of "employer" [in section 3(d)], the appellants were employers of the chore workers.").

(64) *See* 414 U.S. at 195 ("In view of the expansiveness of the Act's definition of `employer' [in section 3(d)] and the extent of D & F's managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees, we hold that D & F is, under the statutory definition [in 3(d)], an `employer' of the maintenance workers.").

(65) *Baystate Alternative Staffing, Inc.* v. *Herman,* 163 F.3d 668, 675-76 (1st Cir. 1998); *see Gray* v. *Powers,* 673 F.3d 352, 355-57 (5th Cir. 2012). Although *Gray* involved whether an individual owner of the employer was jointly liable under the FLSA, the court noted that it "must apply the economic realities test to each individual or entity alleged to be an employer and each must satisfy the four part test." 673 F.3d at 355 (quotation marks and citation omitted)). Two older Fifth Circuit decisions applied a different test to determine whether an entity was a joint employer under the Act, and the Fifth Circuit has not yet overruled those decisions—creating some uncertainty about what joint employer test applies in the Fifth Circuit. *See Hodgson* v. *Griffin & Brand of McAllen, Inc.,* 471 F.2d 235, 237-38 (5th Cir. 1973); *Wirtz* v. *Lone Star Steel Co.,* 405 F.2d 668, 669-670 (5th Cir. 1968).

(66) *See Moldenhauer* v. *Tazewell-Pekin Consol. Commc'ns Ctr.,* 536 F.3d 640, 641-42 (7th Cir. 2008) ("[W]e hold generally that . . . each alleged [joint] employer must exercise control over the working conditions of the employee . . ." (citing *Reyes* v. *Remington Hybrid Seed Co.,* 495 F.3d 403, 408 (7th Cir. 2007)). While the Seventh Circuit's FLSA decision in *Reyes* did not use the *Bonnette* factors, the court in *Moldenhauer* stated that *Reyes* "held that both the farm that employed migrant workers and the recruiter who placed the workers at the farm . . . controlled the workers' daily activities and working conditions." *Moldenhauer,* 536 F.3d at 644 (citing *Reyes,* 495 F.3d at 404-08).

(67) *See, e.g., In re Jimmy John's Overtime Litig.,* Nos. 14 C 5509, 15 C 1681, & 15 C 6010, 2018 WL 3231273, at *13-14 (N.D. Ill. June 14, 2018); *Babych* v. *Psychiatric Solutions, Inc.,* No. 09 C 8000, 2011 WL 5507374, at *6-8 (N.D. Ill. Nov. 9, 2011).

(68) *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.,* 683 F.3d 462, 469-71 (3d Cir. 2012).

(69) *Id.* at 469.

(70) *See Bacon* v. *Subway Sandwiches & Salads LLC,* 2015 WL 729632, at *4 (E.D. Tenn. Feb. 19, 2015) (applying in an FLSA case three factors similar to the *Bonnette* factors); *Ash* v. *Anderson Merchandisers, LLC,* 799 F.3d 957, 961 (8th Cir. 2015) (suggesting in an FLSA case that three factors similar to the *Bonnette* factors would apply to determine joint employer status).

(71) *See Salinas* v. *Commercial Interiors, Inc.,* 848 F.3d 125, 141-42 (4th Cir. 2017) (of the six factors comprising the first step of its joint employer analysis, applying three factors resembling the *Bonnette* factors); *Layton* v. *DHL Exp. (USA), Inc.,* 686 F.3d 1172, 1176 (11th Cir. 2012) (applying an eight-factor test with five factors resembling the *Bonnette* factors); *Zheng* v. *Liberty Apparel Co. Inc.,* 355 F.3d 61, 72 (2d Cir. 2003) (applying a six-factor test with one factor resembling one of the *Bonnette* factors); *Torres-Lopez,* 111 F.3d at 639-41 (applying a thirteen-factor test with five factors resembling the *Bonnette* factors).

(72) *Salinas,* 848 F.3d at 136 (quotation marks omitted); *Zheng,* 355 F.3d at 69.

(73) *Enterprise,* 683 F.3d at 470 (holding that additional joint employer factors should be "indicia of `significant control' " (citing *Moldenhauer,* 536 F.3d at 645 ("In *Reyes* and *Grace,* the primary employer placed workers with the alleged secondary employer, but both employers maintained significant control over the employee and were thus found to be joint employers." (citations omitted))).

(74) *See, e.g., Falk,* 414 U.S. at 195 (finding joint employer liability under 3(d) where the potential joint employer exercised "substantial control [over] the terms and conditions of the [employees'] work"); *Bonnette,* 704 F.2d at 1470 (finding joint employer liability under 3(d) where the potential joint employer "exercised considerable control" and "had complete economic control" "over the nature and structure of the employment relationship").

(75) 29 U.S.C. 203(d).

(76) *See id.* ("Employer" includes any person *acting* directly or indirectly in the interest of an employer in relation to an employee . . . " (emphasis added)).

(77) *See Layton,* 686 F.3d at 1176.

(78) *Id.*

(79) *E.g., Baystate,* 163 F.3d at 675 n.9.

(80) 29 U.S.C. 203(e)(1) (emphasis added).

(81) 29 U.S.C. 203(g).

(82) 29 U.S.C. 203(d).

(83) *Id.*

(84) *Id.* ("`Employer' includes any person acting directly or indirectly *in the interest of an employer in relation to an employee* . . . . " (emphasis added)).

(85) In contrast, the definition of "employee" in the NLRA expressly contemplates the existence of multiple employers. *See* 29 U.S.C. 152(3) ("The term `employee'" shall include any employee, and shall not be limited to the employees of a particular employer . . . ").

(86) *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 727-29 (1947) ("We pass . . . upon the question whether the [workers] were employees of the operator of the Kansas plant under the Fair Labor Standards Act. . . . We conclude . . . that these [workers] are not independent contractors.").

(87) *See id.* at 728 n.6. In addition to *Rutherford,* the Court has consistently defined employment relationships under the FLSA by reference to sections 3(e)(1) and 3(g), not section 3(d). *See, e.g., Goldberg* v. *Whitaker House Coop., Inc.,* 366 U.S. 28, 31-33 (1961) (finding an employment relationship under sections 3(e) and 3(g)); *United States* v. *Rosenwasser,* 323 U.S. 360, 362-64 (1945) (relying on sections 3(e) and (g) and finding an employment relationship without citation to 3(d)).

(88) *See* 414 U.S. at 195.

(89) *See id.*

(90) *See id. Falk* mentioned 3(e)(1), but only in passing. *See id.*

(91) *See* 704 F.2d at 1469-70 ("We conclude that, under the FLSA's liberal definition of `employer' [in 3(d)], the appellants were [joint] employers of the chore workers.").

(92) 29 U.S.C. 203(d).

(93) *Id.*

(94) Proposing to clarify that offering or participating in an association health or retirement plan does not make joint employer status more or less likely under the FLSA does not impact the interpretation of "employer" under the Employee Retirement Income Security Act (ERISA) because ERISA defines "employer" differently than the FLSA. *See* 29 U.S.C. 1002(5) (defining "employer" under ERISA to mean "any person acting . . . in relation to an employee benefit plan" and to include "a group or association of employers acting for an employer in such capacity").

(95) Morality clauses require employees to maintain standards of behavior to protect the reputation of their employer. *See, e.g., Galaviz* v. *Post-Newsweek Stations,* 380 F. App'x 457, 459 (5th Cir. 2010), and *Bernsen* v. *Innovative Legal Marketing, LLC,* No. 2:11CV546, 2012 WL 3525612 (E.D. Va. Jun. 20, 2012), for examples of morality clauses.

(96) 29 U.S.C. 203(d) (emphasis added).

(97) 29 U.S.C. 203(a).

(98) *See, e.g., Chao* v. *A-One Med. Servs., Inc.,* 346 F.3d 908, 917-18 (9th Cir. 2003) (relying on § 791.2 to find two home health care providers that shared staff, had common management, and were operated under common control of the same person to be joint employers); *Murphy* v. *Heartshare Human Servs. of New York,* 254 F.Supp.3d 392, 399-404 (E.D.N.Y. 2017) (relying on § 791.2 to hold that former employees pled with sufficient particularity that a school and a residence house were joint employers for separate hours worked because they coordinated the employees' work assignments, some of the employees' duties benefitted both, and they had overlapping management and human resources functions); *Li* v. *A Perfect Day Franchise, Inc.,* 281 FRD. 373, 400-01 (N.D. Cal. 2012) (relying on the "common control" provision in § 791.2 to find joint employer status); *Chao* v. *Barbeque Ventures, LLC,* No. 8:06CV676, 2007 WL 5971772, at *6 (D. Neb. Dec. 12, 2007) (relying on section 3(d), § 791.2, and *Falk* to find that separate restaurants that shared owners and had the same managers controlling both restaurants were joint employers).

(99) *See, e.g.,* Wage & Hour Div., Opinion Letter FLSA 2005-17NA, 2005 WL 6219105 (June 14, 2005) (applying § 791.2 to determine that separate health care facilities were joint employers and employees' hours worked for different facilities must be aggregated in a workweek to calculate whether overtime pay is due); Wage & Hour Division Opinion Letter 1998 WL 1147714 (Jul. 13, 1998) (applying § 791.2 to determine that separate health care entities were joint employers and employees' hours worked for different entities must be aggregated in a workweek for purposes of calculating any overtime pay due under the Act).

(100) 82 FR 9339 (Feb. 3, 2017).

(101) In this scenario, the employee's separate sets of hours are aggregated so that both employers are jointly and severally liable for the total hours the employee works in the workweek. As such, a finding of joint liability in this situation can result in some hours qualifying for an overtime premium. For example, if the employee works for employer A for 40 hours in the workweek, and for employer

B for 10 hours in the same workweek, and those employers are found to be joint employers, A and B are jointly and severally liable to the employee for 50 hours worked—which includes 10 overtime hours.

(102) Statistics of U.S. Businesses 2016, *https://www.census.gov/programs-surveys/susb.html.*

(103) 2012 Census of Governments: Government Organization Summary Report, *http://www2.census.gov/govs/cog/g12_org.pdf.*

(104) Occupational Employment and Wages, May 2017, *https://www.bls.gov/oes/2017/may/oes131141.htm.*

(105) The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU10200000000000D and CMU10300000000000D.

(106) Nat'l Credit Union Ass'n. (2012). 2012 Year End Statistics for Federally Insured Credit Unions, *https://www.ncua.gov/analysis/Pages/call-report-data/reports/chart-pack/chart-pack-2018-q1.pdf.*

(107) Fed. Depository Ins. Corp. (2018). Statistics on Depository Institutions—Compare Banks. Available at: *https://www5.fdic.gov/SDI/index.asp.* Data are from 3/31/18. Data is from 3/11/2018 for employment, and data is from 6/30/2017 for the share of firms and establishments that are "small".

(108) U.S. Dep't of Agric. (2014). 2012 Census of Agriculture: United States Summary and State Data: Volume 1, Geographic Area Series, Part 51. Available at: *http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf* .

(109) Hogue, C. (2012). Government Organization Summary Report: 2012. Available at: *http://www2.census.gov/govs/cog/g12_org.pdf.*

(110) The SUSB defines employment as of the week of March 12th of the particular year for which it is published.

(111) *See Zheng,* 355 F.3d at 69; *Salinas,* 848 F.3d at 136.

(112) 29 U.S.C. 203(d).

(113) *See* 2 U.S.C. 1501.

(114) Only the rule familiarization cost is quantified, but the Department believes that there are potential cost savings that it could not quantify due to lack of data at this time.

(115) *See* 2 U.S.C. 1532(a)(4).

Legal Update on Independent Contractors Under the NLRA

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NEW YORK STATE BAR ASSOCIATION
LABOR AND EMPLOYMENT LAW SECTION
2019 FALL MEETING – ITHACA, NY
SEPTEMBER 21, 2019

LEGAL UPDATE ON INDEPENDENT CONTRACTORS UNDER THE NLRA

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There are few issues that are as telling on where the National Labor Relations Board stands at any given point in time than the definitions of "employee" and "employer" under Sections 2(2) and 2(3) of the National Labor Relations Act.

That was true during the Obama Administration, when the Board issued its decisions in *Columbia University* (extending the Act's protections to graduate teaching and research assistants) and *Browning-Ferris Industries* (expanding the "joint employer" doctrine).

It also has been the case with the Trump NLRB, which has demonstrated during 2019 an inclination to limit the Act's reach by making it easier to demonstrate "independent contractor" status in a series of rulings by the Board and determinations by the Office of the General Counsel. We review the highlights of that trend below, beginning with the Board's early 2019 decision in the *SuperShuttle* case.

SuperShuttle DFW, Inc., 367 NLRB No. 75 (Jan. 25, 2019)

[1] The author gratefully acknowledges the assistance of Jacob L. Hirsch, an associate in Proskauer's Labor and Employment Law Department in New York City.

On January 25, 2019, in *SuperShuttle DFW, Inc.*, the NLRB overturned another Obama-Board ruling, *FedEx Home Delivery*, 361 NLRB 610 (2014), which had modified the test for determining whether an individual is an employee or independent contractor under the NLRA.

In *SuperShuttle*, the Trump Board rejected the standard established in the *FedEx* case, which had limited the significance of an individual's entrepreneurial opportunity, and reverted to the traditional common-law agency test for determining independent contractor status. *SuperShuttle*, slip op. at 1. *SuperShuttle* is yet another ruling that returns Board law to longstanding precedent predating the Obama Administration.

The NLRB found that franchisees who operated SuperShuttle's shared-ride vans were independent contractors, not Section 2(3) "employees" covered by the Act. Overturning *FedEx*, the Board observed that that case had altered the traditional common-law agency test by holding that "entrepreneurial opportunity" represented just "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*" – as opposed to "an 'animating principle' of the inquiry." *Id.* *SuperShuttle* reaffirmed the traditional common-law agency test that had governed independent contractor determinations prior to *FedEx*.

Applying the common-law test, the Board emphasized that the SuperShuttle franchisees (i) either own or lease their vehicles and thereby control the instrumentality of their work; (ii) exercise complete control over their daily schedules and working conditions; and (iii) pay a monthly fee to the franchisor, while retaining all earned fares for themselves. The Board held that these facts taken together established that the franchisees had significant entrepreneurial opportunity and control over the revenue derived from the operation of their vehicles. *Id*. at 14.

By contrast, SuperShuttle retained little control over the franchisees' performance, and the revenue that it received from the franchisees was unrelated to the fares that they collected. The Board also pointed to the absence of supervision of the franchisees and the understanding between them and SuperShuttle that they were independent contractors -- memorialized in the "Unit Franchise Agreements" -- all of which strongly favored a finding of independent contractor status. *Id.*

The Board's holding in *SuperShuttle* is noteworthy for several reasons. *First*, in overruling *FedEx* the Board rejected an approach that had blurred the well-established lines between employees with Section 7 rights and unprotected independent contractors. The *SuperShuttle* Board made plain its interest in providing greater clarity to employers and workers alike. *Second*, the Board overturned a holding in the *Fed Ex* case that had moved away from a common-law test, putting the Board's jurisprudence in conflict with other federal statutes, including ERISA. Under *SuperShuttle*, the NLRA standard now falls more in line with other federal employment laws. *Third*, given the D.C. Circuit's focus on common-law principles in its recent decision in *Browning-Ferris Industries of California v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018), *SuperShuttle* also reveals where the Board would likely come out on the joint-employer question if presented with the opportunity to address that issue through adjudication rather than rulemaking.

Speaking of rulemaking, on January 28, just a few days after the Board issued its decision, Chairman Ring told *Bloomberg Law*, that the Board may engage in regulatory action to further clarify whether an individual is an independent contractor or employee: "[t]hat's the type of area where we could be able to clarify the law by using specific examples." According to the Chairman, examples would provide helpful guidance to employers, particularly given the fact-

intensive nature of the independent contractor inquiry. At the same time, he expressed an interest in using the Board's rulemaking authority in other areas in the future.

Uber Technologies, Inc., Cases 13-CA-163062, 14-CA-158833 and 29-CA-177483 (4/16/19)

In *Uber Technologies, Inc.*, an Advice Memorandum issued not quite three months after *SuperShuttle*, the NLRB's General Counsel staked out a position on one of the most contentious issues in labor and employment law in recent memory: whether Uber drivers – and by implication other "gig economy" workers – are statutory employees protected by the NLRA, or independent contractors.

Applying the Board's *SuperShuttle* analysis, the NLRB's Division of Advice concluded that drivers of UberX and UberBlack were bona fide independent contractors, not "employees," and directed several Regional Offices to dismiss pending unfair labor practice charges filed against Uber. The Advice Memo focused closely on the NLRB's recent *SuperShuttle* decision in support of its conclusion, particularly the Board's emphasis on "entrepreneurial opportunity," and whether the position in question presents the "opportunities and risks inherent in entrepreneurialism."

Advice concluded that an Uber driver's ability to work for competing rideshare services and to exercise control over their vehicles, work schedules, and log-in locations, among many other things, supported an independent contractor finding, particularly when viewed through the "prism of [the driver's] entrepreneurial opportunity." The General Counsel reached that conclusion despite the fact that Uber shared in every fare earned by the driver, a method of compensation usually indicative of employee status, and notwithstanding the absence of the special skills normally associated with independent contractors.

The obvious implication of the Advice Memo in *Uber Technologies* is that under the *SuperShuttle* standard NLRB Regional Directors are unlikely to prosecute unfair labor practice charges on behalf of Uber or similar ride-share drivers, or extend collective bargaining rights to those workers. Other members of the "gig economy" will likely encounter similar resistance from General Counsel Robb. However, each independent contractor analysis is factually distinct and must be independently evaluated under the *SuperShuttle* test. *Uber Technologies* represents a significant shift from the Agency's position under General Counsel Griffin, who in 2016 concluded that that Postmates' couriers were statutory employees, not independent contractors.

The issuance of this Advice Memo comes as other agencies recently waded into the employment rights of "gig economy" workers under federal and state wage-and-hour laws, with varying outcomes. For example, the U. S. Department of Labor recently opined that such workers are not entitled to minimum wages or overtime under the Fair Labor Standards Act, while the California Supreme Court applied a more restrictive test for whether workers are independent contractors or employees under that state's law. The City of New York also recently enacted a first-in-the-nation minimum wage law applicable to for-hire drivers, which could foreshadow a playbook for advocates of "gig economy" workers to shift their focus to the state and local levels of government.

Velox Express, Inc., 368 NLRB No. 61 (Aug. 29, 2019)

Most recently, in *Velox Express, Inc.*, the NLRB applied the *SuperShuttle* standard and concluded that couriers who collect medical specimens from doctors' offices for consolidation and shipment to diagnostic laboratories were not independent contractors. "Evaluating the common law factors through the prism of entrepreneurial opportunity," the NLRB found that

"Velox's drivers have little opportunity for economic gain or, conversely, risk of loss." *Velox*, slip op. at 3. The Board explained that:

> [u]nlike in *SuperShuttle*, Velox's drivers do not have discretion to determine when and how long they work or to set their routes and the customers they service. . . . Instead, Velox assigns routes containing specific stops that the drivers must service on designated days. . . . Further, the drivers do not have a proprietary interest in their routes, and thus they cannot sell or transfer them, nor can they hire employees to service their routes. *Id.*

In addition, the Board found that "Velox's method for compensating the drivers does not afford them significant entrepreneurial opportunity," emphasizing that "the drivers are guaranteed the same rate of compensation each day, over which they have no control" and "cannot work harder, let alone smarter, to increase their economic gain." *Id*. In sum, the Board found that factors supporting employee status significantly outweighed those supporting an independent contractor finding. Therefore, it was an unfair labor practice for Velox to discharge one of the drivers for bringing to management's attention group complaints about the way the employer was treating its workers.

More significantly, and this is what *Velox Express* will become known for, the Board found that the employer's misclassification of the couriers as independent contractors was *not* a separate violation of the NLRA. The NLRB had requested briefs on whether employee misclassifications could be deemed an independent unfair labor practice. The majority held:

> [I]t is a bridge too far for us to conclude that an employer coerces its workers in violation of Section 8(a)(1) whenever it informs them of its position that they are independent contractors if the Board ultimately determines that the employer is mistaken. We do not agree with our dissenting colleague . . . that by doing so, an employer inherently threatens that those employees are subject to termination or other adverse action if they exercise their Section 7 rights or that it would be futile for them to engage in union or other

> protected activities. In and of itself, an employer's communication of its position that its workers are independent contractors simply does not carry either implication. *Id.* at 7.

In support of that unassailable conclusion, the Board emphasized that "reasonable minds can, and often do, disagree about independent contractor status when presented with the same factual circumstances," noting that even Board members "reach different conclusions when faced with questions concerning independent-contractor status, and reviewing courts often disagree with the Board's application of the common law agency test and deny enforcement of Board decisions finding employee status." *Id.* at 8.

The Board expressed concern that were it to hold that misclassification, standing alone, is a *per se* violation of the Act, that it "would significantly chill the creation of independent-contractor relationships." *Id.* at 8-9. In addition, if misclassification of employees as independent contractors were deemed an unfair labor practice, without more, it would have "far-reaching implications for the Board's treatment of other statutory exclusions," *i.e.*, supervisors and managers. *Id*. at 10.

Most importantly, the Board recognized that creating a standalone misclassification violation would deny employers the degree of certainty necessary to "reach decisions without fear of later evaluations labeling its conduct an unfair labor practice." *Id*. at 9 (quoting *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981)). The majority concluded:

> Given the uncertainties that beset independent-contractor determinations, if the Board were to establish a stand-alone misclassification violation, an employer that classifies its workers as independent contractors would most assuredly *not* have a sufficient degree of certainty that the Board would not later label its communication of that legal opinion to its workers an unfair labor practice. Therefore, we will continue to treat an employer's

> independent-contractor determination and communication of it to its workers as a legal opinion protected by Section 8(c). *Id*.

The misclassification ULP issue had been lurking in the background for quite some time. It has now been laid to rest by the Trump Board.

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SuperShuttle DFW, Inc. *and* Amalgamated Transit Union Local 1338. Case 16–RC–010963

January 25, 2019

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue in this case is whether franchisees who operate shared-ride vans for SuperShuttle Dallas-Fort Worth are employees covered under Section 2(3) of the National Labor Relations Act or independent contractors and therefore excluded from coverage. On August 16, 2010, the Acting Regional Director issued a Decision and Order in which she found, based on the Board's traditional common-law agency analysis, that the franchisees in the petitioned-for bargaining unit were independent contractors, not statutory employees. Accordingly, she dismissed the representation petition at issue.

Thereafter, pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Union filed a request for review of that decision. On November 1, 2010, the Board granted the Union's request for review. The Union and the Employer filed briefs on review, and the AFL–CIO filed an amicus brief. The Employer also filed a response to the AFL–CIO's brief.

Before the Board issued its decision on the Union's request for review, it issued its decision in *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx*), enf. denied 849 F.3d 1123 (D.C. Cir. 2017) (*FedEx II*), in which a Board majority purportedly sought to "more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss." Id. at 610. The Board majority explicitly declined to adopt the holding of the United States Court of Appeals for the District of Columbia Circuit in a prior *FedEx* case[1] "insofar as it treats entrepreneurial opportunity (as the court explained it) as an 'animating principle' of the inquiry." *FedEx Home Delivery*, 361 NLRB at 610. Rather, the Board found that entrepreneurial opportunity represents merely "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*." Id. at 620 (emphasis in original).

In so doing, the Board significantly limited the importance of entrepreneurial opportunity by creating a new factor ("rendering services as part of an independent business") and then making entrepreneurial opportunity merely "one aspect" of that factor. As explained below, we find that the *FedEx* Board impermissibly altered the common-law test[2] and longstanding precedent, and to the extent the *FedEx* decision revised or altered the Board's independent-contractor test, we overrule it and return to the traditional common-law test that the Board applied prior to *FedEx*, and that the Acting Regional Director applied in this case.

Having carefully reviewed the entire record, including the parties' briefs and the amicus brief on review, and applying the Board's traditional independent-contractor analysis, we affirm the Acting Regional Director's decision and her finding that the franchisees are independent contractors. Accordingly, we dismiss the petition.

I. LEGAL FRAMEWORK

A. The Common-Law Agency Test

Section 2(3) of the Act, as amended by the Taft-Hartley Act in 1947, excludes from the definition of a covered "employee" "any individual having the status of an independent contractor." 29 U.S.C. § 152(3). The party asserting independent-contractor status bears the burden of proof on that issue. See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001); accord *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001) (upholding Board's rule that party asserting supervisory status in representation cases has burden of proof).

To determine whether a worker is an employee or an independent contractor, the Board applies the common-law agency test. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). The inquiry involves application of the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency §220 (1958):

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
>
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
>
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
>
> (d) The skill required in the particular occupation.

[1] *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I*).

[2] As the Board noted in *Roadway Package Systems, Inc.*, 326 NLRB 842, 849 (1998), Supreme Court cases "teach us not only that the common law of agency is the standard to measure employee status but also that we have no authority to change it."

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.

(h) Whether or not the work is part of the regular business of the employer.

(i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in business.

In applying these factors, the Court noted that there is no "shorthand formula" and held that "all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." Id. at 258.

B. Developments Since United Insurance

In the 50 years since the Supreme Court's decision in *United Insurance*, the Board and the courts have revisited and refined the proper application of the common-law factors to the independent-contractor analysis. See, e.g., *Roadway Package System, Inc.*, 326 NLRB 842 (1998), *St. Joseph News-Press*, 345 NLRB 474 (2005), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998) (considering, among other things, (1) the Board's authority to change or modify the common-law right-of-control test to determine if an individual is an employee; (2) the relative importance of factors indicative of employee or independent-contractor status; and (3) evidence of financial gains and losses by drivers in the *Roadway* cases). The District of Columbia Circuit Court of Appeals observed in *FedEx I*, 563 F.3d at 497, that over time, the Board, while retaining all the common-law factors, had shifted the emphasis from control to whether putative independent contractors have significant entrepreneurial opportunity for gain or loss (citations omitted). The court noted that "while the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." Id. Further, the court noted that the common-law test "is not merely quantitative . . . there also is a qualitative assessment to evaluate which factors are determinative in a particular case, and why." Id. at 497 fn. 3. Thus, entrepreneurial opportunity is not an individual factor in the test[3]; rather, entrepreneurial opportunity, like employer control, is a principle to help evaluate the overall significance of the agency factors. Generally, common-law factors that support a worker's entrepreneurial opportunity indicate independent-contractor status; factors that support employer control indicate employee status. The relative significance of entrepreneurial opportunity depends on the specific facts of each case.[4]

In 2014, the Board again reviewed its independent-contractor analysis in *FedEx Home Delivery*, 361 NLRB 610, involving the drivers at a FedEx facility in Hartford, Connecticut. The Board majority sought "to more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss." Id. at 610. The Board held that it would give weight to actual, not merely theoretical, entrepreneurial opportunity, and that it would necessarily evaluate the constraints imposed by a company on an individual's ability to pursue this opportunity. In addition, the Board held that it would evaluate—in the context of weighing all relevant common-law factors—whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.[5] The Board held that this factor would encompass not only whether the putative contractor has a significant entrepreneurial opportunity, but also whether the putative contractor (a) has a realistic ability to work for other companies; (b) has a proprietary or ownership interest in his work; and (c) has control over important business decisions, such as the scheduling of performance, the hiring, selection, and assignment of employees, the purchase of equipment, and the commitment of capital.[6]

C. Other Relevant Board Law

In applying the common-law test to the taxicab industry, the Board has given significant weight to two factors: "the lack of any relationship between the company's compensation and the amount of fares collected," and

[3] Although the Board has occasionally listed entrepreneurial opportunity as a separate factor, see, e.g., *Pennsylvania Academy of Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004), it is not one of the factors listed in the Restatement (Second) of Agency.

[4] Despite our dissenting colleague's overwrought claims to the contrary, the D.C. Circuit does not (and we do not) consider entrepreneurial opportunity to be a "super-factor," an "overriding consideration," a "shorthand formula," or a "trump card" in the Board's independent-contractor analysis. But as our review of the Board's case law shows, entrepreneurial opportunity, however it is characterized, has always been at the core of the common-law test.

[5] Id. at 620.

[6] Id. at 621.

"the company's lack of control over the manner and means by which the drivers conduct business after leaving the [company's] garage." *AAA Cab Services*, 341 NLRB 462, 465 (2004) (citing *Elite Limousine Plus*, 324 NLRB 992, 1001 (1997)); *City Cab Co. of Orlando*, 285 NLRB 1191, 1193 (1987).[7] The Board has also held that when a driver pays a company a fixed rental and retains all fares he collects without accounting for those fares, there is a strong inference that the company does not exert control over the means and manner of his performance. *Metro Cab Co.*, 341 NLRB 722, 724 (2004). The theory underlying this inference is that in a flat-rate system, the company makes its money irrespective of the fares received by drivers; therefore, the company has no compelling reason to try to control the means and manner of the drivers' performance. Id.

Finally, the Board has held that requirements imposed by governmental regulations do not constitute control by an employer; instead, they constitute control by the governing body. *Elite Limousine Plus*, 324 NLRB at 1002. The Board has stated that employee status will be found only where "pervasive control" by the private employer "(exceeds) governmental requirements to a significant degree." *Teamsters Local 814 (Santini Bros. Inc.)*, 223 NLRB 752, 753 (1976), enfd. 546 F.2d 989 (D.C. Cir. 1976), cert. denied 434 U.S. 837 (1977); see also *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 875–876 (D.C. Cir. 1979); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983).

II. FACTUAL BACKGROUND

SuperShuttle Dallas-Fort Worth (DFW), an independent business entity, maintains a license agreement with SuperShuttle International and SuperShuttle Franchise Corporation for the right to use the SuperShuttle trademark and transportation system in the Dallas-Fort Worth area. SuperShuttle International, which owns the SuperShuttle name, logo, and color scheme, develops proprietary software for dispatching, cashiering, and taking reservations for use in administering a shuttle van transportation system. Pursuant to the license agreement, SuperShuttle DFW is permitted to market and deploy the SuperShuttle transportation system in its designated local market.

The SuperShuttle DFW franchisees in the petitioned-for unit primarily transport passengers to and from Dallas-Fort Worth and Love Field airports. Before 2005, SuperShuttle DFW designated its drivers as employees. During that period, SuperShuttle assigned drivers—who earned hourly wages—to regularly scheduled shifts picking up customers in company-owned shuttle vans. In 2005, SuperShuttle converted to a franchise model, which remains in place. Under the current franchise model, drivers are required to sign a 1-year Unit Franchise Agreement (UFA) that expressly characterizes them as nonemployee franchisees who operate independent businesses.[8] Franchisees are required to supply their own shuttle vans and pay SuperShuttle DFW an initial franchise fee and a flat weekly fee for the right to utilize the SuperShuttle brand and its Nextel dispatch and reservation apparatus. Franchisees work no set schedule or number of hours or days per week; they work as much as they choose, whenever they choose. Franchisees are then entitled to the money they earn for completing the assignments that they select. Individual franchisees may also hire and employ relief drivers to operate their vans.

Amalgamated Transit Union Local 1338 (the Union) seeks to represent a unit of SuperShuttle DFW drivers, including those who operate as franchisees pursuant to the UFA, and relief drivers. At the time of the hearing, there were approximately 88 drivers who operated as franchisees and 1 relief driver.

A. Airport Contract and Permits

SuperShuttle DFW is permitted to operate at DFW Airport pursuant to a shared-ride contract (Airport Contract) between the Company and the Dallas-Fort Worth International Airport Board, a public governmental agency.[9] The 130-page document has extensive terms, which dictate most of the ways that SuperShuttle DFW operates its business. The Employer is required to maintain a customer complaint procedure, screen franchisees for drugs and alcohol, and train franchisees. As to the SuperShuttle vans, which franchisees must own or lease, the contract governs marking on the vans, the internal condition of the vans including the number of seats, vehicle maintenance requirements, and postaccident safety inspections. DFW Airport has the right to inspect vans operated by SuperShuttle and to audit SuperShuttle's compliance with the Airport Contract.

Under the Airport Contract, franchisees must have a permit issued by Airport Operations. SuperShuttle must perform criminal background checks, a driving history background check, and drug and alcohol screening in accordance with Department of Transportation standards.

[7] *FedEx*, supra, which involved package delivery drivers, did not purport to modify the Board's precedent regarding taxicab drivers.

[8] The agreement states that "persons who do not wish to be franchisees and independent business people but who prefer a more traditional employment relationship should not become SuperShuttle franchisees."

[9] Franchisees are not signatories to the Airport Contract. Although franchisees in the petitioned-for unit serve both DFW and Love Field airports, the Airport Contract entered into evidence only refers to DFW Airport.

A franchisee must be at least 19 years old, a legal resident, have a valid Texas driver's license, be able to effectively communicate in English, and not be suspended from another ground transportation service.

B. Unit Franchise Agreement

The Unit Franchise Agreement (UFA), which governs the relationship between the franchisees and SuperShuttle, describes the SuperShuttle transportation system and delineates how franchisees are to operate within that framework.[10] It is a standard agreement that is not subject to negotiation by individual franchisees.

Under the UFA, a franchisee, subject to some restrictions, pays an initial fee of $500 for the right to provide transportation to and from DFW and Love Field airports, or a $300 fee for access only to Love Field airport. In addition to the initial franchise fee, the UFA requires that franchisees pay to SuperShuttle a weekly system fee—$575 for a Dallas-Fort Worth and Love Field franchise and $375 for a Love Field franchise. This flat fee does not change and is not related to the amount of business that a franchisee generates. The weekly fee covers the franchise fee, the cost of providing the Nextel system through which franchisees bid on routes, and marketing of the SuperShuttle brand. Franchisees also pay a $250 decal fee.

C. Shared-Ride Vehicles

The UFA requires that franchisees purchase or lease a van that meets the system specifications, i.e., make, model, color, size, age, and mechanical condition.[11] SuperShuttle DFW General Manager Ken Harcrow testified that the average cost of a passenger van is about $30,000.[12] With regard to van acquisition, Harcrow testified that some franchisees get their own vans or leases, and that SuperShuttle also has a leasing company, Blue Van Leasing, to assist franchisees. Franchisees are also responsible for paying for gas, vehicle maintenance, tolls, and access fees. Franchisees park the vans at their homes, and there are no restrictions on franchisees using their vans for personal use.

The Airport Contract imposes guidelines regarding essential equipment and vehicle age and condition. For instance, the Airport Contract requires that all vehicles have, among other things, an air conditioner, heater, fire extinguisher, and credit card machine. The Airport Contract also includes detailed provisions regarding the physical condition of the vehicle; for example, the Contract requires that the vehicles be free of large dents, that all interior and exterior surfaces be free of dirt and grease, and that seats be consistent in color and have no more than two small holes. SuperShuttle dictates that all vehicles use the Company's trademarked blue-and-yellow paint scheme and logo.

The Airport Contract requires that shared-ride vehicles must pass a mechanical inspection on two separate occasions during the calendar year. Pursuant to the UFA, SuperShuttle has the right, without prior notice, to inspect any shared-ride vehicle. SuperShuttle conducts its own in-house inspection of vehicles every 60 days.

Franchisees must purchase insurance through a designated insurer. Franchisees must obtain licensing approval from DFW Airport, pay a licensing fee, and undergo background checks. Franchisees must also complete 34 hours of training and 18 hours of on-the-job training. The Airport Contract requires SuperShuttle to provide 8 hours of customer training in the first week and at least 16 hours per year. This training includes permit qualifications, vehicle requirements, duties and responsibilities under the Airport Contract, disciplinary guidelines, dress standards, customer service, and loading area and van requirements.

All SuperShuttle vans are equipped with a Nextel communications system owned and operated by SuperShuttle. Part of the franchisees' weekly fee covers the cost of operating the Nextel system. Franchisees also receive a pager, a two-way radio, and a global positioning navigation system, also owned and operated by SuperShuttle. Franchisees may use only equipment, signs, uniforms, and services approved by SuperShuttle.

D. Franchisees' Hours, Schedules, and Bid Process

Franchisees set their own work schedules and select their own assignments; SuperShuttle does not set schedules or routes, nor does it require franchisees to be active during certain days or hours. Thus, franchisees have complete control over their schedules. All bidding and work assignments are handled through the Nextel system. Generally, when a franchisee wants to start work and pick up an assignment, he can do so by turning on the Nextel apparatus. Customers can coordinate pickup

[10] The UFA notes that "[t]he airport ground transportation business is a regulated industry and, as a result, there are and will be a substantial amount of restrictions arising from government regulation . . . These restrictions are not imposed by SuperShuttle, but effectively are passed along in order to implement the governmental regulatory scheme."

[11] According to the Franchise Disclosure Document, the vehicle must seat 8 persons including the driver and be no more than 5 years old; acceptable models are the Ford Econoline, the Dodge B1500 or B2500, the Chevy Express, and the GMC Savana.

[12] The Franchise Disclosure Document that franchisees receive estimates that the total investment necessary to begin a SuperShuttle franchise is $18,100 to $40,500; this includes the cost of a vehicle, $300–$500 for the initial franchise fee, $250 for the application of decals, a security deposit of $1,500 for decals and specialized equipment, and the first payment of $50 to the weekly airport expense reimbursement fund.

requests and pay by credit card via the national SuperShuttle website or phone number. Once processed by SuperShuttle dispatchers, these requests appear on franchisees' Nextel devices as job "bids" that franchisees can choose to accept or decline. For each bid, the device displays the fare amount, the passenger's name and address, and the pickup time. If the franchisee declines a bid or fails to respond, the dispatcher will generate another bid for his consideration. Generally, a franchisee incurs no negative consequences from passing on a trip. However, if the franchisee accepts a bid, he is required to complete the pickup or he may be subject to a $50 fine that is paid to the franchisee who completes the job.

Several bidding variations occur within this general framework. In "available bidding," a franchisee will make himself available in his current location, and the system will generate a bid within a 20-mile radius. In "outbound finals bidding," franchisees who are leaving the airport enter their final destination, and the system automatically generates outbound bids near that destination. In "AM bidding," the dispatcher releases a list of bids at 7:30 p.m. for the next morning, and franchisees can pre-select jobs for the following day. In "stand bidding" and "holding lot bidding," franchisees line up at a set location, e.g., a hotel stand or a holding lot, and are offered bids in the order that they are assembled. In all variations, bids are processed through the Nextel device; franchisees are not permitted to use any other service or their personal cell phones to obtain business.

In addition to bidding, franchisees have the option to drive "hotel circuits," in which a franchisee is responsible for providing regularly scheduled pickup service at a hotel. General Manager Harcrow testified that SuperShuttle DFW maintains circuits that service major hotels in Dallas and Fort Worth. Franchisees who choose to drive hotel circuits are responsible for creating pickup schedules and writing bylaws for the route. If a franchisee is unable to drive his scheduled route, he is responsible for finding a replacement, with no involvement from SuperShuttle. Finally, a franchisee can run a charter service, which entails transporting non-airport passengers from one location to another. Charter jobs sometimes show up as Nextel bids. Franchisees can also arrange their own charter jobs, provided that they notify SuperShuttle at least 2 hours in advance and observe a 2-hour charter minimum. There is no record evidence of franchisees running charter operations. The Airport Contract specifically forbids franchisees from independently soliciting passengers at the Airport.

The Airport Contract is generally silent as to the specific operating procedures that SuperShuttle and its franchisees employ away from the airport. The Contract does set forth express pickup time goals that SuperShuttle is required to meet: no more than 15 minutes from the pickup request from 9 a.m. to 9 p.m., and no more than 20 minutes from the request from 9 p.m. to 9 a.m. The Airport Contract also requires franchisees to provide every passenger with a receipt, maintain a passenger log, and operate the vehicle in a "safe and competent manner."

In all instances, i.e., pickups from the airport, hotels, and residences, SuperShuttle sets the fares that customers pay; the fare that appears in the Nextel system is the fare that the franchisee must charge the customer. Franchisees are required to turn in all receipts, trip sheets, and vouchers to SuperShuttle on a weekly basis. SuperShuttle then issues each franchisee a reimbursement check for the fares that he earned in excess of the weekly fees owed to SuperShuttle. (The administration of billing and processing of payments by SuperShuttle is one of the services provided by SuperShuttle pursuant to a franchisee's weekly service payment.)

E. Fares and Payments

The franchisee is entitled to all fares paid by customers and does not share the fare with SuperShuttle in any way. The franchisee's flat weekly fee does not vary with revenues earned. Passengers may pay in the form of credit cards, vouchers, coupons, or cash. Franchisees are required to accept SuperShuttle vouchers. Although the record is unclear as to whether the Company reimburses them for all vouchers in full, it does appear from the testimony that franchisees are reimbursed in full for complimentary rides and hotel coupons.

According to the UFA, franchisees have the option of purchasing an a.m., a p.m., or a 24-hour license. The testimony, however, reflects that regardless of their license, franchisees are unlimited in the hours during which they can operate.

Franchisees pay their own expenses, which include gas, tolls, licensing fees, and vehicle maintenance.

F. Franchisee Conduct and Termination

The Airport Contract dictates that all franchisees must be dressed in a uniform that clearly identifies them as representatives of SuperShuttle. The Airport Contract includes various general guidelines for franchisee conduct while on the job, including a requirement that franchisees act in a reasonable, courteous, cooperative, and professional manner. The Contract includes prohibitions on, among other things, the use of improper language, loud boisterous conduct, sleeping on the job, soliciting, and consuming any food or drink in plain sight. If a franchisee violates a term of the Airport Contract, the Airport will assess to SuperShuttle liquidated damages,

which are set out in an attachment to the Contract. For instance, if a franchisee is caught sleeping on Airport property, SuperShuttle will be assessed $35 for the second offense, $70 for the third offense, and $105 for subsequent incidents.

The UFA includes a list of 25 examples of conduct for which SuperShuttle can terminate a franchisee without recourse. These include, among other things, unauthorized use of SuperShuttle marks or trade secrets; failure, on more than three occasions within the course of the contract term, to pay fees on a timely basis or comply with a requirement of the UFA; foreclosure on or repossession of the shared-ride vehicle; suspension or termination of any required license or permit; receipt of an excessive number of complaints, citations, or notices; falsification of trip sheets, credit card receipts, or training or driving records; use of a relief driver who does not complete the required training or have the mandatory qualifications; and entrance into an employment relationship or affiliation with a business that is competitive with SuperShuttle. SuperShuttle can also terminate a franchisee for not complying with the UFA or failing to make any payments due to SuperShuttle and failing to cure within 3 days after written notice of default. The UFA also gives SuperShuttle the right to institute a point system, whereby points are assessed to the franchisee every time he fails to comply with rules, and accumulation of points may result in fines and termination. There is no evidence that SuperShuttle has implemented a points-based progressive discipline system.

G. Additional Terms and Conditions

The UFA requires that the signer of the document (i.e., the franchisee) be the principal driver of the vehicle and that the operation of the vehicle must be under his direct supervision. The franchisee may use a substitute driver or relief driver, provided that written notice is provided to SuperShuttle; the substitute driver is an employee, agent, shareholder or partner of the franchisee; the substitute driver completes the required training program; and the substitute driver meets SuperShuttle's other criteria for driver eligibility. General Manager Harcrow testified that SuperShuttle is otherwise not involved in the arrangement between the franchisee and the relief driver. The franchisee and relief driver enter into an agreement that governs their relationship, setting forth when the relief driver will work, what he will be paid, and other terms and conditions of their arrangement. At the time of the hearing, one franchisee employed a relief driver. Franchisees do not have the right to subfranchise.

The UFA includes detailed rules and procedures that a franchisee must follow if he wishes to transfer, assign or sell his franchise to another individual. The franchisee must first notify SuperShuttle in writing of the proposed transfer, setting forth the name and address of the proposed transferee and the purchase price and payment terms of the offer. SuperShuttle has a first right of refusal, under which it can notify the franchisee within 30 days that it wishes to accept the transfer for itself at the price and terms in the notice. If SuperShuttle declines, the UFA states that SuperShuttle "shall not unreasonably withhold consent to any transfer" if certain enumerated conditions are met. These include, among other things, that all of the franchisee's outstanding obligations to SuperShuttle have been satisfied; that the proposed transferee is "of good moral character, and possesses the business experience and capability, credit standing, driving record, health and financial resources necessary to successfully operate Franchisee's business in accordance with the terms of this Agreement"; that the transferee will execute the standard form of the UFA; that the franchisee must reimburse SuperShuttle for its costs in providing training to the transferee and for evaluating and processing the transfer, including legal and administrative fees; and that before the closing, the franchisee pay a transfer fee to SuperShuttle of the lesser of $500 or 10 percent of the sale price. Vice President Robertson testified that there were two franchise assignments at SuperShuttle DFW in 2009.

SuperShuttle does not provide to franchisees any fringe benefits, sick leave, vacation time, or holiday pay. In addition, SuperShuttle does not withhold taxes for franchisees. The Airport Contract requires SuperShuttle to have all franchisees covered under its insurance policy; specifically, SuperShuttle's insurance policy must provide combined single limits of liability for bodily injury and property damage of no less than $500,000 for each occurrence for each vehicle. The UFA provides that the franchisee will reimburse SuperShuttle for the insurance that it provides at a cost of between $125 and $200 per week.

Finally, the UFA requires that franchisees agree to indemnify SuperShuttle and hold it harmless "against any and all liability for all claims of any kind or nature arising in any way out of or relating to the Franchisee's and Operator's actions or failure to act."

III. THE ACTING REGIONAL DIRECTOR'S DECISION AND THE CONTENTIONS OF THE PARTIES AND AMICUS ON REVIEW

The Acting Regional Director found that SuperShuttle met its burden of establishing that the franchisees are independent contractors and not employees under Section 2(3) of the Act. Citing the Board's decision in *Roadway Package System, Inc.*, 326 NLRB at 842, the Acting Regional Director applied the common-law agency test and assessed "all incidents of the parties' relation-

ship." In so doing, she noted that, in cases involving the taxicab industry, the Board has given significant weight to two factors: "the lack of any relationship between the company's compensation and the amount of fares collected," and "the company's lack of control over the manner and means by which the drivers conduct business after leaving the [company's] garage." *AAA Cab Services*, 341 NLRB at 465 (citations omitted). Accordingly, the Acting Regional Director emphasized that here, (1) franchisees do not share fares with SuperShuttle, and (2) franchisees operate their vehicles with little control by SuperShuttle. In so finding, the Acting Regional Director noted that the franchisees "are free to work if they want and when they want, and have total autonomy in this respect." Although the Acting Regional Director acknowledged some evidence of control by SuperShuttle—including its imposition of fare amounts, its dress requirements, and its installation of GPS tracking devices—she concluded that SuperShuttle does not exercise control "over the manner and means" by which the franchisees conduct the actual business of transporting customers.

In finding independent-contractor status, the Acting Regional Director also assigned significance to the franchisees' ownership of their vehicles and their "opportunities for loss or gain." To this end, the Acting Regional Director found that franchisees face a meaningful risk of loss in light of the substantial costs that go into owning a franchise, i.e., vehicle payments, weekly system fees, insurance costs, gas, maintenance, licensing fees, and tolls. The Acting Regional Director also found that franchisees "make calculated choices between which trips to choose," noting that, because franchisees pay for the costs of operating their vans, their decisions in choosing trips affect profit margins. She also stated that "a driver's determination of when and how much he will work impacts his profit margin. All drivers take similar risks, but by their decisions and efforts, they do not all achieve the same profits." Finally, she noted that franchisees can hire a relief driver, which creates the "potential to generate more gross revenue while spending less time driving when a relief driver is hired."[13]

The Union contends that, on review, the Board should find that the franchisees are employees. Contrary to the Acting Regional Director, the Union argues that SuperShuttle "exercises substantial control over the drivers' daily performance." For example, the Union emphasizes that SuperShuttle unilaterally promulgates the UFA, requires that franchisees display the SuperShuttle logo on their vehicles, imposes strict rules regarding uniforms and appearance, requires franchisees to attend training, can fine franchisees if they decline certain mandatory assignments, can unilaterally change the type of van that franchisees are permitted to use, and can discipline and terminate franchisees for various transgressions. The Union also notes that franchisees perform a regular and essential part of SuperShuttle's business; are prohibited from working for SuperShuttle's competitors; play no role in soliciting passengers and arranging pickups; do not have any special skills or expertise; must acquire Nextel systems, logo decals, and uniforms from SuperShuttle; and are not permitted to modify fares to get more business. As to entrepreneurial opportunities, the Union notes that franchisees are not permitted to operate more than one route or vehicle, and that franchisees' ability to assign or sell the routes is constrained by the terms of the UFA.

SuperShuttle agrees with the Acting Regional Director's holding that the franchisees are independent contractors. In addition to the factors that the Acting Regional Director addressed, SuperShuttle argues that State regulatory control over the franchisees, which is effectuated through the Airport Contract, is more extensive than set forth in the decision. Specifically, it states that the Airport Contract requires franchisees to wear a uniform, keep records, and submit vehicles for inspection. Accordingly, such requirements are evidence of control by the State, not SuperShuttle. SuperShuttle also emphasizes that franchisees have "unfettered entrepreneurial freedom," as evidenced by their complete control over selecting bids, setting hours, and selecting the type of work they do. SuperShuttle also points to franchisees' substantial investment in their vans and associated business costs, as well as the fact that the parties agreed to enter an independent-contractor relationship, in which franchisees can incorporate as independent entities. Finally, SuperShuttle does not provide benefits or withhold taxes.

IV. DISCUSSION

A. Overruling the Board's FedEx Decision

The Board majority's decision in *FedEx* did far more than merely "refine" the common-law independent-contractor test—it "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency." *FedEx Home Delivery*, 361 NLRB at 629

[13] Although the Acting Regional Director made fact findings regarding the Airport Contract, the existence of regulatory control by the Airport Board did not factor heavily in her analysis or her conclusion that the franchisees were independent contractors.

(Member Johnson, dissenting). Today, we overrule this purported "refinement."[14]

The *FedEx* Board begins its alteration of the independent-contractor test with a classic straw-man analysis of the D.C. Circuit's description of entrepreneurial opportunity in *FedEx I*. As previously stated, the court, following its review of the Board's and the court's independent-contractor jurisprudence, concluded that, "while all the considerations of common law remain in play, an important animating principle by which to evaluate those factors . . . is whether the position presents the opportunities and risks inherent in entrepreneurialism." *FedEx I*, 563 F.3d at 497. This statement of the law is fully consistent with Board precedent and affirms that all the common-law factors "remain in play." But the *FedEx* Board majority, in its attempt to discredit the court's analysis of whether the common-law factors demonstrate that the drivers possess entrepreneurial opportunity, inflated the court's holding, finding that the court "treats the existence of 'significant entrepreneurial opportunity' as the *overriding consideration* in all but the clearest cases" and as the "*single animating principle* in the inquiry." 361 NLRB at 617–618 (emphasis added). Relying on this hyperbolic misreading of the court's description of entrepreneurial opportunity, the Board purported to "refine" the independent-contractor test by confining the significance of entrepreneurial opportunity to "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*." Id. at 620 (emphasis in original). Thus, rather than considering the entrepreneurial opportunity, if any, afforded a putative contractor by the common-law factors, the Board limited that inquiry to a single aspect of a newly coined factor, thereby altering the test and greatly diminishing the significance of entrepreneurial opportunity to the analysis.

Contrary to the *FedEx* Board majority's and our dissenting colleague's claim that entrepreneurial opportunity was the *FedEx I* court's "overriding consideration," the court noted that an emphasis on entrepreneurial opportunity "does not make applying the test mechanical." 563 F.3d at 497. Indeed, the court applied and considered all of the relevant common-law factors, including whether the parties believe they are creating a master/servant relationship, the extent of the employer's control over details of the work, the extent of employer supervision, and who supplies the instrumentalities for doing the work, before concluding that, "on balance, . . . they favor independent contractor status." Id. at 504. See also *FedEx II*, 849 F.3d at 1128 (rejecting Board majority's contention that the *FedEx I* court did not consider and weigh all common-law factors).

In sum, we do not find that the *FedEx I* court's decision departed in any significant way from the Board's traditional independent-contractor analysis, and we therefore find that the *FedEx* Board's fundamental change to the common-law test in reaction to the court's decision was unwarranted. The court acknowledged that "the ten-factor test is not amenable to any sort of bright-line rule" and that "'there is no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" 563 F.3d at 496 (quoting *United Insurance Co.*, 390 U.S. at 258). The court followed that guidance. The court further noted that the Board's and the court's evolving emphasis on entrepreneurial opportunity was a "subtle refinement . . . done at the Board's urging," and it reiterated that "all the considerations at common law remain in play." Id. at 497. Thus, no "refinement" of the court's analysis was required. Indeed, while courts afford the Board substantial deference in matters requiring application of special expertise when interpreting the Act, "a determination of pure agency law involve[s] no special administrative expertise that a court does not possess." *United Insurance Co.*, 390 U.S. at 991. As the D.C. Circuit pointedly remarked in *FedEx II* when rejecting the Board's deference argument in support of the *FedEx* majority standard at issue here, "We do not accord the Board such breathing room when it comes to new formulations of the legal test to be applied." 849 F.3d at 1128.

Moreover, we reject the characterization of the *FedEx* decision as mere "refinement" because, as former Member Johnson explained in detail in his dissent in *FedEx,* the majority shifted the independent-contractor test to one of "economic dependency," a test that was specifi-

[14] We do not suggest that the Board cannot refine or clarify its independent-contractor analysis, as it did in *Roadway* and as we do here today. Instead, we find that the *FedEx* majority's purported "refinement" was an impermissible (or at least an unwarranted) diminution of the importance of entrepreneurial opportunity for the reasons discussed below.

Our dissenting colleague complains that the Board is overruling precedent here without public notice and an invitation to file briefs. We dismiss this claim for several reasons. First, the *FedEx* majority promulgated its "refinement" to the independent-contractor test without public notice or invitation to file briefs. Our decision here to undo this refinement, by the *FedEx* majority's own example, requires no such action. Second, as the Board has noted, it has on many occasions overruled or modified precedent without supplemental briefing. See, e.g., *The Boeing Co.*, 365 NLRB No. 154, slip op. at 21 (2017), and cases cited. Finally, to the extent *FedEx* represents precedent, it is, at 4 years old, hardly "longstanding."

cally rejected by Congress.[15] *FedEx Home Delivery*, 361 NLRB at 629–634 (Member Johnson, dissenting). In *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), the Supreme Court articulated a policy-based economic realities test for determining independent-contractor status in cases involving New Deal social legislation. As the Court explained in *U.S. v. Silk*, 331 U.S. 704 (1947),

> [t]he problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, 29 U.S.C.A. s 151 et seq., we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, s 220. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act."[16]

In the Taft-Hartley amendments of 1947, Congress reacted to this expansive alternative to the common-law test by specifically excluding independent contractors from coverage under the Act. In subsequent cases, the Supreme Court recognized that Congress had effectively abrogated the holdings of *Hearst* and *Silk* to the extent they authorized policy-based alternatives to the common-law agency test of employee and independent-contractor status in the absence of express statutory language. See, e.g., *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324–325 (1992) ("In each case, the Court read 'employee' to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning."). In short, the *FedEx* majority's reformulation of the independent-contractor analysis impermissibly revives an "economic dependency" standard that Congress has explicitly rejected.

In addition, the *FedEx* majority's emphasis on drivers' "economic dependency" on the employer makes no meaningful distinction between FedEx drivers and any sole proprietor of a small business that contracts its services to a larger entity. Large corporations such as FedEx or SuperShuttle will always be able to set terms of engagement in such dealings, but this fact does not necessarily make the owners of the contractor business the corporation's employees.

Properly understood, entrepreneurial opportunity is not an independent common-law factor, let alone a "superfactor" as our dissenting colleague claims we and the D.C. Circuit treat it. Nor is it an "overriding consideration," a "shorthand formula," or a "trump card" in the independent-contractor analysis. Rather, as the discussion below reveals, entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa. Moreover, we do not hold that the Board must mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case. Instead, consistent with Board precedent as discussed below, the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate.[17]

[15] *United Insurance Co.*, 390 U.S. at 256. The *FedEx* majority's limitation of the significance of entrepreneurial opportunity to a single aspect of whether the contractor rendered services as part of an independent business derived directly from former Member Liebman's dissent in *St. Joseph News-Press*, 345 NLRB at 484 (Member Liebman, dissenting), where she wrote: "[I]t is entirely appropriate to examine the economic relationship between the [r]espondent and the carriers to determine whether the carriers are economically independent business people, or substantially dependent on the [r]espondent for their livelihood." Notably, the *FedEx* majority overruled *St. Joseph News-Press* "as inconsistent with the view articulated today." 361 NLRB at 621.

[16] 331 U.S. at 713.

[17] Our dissenting colleague claims that we insist that we are "free to adjust [our] test whenever and however [we] like." To the contrary, we simply observe that the Board will not mechanically apply the principle

The Board has long considered entrepreneurial opportunity as part of its independent-contractor analysis.[18] But, as the D.C. Circuit has recognized, the Board has over time (particularly since *Roadway*) shifted its perspective to entrepreneurial opportunity as a principle by which to evaluate the significance of the common-law factors, as demonstrated by the nonexhaustive discussion of relevant Board precedent that follows.

In *Roadway*, the Board, in finding that the disputed drivers were employees rather than independent contractors, devoted much of its analysis section to the evaluation of how certain common-law factors limited the drivers' entrepreneurial opportunity for gain or loss. See 326 NLRB at 851–853. For example, the Board found that obstacles created by the employer through its demanding schedules for the drivers and detailed specifications for the drivers' trucks effectively prevented drivers from taking on additional business during their off hours and therefore limited the "entrepreneurial independence" that ownership of their trucks may have otherwise provided them. See id. at 851 & fn. 36 ("[The employer] has simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities."). In addition, the Board found that the drivers' ability to increase their "entrepreneurial profit" through their own "efforts and ingenuity" was limited by the employer's control over their routes, the number of packages and stops on their routes, and the prices charged to customers, and that the employer's compensation system provided "an important safety net for the fledging driver to shield him from loss." See id. at 852–853. Finally, the Board found that the employer's "considerable control" over the drivers' ability to sell their routes limited the possibility of the drivers "influenc[ing] their profits like entrepreneurs" through their proprietary interests in their routes.[19]

In other cases, the Board has found that certain common-law factors significantly supported independent-contractor status because they provided workers with the entrepreneurial opportunity for gain or loss. In *Dial-A-Mattress*, the companion case to *Roadway*, the Board, in finding that the drivers were independent contractors, emphasized that the drivers had significant entrepreneurial opportunity for gain or loss where they could own multiple trucks and hire their own employees without being subject to control or requirements of the employer, they were not guaranteed minimum compensation, they could decline orders, and they were not required to provide delivery services on every workday. See 326 NLRB at 891. In *St. Joseph News-Press*, the Board found that the conditions "enabl[ed] carriers to take economic risk and reap a corresponding opportunity to profit from working smarter, not just harder" where the carriers could hire full-time substitutes over whom they had complete control, hold contracts on multiple routes, deliver other products (including for competitors) while making deliveries for the employer, and solicit new customers. See 345 NLRB at 479 (internal quotations omitted).[20]

Our dissenting colleague argues that the Board has merely considered the presence of entrepreneurial opportunity as an aspect of the "method of compensation" factor when citing it in support of an independent-contractor finding and has generally cited the absence of entrepreneurial opportunity as support for finding employee status. As demonstrated by the discussion above, however,

of entrepreneurial opportunity where it does not apply, i.e., when the factual circumstances of a case render entrepreneurial opportunity irrelevant to a particular common-law factor or factors. But, in every case, the Board will evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain.

[18] See, e.g., *Roadway Package System*, 288 NLRB 196, 198 (1988) (*Roadway I*) (finding that the drivers "[bore] few of the risks and enjoy[ed] little of the opportunities for gain associated with an entrepreneurial enterprise" where the employer controlled the number of packages and stops for each driver and their service areas, did not give drivers a proprietary interest in their service areas, and utilized a compensation system that effectively balanced the drivers' incomes); *Standard Oil Co.*, 230 NLRB 967, 971 (1977) (finding that the employer controlled "all meaningful decisions of an entrepreneurial nature which affect profit or risk of loss" where the employer unilaterally determined the drivers' compensation and delivery territories, the prices of the products, and the customers to whom they could deliver).

[19] See also *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000) (finding that the drivers had "no significant opportunity for entrepreneurial gain or loss" where the employer determined the routes, the base pay, and the amount of freight on each route, and did not allow the drivers to add or reject customers), enfd. 292 F.3d 777 (D.C. Cir. 2002); *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000) (finding that the drivers did "not have a significant entrepreneurial opportunity for financial gain or loss" where the employer controlled the drivers' rates of compensation and the prices charged to the customers, and that despite the "theoretical potential for entrepreneurial opportunity" that came with the drivers' ability to hire their own drivers, the evidence did not demonstrate any resulting "economic gain" given the employer's control).

[20] See also *Arizona Republic*, 349 NLRB 1040, 1044–1045 (2007) (finding that the carriers had entrepreneurial potential to increase their income where they could use full-time substitutes, hold contracts on multiple routes, deliver other newspapers, negotiate the piece rate for delivering the employer's newspaper, solicit new customers, and receive tips); *Argix Direct, Inc.*, 343 NLRB 1017, 1020–1021 (2004) (finding that some of the employer's drivers were entrepreneurs who owned multiple trucks and hired their own drivers and that all of the drivers could "choose to maximize or minimize their income" because they set their own schedules and therefore chose when and when not to work).

the Board has never thus limited its consideration of entrepreneurial opportunity but has evaluated a number of other common-law factors to determine whether workers in a given case were provided opportunities for economic gain.

Moreover, we reject our colleague's suggestion that the Board has not previously evaluated entrepreneurial opportunity in a manner consistent with our decision today. Rather, as discussed above, the Board has found that specific common-law factors may or may not demonstrate entrepreneurial opportunity depending on the overall circumstances of the case.[21] Going forward, we will continue to consider how the evidence in a particular case, viewed (as it must be) in light of all the common-law factors, reveals whether the workers at issue do or do not possess entrepreneurial opportunity.[22] Our cases simply do not support the *FedEx* majority's or our dissenting colleague's attempt to cabin consideration of entrepreneurial opportunity to one aspect of a single factor.

As a more general matter, our dissenting colleague claims that our approach is inconsistent with the common-law agency test. In support, she argues that "if the common-law agency test has a core concept, it is . . . 'control.'" However, as she acknowledges, the *Roadway* Board rejected the "proposition that those factors which do not include the concept of 'control' are insignificant when compared to those that do." 326 NLRB at 850. Moreover, the Restatement expressly recognizes that a master-servant relationship can exist in the absence of the master's control over the servant's performance of work. See Restatement (Second) of Agency § 220 cmt. d ("[T]he full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking."). But most importantly, the Board's subtle shift in emphasis from control to entrepreneurial opportunity, which the D.C. Circuit first recognized and we explicitly acknowledge today, did not fundamentally alter the Board's independent-contractor analysis. As stated, control and entrepreneurial opportunity are two sides of the same coin: the more of one, the less of the other. Indeed, entrepreneurial opportunity often flowers where the employer takes a "hands off" approach. At the end of the day, the Board has simply shifted the prism through which it evaluates the significance of the common-law factors to what the D.C. Circuit has deemed a "more accurate proxy" to "'capture[] the distinction between an employee and an independent contractor.'" See *FedEx I*, 563 F.3d at 497 (citing *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (2002)). As the D.C. Circuit has made clear, the Board's independent-contractor analysis is qualitative, rather than strictly quantitative; thus, the Board does not merely count up the common-law factors that favor independent contractor status to see if they outnumber the factors that favor employee status, but instead it must make a qualitative evaluation of those factors based on the particular factual circumstances of each case. See *FedEx I*, 563 F.3d at 497 fn. 3. Where a qualitative evaluation of common-law factors shows significant opportunity for economic gain (and, concomitantly, significant risk of loss), the Board is likely to find an independent contractor.

Our dissenting colleague further claims that our approach is inconsistent with the Supreme Court's decision in *United Insurance*. To the contrary, we will continue to adhere, as we must, to the Court's decision, considering all of the common-law factors in the total factual context of each case and treating no one factor (or the principle of entrepreneurial opportunity) as decisive. And where the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, we will likely find independent-contractor status. Thus, our approach is faithful to *United Insurance* and the common-law agency test that it requires.[23]

In conclusion, we find that the Board majority in *FedEx*, based on a mischaracterization of the D.C. Circuit's opinion in *FedEx I*, impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial

[21] For example, in some cases, vehicle ownership provides the driver with significant entrepreneurial opportunity. *Dial-a-Mattress*, supra. Under other facts, vehicle ownership provides no such opportunity. *Roadway*, supra.

[22] We acknowledge that the Board's precedent in this area, like in many areas, has not been entirely consistent. See *FedEx I*, 563 F.3d at 498 ("[T]he Board's language has not been as unambiguous as this court's binding statement."). Today's decision is intended to eliminate any ambiguity over how to treat entrepreneurial opportunity in the Board's independent-contractor analysis in the future.

[23] We do not find our dissenting colleague's citation of *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014), to be persuasive because in that case, the court applied the California state law standard for determining employee status, which, as the California Supreme Court has explained, is "not inherently limited by common law principles" but, rather, "must be construed with particular reference to the history and fundamental purposes of the statute." *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399, 405 (Cal. 1989) (internal quotations omitted); see also *Alexander*, 765 F.3d at 992 ("The *Borello* court noted that the '"control-of-work-details" test for determining [employee status] must be applied with deference to the purposes of the protective legislation.'") (quoting *Borello*, 769 P.2d at 406) (alteration in *Alexander*); *FedEx Home Delivery*, 361 NLRB at 631 fn. 11 (Member Johnson, dissenting) (explaining that while the California standard considers secondary indicia that overlap with the common-law factors in the Restatement, it is not the equivalent of the common-law test that the Board must apply but is, instead, "a variant of the policy-based economic realities test of *Hearst* [and] *Silk*").

opportunity to the analysis. We therefore overrule the Board's *FedEx* decision and return the Board's independent-contractor test to its traditional common-law roots.

B. Applying the Common-Law Factors

Applying the Board's traditional common-law factor test to the facts of this case, we find, in agreement with the Acting Regional Director, that SuperShuttle franchisees are independent contractors. Like most entrepreneurs or small business owners, SuperShuttle franchisees make a significant initial investment in their business by purchasing or leasing a van and entering into a Unit Franchise Agreement that requires certain payments, including an initial fee and a weekly flat fee. Like small business owners, franchisees have nearly unfettered opportunity to meet and exceed their weekly overhead: with total control over their schedule, they work as much as they choose, when they choose; they keep all fares they collect, so the more they work, the more money they make; and they have discretion over the bids they choose to accept, so they can weigh the cost of a particular trip (in terms of time spent, gas, and tolls) against the fare received. As explained in more detail below, these factors (i.e., extent of control by employer, method of compensation, and ownership of principal instrumentality), which demonstrate that the franchisees have significant opportunity for economic gain and significant risk of loss, strongly support finding independent-contractor status, and they are not outweighed by any countervailing factors supporting employee status.

i. Extent of control by the employer

As the Acting Regional Director found, the Board has held that the control exerted by an employer "over the manner and means by which drivers conduct[] business" is one of two factors given significant weight in the taxicab industry. *AAA Cab Services*, 341 NLRB at 465. Stated differently, the fact that an employer does not exercise control over the manner and means by which drivers conduct business may reliably signal the existence of significant entrepreneurial opportunity. We agree with the Acting Regional Director's finding that the shared-ride industry is an extension of the taxicab industry and that this factor should be afforded significant weight.

As noted above, SuperShuttle franchisees are free from control by SuperShuttle in most significant respects in the day-to-day performance of their work. Franchisees have total autonomy to set their own work schedule. They merely turn on their Nextel device and wait for the next bid offer. Once a trip is offered, franchisees, except in very limited circumstances,[24] can decide whether to accept the trip or not. Further, when a franchisee wishes to take a break or end the work day, he merely turns off his Nextel device. Other than the receipt of data from the Nextel device, there is little record evidence of communication between a franchisee and SuperShuttle during day-to-day operations. Franchisees' discretion in deciding when to work and which trips to accept weighs in favor of independent-contractor status. *AAA Cab Services*, 341 NLRB at 465.[25]

In addition, franchisees are largely free to choose where they work. Although they are practically limited to the Dallas-Fort Worth area, SuperShuttle does not impose any restrictions or control over where franchisees work within that area. Franchisees have no set routes and are not confined to any specific region of the Dallas-Fort Worth area. Thus, the absence of control over franchisees' routes affords franchisees considerable opportunity and independence during those times they choose to work. This geographic freedom is indicative of independent-contractor status. Id.

Franchisees are required under the UFA to indemnify SuperShuttle and hold it harmless "against any and all liability for all claims of any kind or nature arising in any way out of or relating to the Franchisee's and Operator's actions or failure to act." Such indemnification greatly lessens SuperShuttle's motivation to control a franchisee's actions, since SuperShuttle is not liable for a franchisee's negligent or intentionally harmful acts. This fact weighs in favor of independent-contractor status. *Dial-A-Mattress*, 326 NRLB at 891 ("[I]n employment relationships, employers generally assume the risk of third-party damages, and do not require indemnification from their employees.").[26]

[24] The record indicates that franchisees can be asked to bid on a trip that no one else has accepted. The Petitioner presented evidence that, in *one* instance, a trip was forced into a franchisee's Nextel and that when the franchisee refused the trip, he was fined $50.

[25] In an effort to minimize the franchisees' freedom to choose when they work, how long they work, and which trips they accept, our dissenting colleague makes much of the fact that the franchisees must use the Nextel device to accept trips. However, the Nextel device does not allow SuperShuttle to exercise control over the franchisees. Instead, it is simply the mechanism that SuperShuttle uses to transfer the passengers' trip reservations to the franchisees. Without such a transfer mechanism, SuperShuttle's operation would be all for naught, as the franchisees would not know who to pick up, when and where to pick them up, and where to take them. Because the franchisees decide when to turn on the Nextel device and what trips to accept, the Nextel device does not allow SuperShuttle to control their work.

[26] Our dissenting colleague distinguishes the present case from *Dial-A-Mattress* by pointing out that the Airport Contract requires SuperShuttle to have all franchisees covered under its insurance policy. While that is correct, it proves nothing because the Airport Contract does not require that SuperShuttle have the franchisees agree to indem-

Although franchisees enjoy broad latitude in controlling their daily work, they are subject to certain requirements. The Airport Contract requires franchisees to wear a uniform and maintain certain grooming standards. Franchisees must display the SuperShuttle decals and markings on their vans, and they must maintain the interior condition of the vans, including the number of seats. DFW Airport has the right to inspect vans operated by SuperShuttle and to audit SuperShuttle's compliance with the Airport Contract. But these requirements are not evidence of SuperShuttle's control over the manner and means of doing business because they are imposed by the state-run DFW Airport. *AAA Cab Services*, 341 NLRB at 465; *Don Bass Trucking Co.*, 275 NLRB 1172, 1174 (1985) ("Government regulations constitute supervision not by the employer but by the state.") (internal citations omitted). Thus, these controls do not mitigate the substantial weight of the factors supporting independent-contractor status.

Fares received by franchisees are set by SuperShuttle,[27] and franchisees must accept vouchers and coupons. SuperShuttle requires more frequent vehicle inspections than the Airport Contract, and franchisees are required to display a "How am I driving?" sticker on their vehicle. SuperShuttle also requires some additional training. However, we find that these limited employer controls are vastly outweighed by the general control that franchisees have over their working conditions, including scheduling and selecting bids.[28] In short, this factor weighs heavily in favor of independent-contractor status.

ii. Method of payment

The method of payment is the second factor to which the Board has traditionally given significant weight in the taxicab industry. *AAA Cab Services*, 341 NLRB at 465; *Elite Limousine Plus*, 324 NLRB at 1001. As noted above, franchisees pay a monthly flat fee pursuant to the UFA, and their monthly fee does not vary based on revenues earned. They are entitled to all fares they collect from customers, and they do not share the fares in any way with SuperShuttle. When an employer does not share in a driver's profits from fares, the employer lacks motivation to control or direct the manner and means of the driver's work. *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300, 1309–1310 (2004). Moreover, the franchisees' freedom to keep all fares they collect, coupled with their unfettered freedom to work whenever they want, provides them with significant entrepreneurial opportunity. Thus, the Board has found that "the lack of any relationship between the company's compensation and the amount of fares collected" supports a finding that franchisees are independent contractors.

iii. Instrumentalities, tools, and place of work

The primary instrumentalities of franchisees' work are their vans and the Nextel dispatching system. As noted, franchisees purchase their vans, an investment of $30,000 or more, or they lease their vans, also a significant investment. The Nextel devices are a part of the franchise agreement, and franchisees pay for them as part of their weekly fee. In addition, franchisees pay for gas, tolls, repairs, and any other costs associated with operating their vans. Franchisees' full-time possession of their vans facilitates their ability to work whenever and wherever they choose.[29] These factors weigh in favor of independent-contractor status.

iv. Supervision

Franchisees are not generally supervised by SuperShuttle. The evidence shows that the only daily communication between SuperShuttle and the franchisees occurs through the Nextel dispatch system. Because franchisees have the right to accept or decline any bid, SuperShuttle, through the Nextel system, does not "assign" routes to franchisees or perform any other supervisory role. SuperShuttle may fine a franchisee $50 for accepting a bid and then later declining it. The $50 is given to the franchisee who picks up the previously de-

nify it and hold it harmless against any and all liability. The Airport Contract allows for SuperShuttle to assume the risk of third-party damages, and the fact that SuperShuttle shifts that risk to franchisees weighs in favor of independent-contractor status.

[27] As a practical matter, fares are set by the competitive airport transportation market, so even if franchisees could negotiate their own fares, those fares are unlikely to vary significantly from SuperShuttle's fares.

[28] Our dissenting colleague emphasizes that the UFA requires franchisees "not to deviate from the standards, specifications and operating procedures" in it. However, she has not explained how those "standards, specifications and operating procedures" significantly exceed the requirements in the Airport Contract, which, as government regulations, are not evidence of SuperShuttle's control. As discussed above, the UFA itself states that many restrictions imposed by the Airport Contract are effectively passed along in the UFA. Overall, we simply have not found that the UFA's requirements exceed the requirements of the Airport Contract to such an extent that they outweigh the significant evidence, discussed above, of the franchisees' control over their work.

[29] We acknowledge that the UFA's prohibition on franchisees entering into business relationships with SuperShuttle's competitors limits to some extent the potential for entrepreneurial opportunity that would otherwise come with ownership of their vans. However, that limitation is mitigated by the fact that SuperShuttle does not limit its hours of service and that the franchisees can drive for SuperShuttle whenever and for as long as they choose. Thus, the franchisees do not need the option to work for SuperShuttle's competitors to maximize their entrepreneurial opportunity to the same extent that they would need that option if SuperShuttle's hours of service were limited or if SuperShuttle limited the number of hours that they could drive.

clined trip. There was also evidence that, on one occasion, SuperShuttle forced a trip into a franchisee's Nextel and that, when the franchisee declined the trip, he was fined $50.

Franchisees' near-absolute autonomy in performing their daily work without supervision supports a finding that they are independent contractors. The few minor and isolated fines do not diminish the force of that conclusion.

v. The relationship the parties believed they created

The UFA states unequivocally, in bold, capital letters: **FRANCHISEE IS NOT AN EMPLOYEE OF EITHER SUPERSHUTTLE OR THE CITY LICENCEE.** In Article O of the UFA, "Relationship of Parties," the agreement further states: **IT IS ACKNOWLEDGED THAT THE FRANCHISEE IS THE INDEPENDENT OWNER OF ITS BUSINESS.** These provisions leave little doubt as to the intention of the parties to create an independent-contractor relationship between SuperShuttle and its franchisees.

As the Acting Regional Director found, two other factors support this conclusion. SuperShuttle does not provide franchisees with any benefits, sick leave, vacation time, or holiday pay. Further, SuperShuttle does not withhold taxes or make any other payroll deductions from franchisees' pay. Finally, the record shows that five franchisees entered into the franchise agreement as corporations. Such a relationship is rare in employer-employee relationships and is associated with independent-contractor status. In short, this factor supports finding that franchisees are independent contractors.

vi. Engagement in a distinct business; work as part of the employer's regular business; the principal's business

As the Acting Regional Director noted, these three factors are closely related. Certain specialized occupations are commonly performed by individuals in business for themselves, and workers in such occupations are usually deemed independent contractors. In this case, driving is not considered a distinct occupation. In addition, SuperShuttle is clearly involved in the business of transporting customers, and its revenue comes from providing that service. Thus, these related factors weigh in favor of employee status.

vii. Length of employment

Generally, a longer employment relationship indicates employee status. In this case, the Unit Franchise Agreement is a one-year contract. On this basis, the Acting Regional Director found that this factor favored independent-contractor status. Although the UFA is a one-year contract, the evidence shows that most franchisees renew their agreements yearly. Under these circumstances, we find that this factor is neutral.

viii. Skills required

As the Acting Regional Director found, the record does not indicate that franchisees have any particular skill or require any specialized training. This factor favors finding employee status. *Prime Time Shuttle International*, 314 NLRB 838, 840 (1994).

C. Conclusion

Having considered all of the common-law factors, we find, in agreement with the Acting Regional Director, that SuperShuttle established that its franchisees are independent contractors. Franchisees' ownership (or lease) and control of their vans, the principal instrumentality of their work, the nearly complete control franchisees exercise over their daily work schedules and working conditions, and the method of payment, where franchisees pay a monthly fee and keep all fares they collect, all weigh strongly in favor of independent-contractor status. Moreover, these three factors provide franchisees with significant entrepreneurial opportunity and control over how much money they make each month. Further, we emphasize again that the shared-ride industry is an extension of the taxicab industry,[30] and that in taxicab cases, the Board has particularly focused on the company's "control over the manner and means by which the drivers conduct[] business" and "the relationship between the company's compensation and the amounts of fares collected." *AAA Cab Services*, 341 NLRB at 465 (citing *Elite Limousine Plus*, 324 NLRB at 1001); *City Cab Co.*, 285 NLRB at 1193.[31] Thus, our findings that SuperShuttle has little control over the means and manner of the franchisees' performance while they are actually driving and that SuperShuttle's compensation is not related at all to the amounts of fares collected by the franchisees, and conversely, that these facts provide franchisees with significant entrepreneurial opportunity, strongly point toward independent-contractor status. In addition, the absence of supervision of franchisees and the understanding between parties that franchisees are independent operators, as clearly expressed in the Unit Franchise Agreement, also weigh in favor of independent-contractor status. Although the skill required as a franchisee, the fact that driving is not a distinct occupation, and SuperShuttle's involvement in the business all weigh in favor of employee status, we agree with the Acting Regional Director that these factors are relatively less

[30] Our dissenting colleague does not dispute this finding.

[31] Our dissenting colleague does not dispute or take issue with this taxicab precedent.

significant and do not outweigh those factors that support independent-contractor status.

ORDER

The petition is dismissed.

Dated, Washington, D.C. January 25, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Until 2005, SuperShuttle DFW treated its drivers as employees. It then implemented a franchise model, supposedly transforming the drivers into independent contractors. Today, the majority finds that this initiative succeeded, at least for purposes of the National Labor Relations Act. To reach that finding, the majority wrongly overrules the Board's 2014 *FedEx* decision,[1] without public notice and an invitation to file briefs.[2] But under any reasonable interpretation and application of the common-law test for determining employee status—which everyone agrees is controlling—the SuperShuttle drivers are, in fact, employees. The drivers perform work that is the core part of SuperShuttle's business, subject to a nonnegotiable "unit franchise agreement" that pervasively regulates their work; they could not possibly perform that work for SuperShuttle without being completely integrated into SuperShuttle's transportation system and its infrastructure; and they are prohibited from working for any SuperShuttle competitor. SuperShuttle's drivers are not independent in any meaningful way, and they have little meaningful "entrepreneurial opportunity." Under well-established Board law—reflected in decisions leading up to and including *FedEx*—this should be a straightforward case.

Instead, purporting to "return the Board's independent-contractor test to its traditional common-law roots," the majority not only reaches the wrong result here, but also adopts a test that cannot be reconciled with either the common law or Supreme Court and Board precedent. According to the majority, the Board is required to apply the multi-factor, common-law agency test of employee status, as articulated in the *Restatement (Second) of Agency* §220 (1958), yet, at the same time, the majority insists that "entrepreneurial opportunity . . . has always been at the core of the common law test" and thus the Board must treat "entrepreneurial opportunity" as "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." Simply put, these two requirements are contradictory: "entrepreneurial opportunity" is demonstrably *not* "at the core of the common law test."

Indeed, the majority does not coherently apply the test it claims to adopt in actually deciding this case. Instead, the majority insists that it is free to adjust its test whenever and however it likes, observing that "the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." As the Supreme Court has told the Board, however, the reasoned decision making required by the Administrative Procedure Act means that federal agencies may not announce one rule but apply another.[3] That seems to be the path the majority has chosen today.

I.

[1] *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017).

[2] The current majority has routinely broken with established Board practice in this respect, at the cost of public participation and fully-informed decision making. See, e.g., *The Boeing Co.*, 365 NLRB No. 154, slip op. at 31–33 (2017) (dissenting opinion).

The majority explains its failure to provide notice and an opportunity for briefing by pointing out that the *FedEx* Board did not invite briefs either. I was not a Board member when *FedEx* was decided. It is worth noting, however, that at the time, the Board effectively was required to address the District of Columbia Circuit's decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009), because every reviewable Board decision may be challenged in that court. See National Labor Relations Act, Sec. 10(f), 29 U.S.C. §160(f). Thus—in contrast to today's out-of-the-blue ruling—the Board's refinement of independent-contractor doctrine in the *FedEx* decision could easily have been anticipated, and amicus participation sought.

Insofar as the majority suggests that a Board decision issued without notice and an invitation to file briefs may be overruled the same way, its own reversals of precedent are vulnerable. This prospect, of course, only shows that institutional norms, once broken, may be hard to fix.

[3] *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 374–375 (1998). As the Supreme Court explained there:

> Reasoned decisionmaking, in which the rule announced is the rule applied, promotes sound results, and unreasoned decisionmaking the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel . . . and effective review of the law by the courts.

Id. at 375.

Assessing the majority's decision here first requires understanding its legal background, as well as carefully analyzing what the Board actually said and did in the 2014 *FedEx* decision. I address each point in turn.

A. The Common-Law Origins of the Employee/Independent Contractor Test

Section 2(3) of the National Labor Relations Act excludes independent contractors, as opposed to employees, from statutory coverage.[4] The starting point for independent-contractor determinations under the National Labor Relations Act is the Supreme Court's decision in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). There, the Court held that the Act incorporated the "common law agency test in distinguishing an employee from an independent contractor." 390 U.S. at 256. Upholding the Board's determination that insurance-company "debit agents" were statutory employees (and reversing the Seventh Circuit's contrary determination), the Court explained that:

> There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor. . . .
>
> . . . .
>
> *There is no shorthand formula or magic phrase that can be applied to find the answer*, but all of the incidents of the relationship must be assessed and weighed *with no one factor being decisive.* What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.

Id. at 258 (footnote omitted; emphasis added).

In later decisions involving application of the common-law agency test to employee-status determinations under federal statutes, the Supreme Court has consistently been guided by the multifactor test articulated in Section 220 of the *Restatement (Second) of Agency*, which addresses the tort liability of "masters" for the actions of their "servants."[5] See, e.g., *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323–324 (1992) (applying Employee Retirement Income Security Act). The *Restatement* notes that "[u]nder the existing regulations and decisions involving the Federal [sic] Labor Relations Act, there is little, if any, distinction between employee and servant as here used."[6] No Supreme Court decision has cast doubt on the continuing viability of *United Insurance* or the later cases that look to the *Restatement* for authoritative guidance.

The Board's seminal independent-contractor case is *Roadway Package System*, 326 NLRB 842 (1998), a unanimous full-Board decision[7] that, not surprisingly, endorsed the use of the open-ended, multifactor *Restatement* test. There, relying heavily on the Supreme Court's decision in *United Insurance*, the Board (1) rejected the

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[4] Sec. 2(3) provides that "[t]he term 'employee' shall include any employee . . . but shall not include … any individual having the status of an independent contractor." 29 U.S.C. §152(3).

[5] Under Sec. 219(1) of the *Restatement*, a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Sec. 220(1) provides that "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Sec. 220(2), in turn, identifies a long list of factors to be considered "[i]n determining whether one acting for another is a servant or an independent contractor." It provides that:

> [T]he following matters of fact, *among others*, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

(emphasis added).

[6] *Restatement (Second) of Agency* §220, comment g. The focus of the *Restatement*, of course, is the common-law liability of employers ("masters") for torts committed by their employees ("servants"), not issues of federal statutory coverage turning on employee status or the existence of an employment relationship. As the *Restatement* explains:

> The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally.
>
> . . . .
>
> [W]ith the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit. As a result of these considerations, historical and economic, the courts of today have worked out tests which are helpful in predicting *whether there is such a relation between the parties that liability will be imposed upon the employer for the employee's conduct which is in the scope of employment*.

Id., §219, comment a (emphasis added).

[7] Four of the Board's five members participated; the remaining member was recused. Id. at 842 & fn. 8.

argument that "those factors which do not include the concept of 'control' are insignificant when compared to those that do;" (2) correctly noted that the *Restatement* "specifically permitt[ed] the consideration of . . . relevant factors" other than those identified by the *Restatement*; and (3) concluded that the "common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control."[8] *Roadway* has never been overruled, and the majority today cites the decision with approval—as it must, if it wants to claim (and maintain) continuity with the Board's well-established approach in this area.

B. The FedEx Cases

The Board's 2014 *FedEx* decision, overruled today, was a response to a 2009 divided-panel decision of the District of Columbia Circuit, which also involved drivers working for FedEx Home Delivery. Reversing a Board decision that had found the drivers to be employees,[9] the panel majority interpreted the Circuit's case law—and the Board's—as having shifted over time

> away from the unwieldy control inquiry in favor of a more accurate proxy: whether the "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss.'"

FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009), quoting *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002). "Thus," the panel majority announced, "while all of the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." Id.

This description of the Board's independent-contractor caselaw as evolving was inaccurate, as Circuit Judge Garland explained in his detailed dissent.[10] First, the Board had *not* treated "control" as an "animating principle" or master factor. The *Roadway* decision makes this plain. There, the Board rejected the argument that the *Restatement* factors that did not involve the right to control were relatively insignificant. Second, the Board decisions cited by the Circuit panel majority as marking the Board's supposed shift in emphasis—away from control and to "entrepreneurial opportunity"—reveal nothing of the sort.[11]

What *has* characterized the Board's independent-contractor doctrine since *Roadway* has been continuity, not change: a consistent emphasis on the *Restatement*'s multi-factor common-law test and a corresponding adherence to the Supreme Court's admonition in *United Insurance* that "[t]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[12]

The Board's 2014 *FedEx* decision[13] responded to the District of Columbia Circuit's misperception that the Board had *already* taken a new approach in evaluating employee status, and to the court's endorsement of that

[8] Id. at 850.

[9] A Regional Director, applying *Roadway*, determined that the drivers were employees. The Board denied the company's request for review of the Regional Director's decision. After an election that led to the union's certification, the Board ultimately found that the company had unlawfully refused to bargain. *FedEx Home Delivery*, 351 NLRB No. 16 (2007) (not reported in Board volumes).

[10] *FedEx Home Delivery*, supra, 563 F.3d at 504–519.

[11] Indeed, the Circuit panel majority itself "readily concede[d] that the Board's language ha[d] not been as unambiguous as" the court's own decisional language assertedly had. *FedEx Home Delivery*, supra, 563 F.3d at 498. But this concession was an understatement. In *Corporate Express*, 332 NLRB 1522 (2000), for example, the Board found that driver "owner-operators" working for a delivery company were statutory employees, not independent contractors, but gave no special emphasis to the concept of "entrepreneurial opportunity." In *Arizona Republic*, 349 NLRB 1040 (2007), meanwhile, a divided Board also reaffirmed *Roadway* and considered several factors (including "entrepreneurial potential" in connection with "method of compensation") in determining that the newspaper carriers at issue were independent contractors. But here, too, there was no hint of a shift in emphasis or the elevation of "entrepreneurial opportunity" into an "animating principle."

The same is true of two other Board decisions briefly cited by the Circuit panel majority. In *St. Joseph News-Press*, 345 NLRB 474 (2005), a divided decision involving newspaper carriers, a divided Board reaffirmed *Roadway*, observing that "both the right of control and other factors, as set out in the Restatement, are to be used to evaluate claims that hired individuals are independent contractors." Id. at 478. The Board majority concluded that "[o]n balance . . . under the common law test . . . the factors weigh in favor of finding independent contractor status." Id. at 479. Among the five factors relied upon, but given no special weight, was the "method of compensation, which allowed for a degree of entrepreneurial control." Id. In *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998), the companion case to *Roadway*, the Board observed that the "list of factors differentiating 'employee' from 'independent contractor,' is nonexhaustive, with no one factor being decisive." Id. at 891. The Board observed that the "separateness" from the company of the owner-operator drivers was "manifested in many ways, *including* significant entrepreneurial opportunity for gain or loss," id. at 891 (emphasis added), but the decision relied on multiple factors, id. at 891–893, none of which was treated as of overriding importance.

[12] 390 U.S. at 258.

[13] *FedEx 2014* involved drivers at the company's Hartford, Connecticut facility. The Board initially denied review of a Regional Director's finding that the drivers were statutory employees. The District of Columbia Circuit then issued its own *FedEx* decision, which (as discussed) found that drivers at the company's Wilmington, Massachusetts facility were independent contractors. In turn, FedEx argued to the Board that, in light of the court's decision, it was required to revisit the earlier denial of review, prompting the Board to take up the issue. *FedEx*, supra, 361 NLRB at 610.

supposed shift. The *FedEx* Board first reaffirmed the Board's longstanding commitment to the principles articulated by the Supreme Court in *United Insurance*, to the "seminal" *Roadway* decision, and to the "nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency."[14] Second, the Board "more clearly define[d] the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss, a factor that the Board has traditionally considered."[15] It "decline[d] to adopt the District of Columbia Circuit's . . . holding insofar as it treat[ed] entrepreneurial opportunity . . . as an 'animating principle' of the inquiry."[16]

"Entrepreneurial opportunity," the Board held, "represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business."[17] The Board carefully explained *why* it chose not to adopt the District of Columbia Circuit's approach, observing that this approach was not mandated by the Act, by the Supreme Court's decision in *United Insurance*, or by Board precedent and that "adopting it would mean a broader exclusion from statutory coverage than Congress appears to have intended."[18] The Board observed, in turn, that the "Restatement makes no mention at all of entrepreneurial opportunity or any similar concept," a "silence [that] does not rule out consideration of such a principle, but . . . cannot fairly be described as requiring it."[19] Meanwhile, the *United Insurance* admonition against relying on a "shorthand formula or magic phrase" weighed against the District of Columbia Circuit's approach.[20]

The Board has since applied the *FedEx* decision faithfully, continuing to examine each of the traditional common-law factors enumerated in the *Restatement*, as well as the independent-business factor, in making independent-contractor determinations.[21] The District of Columbia Circuit, meanwhile, denied enforcement to the Board's *FedEx* decision, applying the law-of-the-circuit doctrine and holding that the issue addressed there—the independent-contractor status of the company's drivers—had already been resolved by the Circuit's earlier decision.[22] Notably, other courts have reached a contrary conclusion, finding FedEx drivers to be employees under the common law. See, e.g., *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014) (applying California common law).[23]

As I will explain, while I did not participate in *FedEx* (which issued before I joined the Board), I am persuaded

[14] 361 NLRB at 610–611.

[15] Id. at 610.

[16] Id.

[17] Id. (emphasis omitted). The Board explained that it "should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity." Id. at 610. Accordingly, the Board overruled two prior decisions by divided Board panels—*St. Joseph News-Press*, supra (decided in 2005), and *Arizona Republic* (decided in 2007)—"[t]o the extent that . . . [they] may have suggested that" the constraints effectively imposed on a putative contractor's ability to render services as part of an independent business "are *not* relevant to the Board's independent-contractor inquiry." Id. at 621 (emphasis added).

[18] Id. at 617.

[19] Id. at 618.

[20] Id.

[21] See *Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124 (2017); *Pennsylvania Interscholastic Athletic Assn.*, 365 NRB No. 107 (2017); *Sisters' Camelot*, 363 NLRB No. 13 (2015); *Porter Drywall, Inc.*, 362 NLRB 7 (2015).

[22] *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017). However, it is noteworthy that in a post-*FedEx* decision, considering "entrepreneurial opportunity" as a "factor," the District of Columbia Circuit has also enforced the Board's decision (issued before *FedEx*) in which the Board determined that symphony orchestra musicians were statutory employees, not independent contractors, based on an analysis that seemingly departs from the court's own preferred approach. *See Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016), enfg. 357 NLRB 1761 (2011). The court described "entrepreneurial opportunity" as a "factor which does not appear in the Restatement but which the Board and this court use in assessing whether workers are employees or independent contractors." Id. at 569. The court analyzed the *Restatement* factors, then seemed to consider "entrepreneurial opportunity" as a separate factor, concluding that in the case of the musicians, it was "limited" and "provide[d] only miniscule support for independent contractor status." Id. at 570. "Summing up," the court determined "that the relevant factors point in different directions" and accordingly "defer[red] to the Board's conclusion that the . . . musicians [were] employees." Id.

[23] See also Mark J. Lowenstein, *Agency Law and the New Economy*, 72 Bus. Law. 1009, 1017–1020 (2017) (describing litigation involving FedEx drivers and collecting decisions).

Professor Lowenstein writes that "businesses often have crafted contracts to fit their workers within the definition of independent contractor" and that "[n]o business has been more creative in that regard than FedEx . . . whose efforts to craft an independent contractor relationship with its drivers spawned litigation across the country." Id. at 1017. As the U.S. Commission on the Future of Worker-Management Relations (the blue-ribbon Dunlop Commission) observed nearly 25 years ago:

> [C]urrent tax, labor and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations. For example, an employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, workers' compensation, and health insurance, will save the administrative expense of withholding, and will be relieved of responsibility to the worker under labor and employment laws. . . . Many low-wage workers have no practical choice in the matter.

U.S. Commission on the Future of Worker-Management Relations, *Final Report* 62 (1994) (available at www.digitalcommons.ilr.cornell.edu)

that the Board's decision was sound and defensible, and I see no good reason to abandon it—in particular, not for the confused approach adopted by the majority today, which cannot be reconciled with common-law principles or Supreme Court authority.

II. THE BOARD MAJORITY'S NEW TEST

Today, the majority overrules the *FedEx* decision, essentially embracing the District of Columbia Circuit's approach to "entrepreneurial opportunity." But the majority cannot have it both ways; it cannot claim fidelity to both the common-law test and the Circuit's approach, because that approach actually broke with the traditional test. In support of this shift, the majority claims that the *FedEx* Board gave too little weight to "entrepreneurial opportunity," and the Circuit, just the right amount—purportedly the *same* amount as the Board had traditionally given it. However, as explained above, this view is refuted by any fair reading of the decisions: the Board's, the Circuit's, and the Supreme Court's decision in *United Insurance*, which matters most of all.

The majority also claims that the approach taken by the *FedEx* Board is somehow contrary to the common-law agency test, and that its own approach conforms to that test. That claim is similarly baseless. Indeed, there is no real evidence to suggest that the traditional common law of agency, as reflected in the *Restatement* and as developed to address issues of tort liability, was informed by the concept of "entrepreneurial opportunity" at all. The majority seems to have been bewitched by just the sort of "magic phrase" the Supreme Court warned about and has accordingly elected to replace a sound test with an unsupportable formulation that is inconsistent with Board precedent as well as both the common-law and Supreme Court precedent.

A. Board precedent

There is no principled way to reconcile the District of Columbia Circuit's approach, now adopted by the majority, with Board precedent. With respect to the independent-contractor analysis, the court treated "entrepreneurial opportunity" as a "more accurate proxy" than the "unwieldy control inquiry."[24] But the *Roadway* Board in 1998's seminal decision had definitively rejected the claim that "control" was the key analytical concept—and, in the process, made clear that there *is* no such key, no "animating principle" (to use the court's phrase) of independent-contractor doctrine. In supposedly replacing "control" with "entrepreneurial opportunity," then, the court began with an incorrect premise (that one principle guides the analysis) and ended with a conclusion that fundamentally departed from Board doctrine.

Similarly, the court in *Fed Ex* erred when it explicitly rejected the Board's view "[b]ecause the indicia favoring a finding that the contractors are employees are clearly outweighed by the evidence of entrepreneurial opportunity." No Board decision has ever treated "evidence of entrepreneurial opportunity" as such a trump card. To the contrary, the two Board decisions in which such evidence was cited in support of finding independent-contractor status treated the evidence as simply one aspect of a common-law factor ("method of compensation") that was itself part of a multifactor test, with no factor receiving special weight.[25] It is simply incorrect to claim, as the majority does, that the District of Columbia Circuit's decision did not "depart[] in any significant way from the Board's traditional independent-contractor analysis."

Here, the majority fails in its attempt to explain how the District of Columbia Circuit's approach comports with *Roadway* or other Board precedent. It tellingly fails to cite a single Board decision that employs "entrepreneurial opportunity" as the Circuit does: to "evaluate" the common-law factors, and to ask—as the decisive question—"whether the position presents the opportunities and risks inherent in entrepreneurialism."[26] The majority echoes the Circuit in asserting that "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." But this is simply not how the Board has ever before approached independent-contractor determinations applying the common-law agency test.

Remarkably, the majority cites with apparent approval two Board decisions in which the *absence* of "entrepreneurial opportunity"—a function of constraints imposed by the employer—was relied upon as one factor among others in finding that drivers were employees, not independent contractors. Thus, in *Roadway*, supra, the Board explained:

> As in *United Insurance*, the drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's busi-

[24] *FedEx*, supra, 563 F.2d at 497.

[25] See *Arizona Republic*, supra, 349 NLRB at 1042–1046; *St. Joseph News-Press*, supra, 345 NLRB at 478–479.

[26] Id.

> ness under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; *and they have no significant entrepreneurial opportunity for gain or loss. All these factors* weigh heavily in favor of employee status.

326 NLRB at 851 (emphasis added). Of course, even to find that the *lack* of "entrepreneurial opportunity" is enough to establish *employee* status would not mean that the presence of some "entrepreneurial opportunity," no matter how limited, would be enough to establish independent-contractor status. Nothing in *Roadway* suggests that if the drivers there had enjoyed "significant entrepreneurial opportunity for gain or loss," this alone would have been decisive.[27] The *Roadway* Board clearly did not use "entrepreneurial opportunity" to "evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain" (as the majority would have it).[28]

Nor did the Board do so in the companion case to *Roadway*, *Dial-A-Mattress*, supra, where it found delivery drivers to be independent contractors. The Board, citing *Roadway*, observed that the "list of factors differentiating 'employee' from 'independent contractor' status under the common-law agency test is nonexhaustive, with no one factor being decisive" and found that in the case before it, the "factors weigh[ed] more strongly in favor of independent-contractor status."[29] To be sure, the Board found that the drivers' "separateness from [the company] was manifested in many ways, including significant entrepreneurial opportunity for gain or loss," but the Board also distinguished *Roadway* in several respects, including by observing that the employer there "exercise[d] more control over its drivers' manner and means of accomplishing their work."[30] There was no "shorthand formula" at work in *Dial-A-Mattress* any more than in *Roadway*, but instead a nuanced analysis and weighing of multiple factors.

The Board's *FedEx* decision is entirely consistent with *Roadway* and *Dial-A-Mattress*, whereas the formulation adopted by the majority today manifestly is not.[31] Tellingly, the Circuit's *FedEx* decision did not cite either decision as evidence of the Board's supposed focus on "entrepreneurial opportunity," and the majority today is forced to say that the imaginary "shift[]" in the Board's "perspective" occurred "particularly *since Roadway*" (emphasis added)—when, in fact, it never happened at all (until today). As the District of Columbia Circuit has itself explained, "[a]n agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'"[32] Under the cover of the Circuit's decision, this is just what the majority has done here: departed from Board precedent—that is, the precedent *before FedEx*—without ever acknowledging that it conflicts with today's decision.

The most the majority will say is that "the Board's precedent in this area . . . has not been entirely consistent" and that "[t]oday's decision is intended to eliminate any ambiguity over how to treat entrepreneurial opportunity in the Board's independent-contractor analysis in the future." In fact, however, it was the Board's *FedEx* decision that, responding to the District of Columbia Circuit, actually eliminated ambiguity and clarified Board doctrine, within permissible bounds. The majority's decision, in contrast, adopts an impermissible approach that cannot be reconciled with what came before and that provides no clear guidance for the future.

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[27] To recall, the *Roadway* Board explicitly rejected the view that the non-control factors were relatively insignificant to the common-law analysis. 326 NLRB at 850. The majority mistakenly posits that "employer control and entrepreneurial opportunity are opposite sides of the same coin," ignoring the fact that "entrepreneurial opportunity" has no apparent basis in the common law of agency. But even by the majority's token, *Roadway* cannot possibly be read to hold that "entrepreneurial opportunity" (any more than "control") diminishes the weight to be given to factors that do not implicate either control or its supposed obverse.

[28] The majority also cites *Corporate Express*, supra, but to no avail. There, in the course of addressing the usual range of traditional factors, the Board observed:

> They [the drivers] have no proprietary interest in their routes *and no significant opportunity for entrepreneurial gain or loss*. The routes, the base pay, and the amount of freight to be delivered daily on each route are determined by the [employer], and owner-operators have no right to add or reject customers.

332 NLRB at 1522 (emphasis added). But the Board did not treat "entrepreneurial opportunity" as the analytical key to the case.

Nor did the Board do so in *Slay Transportation Co.*, 331 NLRB 1292 (2000), also cited by the majority. There, the Board examined all of the traditional common-law factors in holding the drivers to be employees, observing (among other things) that the drivers were "given specific instructions as to the manner in which they [were] to perform their tasks," that they did not "operate independent businesses," and that they performed functions that were "the very core of [the employer's] business." Id. at 1293–1294. "Having considered *all* of the incidents of the [drivers'] relationship with the [e]mployer," the Board concluded "that the various factors of the common law agency test weigh[ed] heavily in favor of employee status." Id. at 1294.

[29] 326 NLRB at 891.

[30] Id. at 893.

[31] It merits notice that, by citing *Roadway* and *Corporate Express* with approval, the majority seems to recognize (as it must) that to the extent that the "entrepreneurial opportunity" of a purported independent contractor is, as a practical matter, constrained by the company he works for, it is entitled to correspondingly lesser weight in the analysis. If a purely theoretical "entrepreneurial opportunity" were enough to make a worker an independent contractor, then the *Roadway* Board would not have found the drivers there to be employees.

[32] *NLRB v. CNN America, Inc.*, 865 F.2d 740, 751 (D.C. Cir. 2017).

B. Supreme Court Precedent and the Common Law

Even more troubling than this inconsistency with Board precedent is the majority's failure to reconcile its new approach with common law principles and the Supreme Court's decision in *United Insurance*. Certainly, today's majority repeats the District of Columbia Circuit's profession that its approach was faithful to *United Insurance* and pays lip service to the settled principle that the "ten-factor [*Restatement*] test is not amenable to any sort of bright-line rule."[33] But the approach adopted by the Circuit, and now by the Board majority today, is precisely the kind of "shorthand formula" that both the common law and the *United Insurance* decision reject.[34]

The majority argues that it is *required* to overrule the Board's *FedEx* decision because the decision "impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis." According to the majority, the *FedEx* Board effectively abandoned the common-law agency test in favor of the "economic realities" test endorsed by the Supreme Court's 1944 *Hearst* decision, but then legislatively overruled by Congress in 1947. This claim is baseless. Indeed, it is the majority's approach today—with its endorsement of "entrepreneurial opportunity" as a sort of super-factor—that subordinates the common law to a particular vision of supposed "economic reality" where workers are deemed "entrepreneurs" and labor law, irrelevant. Neither the common law nor the policies of the Act support the majority's expansive view of how "entrepreneurial opportunity" should operate to exclude workers from statutory coverage.[35]

The majority's position rests on the premise that "entrepreneurial opportunity" is the core concept of the traditional common-law agency test. There is no support for such a claim. If the common-law agency test has a core concept, it is demonstrably not "entrepreneurial opportunity," but rather "control" (although, to be sure, the *Roadway* Board rejected the view that the *Restatement* factors "which do not include the concept of 'control' are insignificant when compared to those that do"[36]). As the District of Columbia Circuit itself has just told us, "the 'right to control' [not 'entrepreneurial opportunity'] runs like a *leitmotif* through the Restatement (Second) of Agency."[37] Thus, as noted, *Restatement* Section 220(1) defines a "servant" (as opposed to an independent contractor) as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is *subject to the other's control or right of control*." *Restatement* Section 220, comment g, in turn, traces this definition to the idea that because "the master can exercise control over the physical activities of the servant," he is properly held liable for harm caused by the servant.

The *Restatement* certainly does not define a "servant" as a "person employed to perform services in the affairs of another and who in the performance of the services *lacks entrepreneurial opportunity for gain or loss.*"[38] But this is how the majority, embracing the District of Columbia Circuit's approach, has effectively rewritten the definition. None of the *Restatement* Section 220(2) factors, meanwhile, explicitly or implicitly incorporate the concept of "entrepreneurial opportunity." "Entrepreneurial opportunity" does not inform (in any clear and direct way, at least): "extent of control;" "distinct occupation or business;" "kind of occupation;" "skill required;" who supplies the instrumentalities; "length of time . . . employed;" "method of payment;" "part of the regular business;" the parties' belief in what relationship they are creating; and the "business" of the principal.[39] Citing the *Restatement*, the Supreme Court has observed that "[a]t common law the relevant factors defining the master-servant relationship focus on the master's control over the servant," and that in determining whether a person is an "employee" under a federal statute that does not otherwise define the term, "the *common-law element of*

[33] 563 F.3d at 496.

[34] It is clear from the District of Columbia Circuit's decision that it was, indeed, applying a new standard and thus rejecting the Board's view (that the FedEx drivers were employees) "[b]ecause the indicia favoring a finding that the contractors are employees are clearly outweighed by the evidence of entrepreneurial opportunity." 563 F.3d at 504. This approach amounts to a "shorthand formula," despite any disclaimer. It was the adoption of this formula, in turn, that enabled the Circuit to reject the Board's view of the case, despite the deferential standard of judicial review established by *United Insurance*.

[35] The explicit policy of the National Labor Relations Act is "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . ." NLRA, Sec. 1, 29 U.S.C. §151. In light of that policy, exclusions from statutory coverage should be interpreted narrowly.

[36] 326 NLRB at 850.

[37] *Browning-Ferris Industries of California, Inc. v. NLRB*, No. 16-1028, slip op. at 27 (D.C. Cir. Dec. 28, 2018). "[A]t bottom," the court observed, the "independent-contractor test considers *who, if anyone, controls the worker* other than the worker herself." Id. at 33 (emphasis added).

[38] The dictionary definition of an "independent contractor" (the term actually used in Sec. 2(3) of the National Labor Relations Act) is "one that contracts to do work or perform a service for another and that *retains total and free control* over the means and methods used in doing the work or performing the service." *Webster's Third New International Dictionary of the English Language* 1148 (1966) (emphasis added).

[39] See fn. 5, supra (quoting *Restatement* §220(2) factors).

control is the principal guidepost that should be followed."[40]

To be clear, the Supreme Court has not held that "*entrepreneurial opportunity*" is "the principal guidepost that should be followed." Nor does the majority's incorrect description of "employer control" and "entrepreneurial opportunity" as "opposite sides of the same coin" do the analytical trick. As explained, the focus of the common law of agency is determining tort liability—a master is liable for the torts of his servant—and liability follows from control.[41] The servant's "entrepreneurial opportunity" (or lack of it) is simply not part of the common-law equation. While one can debate whether the common law of agency is well suited to determining covered-employee status under a federal statute like the National Labor Relations Act, that was the choice that Congress made, as the Supreme Court has definitively held. Here, as in the joint-employer context, the Board "must color within the common-law lines identified by the judiciary."[42]

Quoting then-Member Johnson's dissent, the majority criticizes the *FedEx* Board's approach because (in the majority's view) it "greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency." What the majority fails to explain, however, is where, how, and why traditional common-law agency doctrine not only incorporates the concept of "entrepreneurial opportunity," but also subordinates the "control" factors to it (along with the remaining *Restatement* factors, as well). With approval, the majority cites the supposed "evolving emphasis on entrepreneurial opportunity" in the decisions of the District of Columbia Circuit and the Board, as described by the *FedEx* court. But the majority does not explain how the common-law agency test applied by the Board (or the Circuit) could evolve in a fundamental way and yet still adhere to the *Restatement*, the legal source treated as authoritative by the Supreme Court.[43] Put somewhat differently, the traditional common law of agency does not develop through the decisions of the Board and the District of Columbia Circuit, but rather exists independently of them.[44] *United Insurance*, meanwhile, contains no hint that "entrepreneurial opportunity" was an "animating principle" of the common-law test. The approach taken by the *FedEx* Board, unlike the majority's today, is entirely consistent with common-law agency principles.

The *FedEx* Board did no more than permissibly refine the way that the Board would apply the common-law agency test.[45] Essential to the majority's criticism of *FedEx* is the suggestion that it was somehow illegitimate to treat "entrepreneurial opportunity" as a factor, or as an element of a factor, in the independent-contractor analysis. Thus, the majority insists that "[p]roperly understood, entrepreneurial opportunity is not an independent common-law factor;" rather, it is "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain" and thus (according to the majority), the *FedEx* Board "impermissibly altered the Board's traditional common law test . . . by severely limiting the significance of entrepreneurial opportunity to the analysis." As

[40] *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448 (2003) (emphasis added) (addressing employee status under Americans with Disabilities Act of 1990). The majority—citing the *Restatement*'s example of a full-time cook regarded as a servant, despite the fact that the employer exercises "no control over the cooking"—observes that a "master-servant relationship can exist in the absence of the master's control over the servant's performance of work." This single example, however, in no way suggests that "entrepreneurial opportunity" informs the common-law analysis. Indeed, it refutes the majority's assertion that "entrepreneurial opportunity" is simply the obverse of "control." That the cook's employer does not control his cooking does not mean that the cook has "entrepreneurial opportunity."

[41] See *Restatement (Second) of Agency* §219.

[42] *Browning-Ferris Industries*, supra, No. 16–1028, slip op. at 21.

[43] See, e.g., *Nationwide Mutual Insurance*, supra, 503 U.S. at 323–324.

[44] Thus, in recently upholding the Board's joint-employer standard, the District of Columbia Circuit "look[ed] first and foremost to the 'established' common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947." *Browning-Ferris Industries*, supra, No. 16–1028. slip op. at 22. There is no clear indication that in adopting the "independent contractor" exclusion in 1947—and thus incorporating the common-law agency test into the National Labor Relations Act (as the Supreme Court held in *United Insurance*)—Congress intended for the test to evolve over time, much less that this evolution was to be directed by the Board or by the federal courts.

[45] As explained, the *FedEx* Board sought to refine how evidence of "actual entrepreneurial opportunity for gain or loss" is "to be properly assessed as part of the traditional common-law factors." 361 NLRB at 620. It observed that the Board "has been less than clear about this point." Id. In some cases, "entrepreneurial opportunity ha[d] been analyzed expressly as a separate factor." Id., citing *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011), and *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004). In others, it was "integrated into the Board's analysis of other factors." Id., citing *Roadway*, supra, 326 NLRB at 851–853, and *Stamford Taxi*, 332 NLRB 1372, 1373 (2000). The Board had also "spoken in terms of the 'economic independence' of putative contactors from their employing entities." Id., citing *Slay Transportation*, supra, 331 NLRB at 1294. Synthesizing the Board's prior decisions, the *FedEx* Board articulated a new "independent-business" factor, which "supplements—without supplanting or overriding—the traditional common-law factors," and explained that the "weight given to the independent-business factor will depend upon the factual circumstances of the particular case." Id. at 621.

explained already, it is the majority's treatment of "entrepreneurial opportunity" as a sort of super-factor that contradicts the common-law agency test. As for the *FedEx* Board's approach, in contrast, the *Restatement* explicitly states that the factors listed in Section 220(1) are considered "among others." The *Roadway* Board, in turn, accurately described the *Restatement* as "specifically permitting the consideration of other relevant factors as well, depending on the factual circumstances presented."[46] Pre-*FedEx* decisions by the Board, as noted, have treated "entrepreneurial opportunity" as a factor. And, as earlier pointed out, the District of Columbia Circuit itself, in a post-*FedEx* decision, has described "entrepreneurial opportunity" as a "factor" to be considered, along with those identified in the *Restatement*.[47]

The majority's insistence that the *FedEx* Board impermissibly abandoned common-law agency principles to return to the "economic realities" test articulated by the Supreme Court in *Hearst*, supra, is baseless—as demonstrated by any fair reading not only of *FedEx*, but of the Board decisions that have since applied *FedEx*, all of which reflect a careful analysis of the *Restatement* factors and the independent-business factor articulated in *FedEx*. In *Porter Drywall*, for example, the Board followed this approach and determined that "crew leaders" hired as drywall-installation subcontractors were independent contractors, not employees.[48] Then-Member Johnson (who had dissented in *FedEx*) concurred, observing that the result would have been the same under the test he had advocated there.[49] If *FedEx* had actually left the common law behind, one might think it would yield different results.

On that score, finally, it is worth pointing again to the Ninth Circuit's *Alexander* decision involving FedEx drivers. There, the court—just like the *FedEx* Board—held that the drivers were not independent contractors, but rather employees. Applying California common law, which closely resembles the approach of the *Restatement*, the Ninth Circuit rejected the company's reliance on the District of Columbia Circuit's *FedEx* decision, observing that there was "no indication that California had replaced its longstanding right-to-control test with the *new entrepreneurial opportunities test developed by the D.C. Circuit*" and explaining that under California law, the sort of company-constrained "entrepreneurial opportunities" available to the drivers "did not override other factors in [the] multi-factor analysis."[50] The Ninth Circuit's decision, then, illustrates that the test adopted by the Board majority today is the novelty, a departure from traditional common law.

III.

The "entrepreneurial opportunities" test, in short, cannot be reconciled with the Board's pre-*FedEx* precedent (to which the majority claims to adhere) or with Supreme Court precedent and the common law of agency (to which the Board *must* adhere). But that is not where the problems with today's decision end, because while the majority adopts the "entrepreneurial opportunities" test, it does not apply the test as articulated.

Under the test adopted and articulated by the majority, "entrepreneurial opportunity . . . is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." Precisely what this means, even in theory, is not easy to understand. In its subsequent analysis of the record evidence here, however, the majority does not evaluate "the overall effect of the common -law factors." Instead, it begins its analysis by reciting ways in which the SuperShuttle drivers assertedly resemble "entrepreneurs or small business owners," and then asserts that "these factors"—which are not, in fact, drawn from the *Restatement*—"are not outweighed by any countervailing

[46] 326 NLRB at 850. The District of Columbia Circuit is in agreement on this point. See, e.g., *FedEx Home Delivery*, supra 849 F.3d at 1125 (describing *Restatement* as "provid[ing] a non-exhaustive list of ten factors to consider").

[47] *Lancaster Symphony Orchestra*, supra, 822 F.3d at 569–570.

[48] *Porter Drywall*, supra, 362 NLRB 7.

[49] Id. at 12.

[50] 765 F.3d at 993–994 (emphasis added). The majority discounts the Ninth Circuit's decision based on its mistaken view that the court applied a California test fundamentally different than the common-law agency test that the Board is required to apply. The Ninth Circuit described California law this way:

> California's right-to-control test requires courts to weigh a number of factors: "The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."
>
> . . .
>
> California courts also consider "several 'secondary' indicia of the nature of a service relationship. . . ." The right to terminate at will, without cause, is "[s]trong evidence in support of an employment relationship." Additional factors include:
>
> " (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee."

765 F.3d at 988 (citations omitted). The close similarity to the *Restatement* test is obvious.

factors supporting employee status." Only then does the majority turn to the *Restatement* factors. In short, the majority does, indeed, treat "entrepreneurial opportunity" as an "overriding consideration." The internal inconsistencies in the majority's approach are reason enough to reject its analysis.[51]

By contrast, even putting aside the now-overruled *FedEx* approach, looking only to pre-*FedEx* Board precedent (which remains good law), and keeping SuperShuttle's burden of proof in mind, a careful examination of the *Restatement* factors, as the Board has traditionally applied them, should lead to a finding of employee status here. Notably, the SuperShuttle drivers bear a strong resemblance to the insurance agents found by the Supreme Court to be employees, not independent contractors, in *United Insurance*, supra. Thus, the Regional Director erred in dismissing the Union's representation petition: the SuperShuttle drivers should be permitted to pursue the union representation that they seek.

A. Essential Facts

The essential facts here are straightforward and not in dispute—although the majority's discussion neglects certain facts that cut against its ultimate conclusion that the drivers are independent contractors.

SuperShuttle has a contract with the Dallas/Fort Worth International Airport Board, a public agency, to provide a shared-ride service to airport customers. The relationship between SuperShuttle and its drivers, in turn, is governed in comprehensive detail by the "Unit Franchise Agreement" (UFA).

The UFA is effectively imposed on the drivers by SuperShuttle. It is a standard agreement, not subject to negotiation by individual drivers, and (by its terms) it may be changed by SuperShuttle at will. The UFA prohibits drivers from engaging in any business activity that will conflict with their obligations under the agreement—including working for a SuperShuttle competitor and any involvement with another business that provides transportation services (a fact the majority ignores).

Under the UFA, drivers pay SuperShuttle not only an initial "franchise fee," but also a flat, weekly system fee ($575 for a Dallas/Fort Worth Airport franchise) and a $100-per-week contribution to reimburse SuperShuttle for its payment of certain driving-related fees.

The UFA requires drivers to buy or lease a van that meets SuperShuttle's detailed specifications. Most drivers lease their vehicles—and SuperShuttle has its own, affiliated leasing company, which (as SuperShuttle's general manager testified) "helps these guys who have poor credit"—a fact the majority ignores.

SuperShuttle provides training to its drivers, not only the training required by its contract with the airport board, but also training in its "brand standards" and the operation of its communication systems—subjects that the UFA describes as "unique to the SuperShuttle system." (The majority does not mention this.)

Central to the drivers' work is SuperShuttle's Nextel trip generating system, which the UFA requires drivers to use. The specialized equipment drivers must use includes a pager, a two-way radio, and a global-positioning navigation system—all owned by SuperShuttle, which prohibits the drivers from using the equipment outside the SuperShuttle system.

SuperShuttle does not set drivers work schedules, routes, or assignments. But SuperShuttle's Nextel trip generating system is integral to dispatch services. The system generates job "bids," that drivers ostensibly may accept or decline. However, drivers testified that they had been fined for declining bids. One driver testified that deciding whether to accept or decline a bid was "commonsense stuff," based on the time and distance involved in picking up a passenger. Drivers testified that whether or not SuperShuttle required them to work, they felt a practical need to work to be able, at least, to make the fixed, weekly system payments to the company that SuperShuttle required. SuperShuttle, not the drivers, sets the fares. And, as mentioned, if drivers wish to work as drivers, they must do so only for SuperShuttle.

Under the UFA, a driver may use a substitute or relief driver, but only if the other driver meets SuperShuttle's detailed requirements. The UFA also imposes detailed requirements on the transfer, assignment, or sale of a SuperShuttle franchise.

B. The Restatement Factors

1. Factors the majority concedes support employee status

Starting with the factors that the majority concedes favor a finding of employee status, it is clear here that the drivers are not "engaged in a distinct occupation or business."[52] In fact, their "work is a part of the regular business of the employer," SuperShuttle.[53] The "principal,"

[51] See *Allentown Mack*, supra, 522 U.S. at 374–375.

[52] *Restatement (Second) of Agency* §220(2)(b).

[53] Id., §220(2)(h). Beyond the common color scheme and driver uniforms (which are required by the Airport Contract), every aspect of driver performance manifests SuperShuttle's "uniform method and philosophy of operation, customer service, marketing, advertising, promotion, publicity, and technical knowledge relating to the airport shuttle service business." At the outset, drivers receive training in brand standards and the Company's proprietary system designed to foster a consistent customer experience across SuperShuttle vehicles and affiliates.

In their work, drivers are fully integrated into SuperShuttle's nationwide organization and "central reservation system": trip requests

SuperShuttle, "is . . . in business."[54] The majority correctly explains that "SuperShuttle is clearly involved in the business of transporting customers, and its revenue comes from providing that service." As for the "skill required in the particular occupation,"[55] the majority acknowledges that "the record does not indicate that drivers have any particular skill."[56] Putting these factors together, of course, reveals unskilled workers who perform the core function of a particular commercial enterprise.[57] That picture is very strongly suggestive of an employment relationship, as traditionally understood.[58]

The suggestion is reinforced, moreover, by a fact the majority tellingly minimizes, relegating to a footnote the fact that SuperShuttle, through the nonnegotiable franchise agreement, prohibits the drivers from working for other transportation companies. The Board has previously relied on such restrictions as demonstrating employer control.[59] Even with respect to their own work for SuperShuttle, meanwhile, the drivers may not arrange for a substitute or surrogate, unless SuperShuttle approves. At the time of the hearing, only 1 of 88 drivers employed a relief driver. The *Restatement* observes that "an agreement that the work cannot be delegated" is a factor "indicating the relation of master and servant."[60]

Thus, even under the majority's own view, SuperShuttle performs the very core of its business with a work force consisting entirely of unskilled workers, who are otherwise prohibited from working in the industry and who are subject to a uniform agreement imposed by the company on each of them. This situation, it is fair to say, is the antithesis of the independent-contractor relationship envisioned by the common law of agency. But there are, of course, additional common-law factors to consider.

2. Factors the majority characterizes as neutral

In addition to the factors that the majority concedes support finding employee status (engagement in a distinct business, work as part of the employer's regular business, the principal's business, and skill required), the majority treats length of employment as neutral, observing that drivers are required to sign the 1-year Unit Franchise Agreement, but "most drivers renew their agreements yearly." On this record, however, it should be apparent that the length-of-employment factor actually weighs in favor of employee status.

are processed via the Company's website and central telephone number, and jobs are allocated to drivers by a network of dispatch managers. By General Manager Harcrow's account, drivers also receive support from SuperShuttle's franchise manager, training and safety manager, sales and marketing team, and accounting department.

Drivers also rely on the Nextel system, which is required to receive jobs and process customer fares. In addition, the availability of work for drivers largely depends on SuperShuttle's access to Airport facilities, name recognition, marketing and advertising efforts, relationships with hotels, and internet partnerships.

[54] Id., §220(2)(j). SuperShuttle DFW, by the terms of the UFA, operates "a demand responsive and/or scheduled airport shuttle . . . providing transportation to passengers traveling to and from specific metropolitan airports and destinations within the general markets surrounding those airports." Accordingly, drivers' work "is the precise business of the [employer]." *Community Bus Lines/Hudson County Executive Express*, 341 NLRB 474, 475 (2004).

[55] Id., §220(2)(d).

[56] Drivers are not required to have any special training or skills. Apart from the required licenses and shuttle certifications, drivers acquire the skills and information they need during the training and ride-along sessions that SuperShuttle provides.

[57] It is almost inconceivable that at common law, such an enterprise would *not* be held liable for a tort committed by one of its workers while working. And that, of course, is the proper reference point, because (as described) common-law agency principles were developed for the purpose of determining a principal's liability for the acts of his agent.

[58] See, e.g., *Prime Time Shuttle*, 314 NLRB 838, 840 (1994) ("The business of the [employer] is providing shared rides to the public and its vans and drivers perform that function. Driving is not merely an essential part of [the employer's] business it is [the employer's] business."); *Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000) (drivers "devote virtually all of their time, labor and equipment to providing the essential functions of the [employer's] . . . business."); see also *Slay Transportation Co.*, supra, 331 NLRB at 1294 ("[Drivers] perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business").

[59] See, e.g., *Metro Cab Co.*, 341 NLRB 722, 724 (2004); *Stamford Taxi*, supra, 332 NLRB at 1373; see also *Argix Direct, Inc.*, 343 NLRB 1017, 1021 (2004) (finding drivers to be independent contractors, relying in part on fact that company's agreement with drivers reserved drivers' right to provide services for other carriers). Restrictions on working for a competitor certainly do not suggest an independent-contractor relationship. It is hard to imagine, for example, a company engaging a skilled tradesman (like a plumber), with his own business, to make repairs—but only if he agrees not to do similar repair work for a competing company.

The majority "acknowledge[s] that the UFA's prohibition on franchisees entering into business relationships with SuperShuttle's competitors limits to some extent the potential for entrepreneurial opportunity that would otherwise come with ownership of their vans." It is obviously no answer to say, as the majority does, that this "limitation is mitigated" because the drivers are free to drive *for SuperShuttle* as much as they want. The point is that the drivers are locked into SuperShuttle's system and cannot drive—at any time—for another company (including one of their own creation) that might allow them greater economic gains.

[60] *Restatement (Second) of Agency* §220, comment h. The independent-contractor plumber may well choose to send someone else to do the repair, but the employee plumber must show up for work himself if he wants to keep his job. The facts here stand in contrast to those in *Argix Direct*, supra, where some independent-contractor drivers had their own independent contractors and hired their own drivers, independently setting their terms and conditions of employment. 343 NLRB at 1020–1021.

The majority acknowledges, as it must, that "a longer employment relationship indicates employee status."[61] Here, driver relationships with SuperShuttle have continued indefinitely, and General Manger Harcrow testified that he had never denied a renewal request. As the Board has observed, such an "open-ended duration" of the working relationship indicates employee status.[62]

3. Factors the majority characterizes as supporting independent contractor status

The majority characterizes the extent of control exercised by the employer as a factor strongly supporting independent contractor status. However, here the evidence of SuperShuttle's control over the drivers and the details of their work, as reflected in the Unit Franchise Agreement, is overwhelming. The majority ignores or minimizes that evidence at every turn.[63]

To begin, there is the obvious fact of the nonnegotiable Unit Franchise Agreement itself. Its identical terms are imposed by SuperShuttle on every driver, and there is no contractual limit at all on what SuperShuttle may require the drivers to do while performing work. Notably, the UFA requires drivers "not to deviate from the standards, specifications and operating procedures as specified in this Agreement . . . in order to ensure uniformity and quality of services offered to the public." The UFA explains that the SuperShuttle system has been "developed as a uniform method and philosophy of operation, customer service, marketing, advertising, promotion, publicity, and technical knowledge relating to the airport shuttle service business." Not even the requirements incorporated in the UFA are fixed. Rather, the UFA authorizes SuperShuttle to "from time to time . . . add to, subtract from or otherwise modify or change [the driver's] obligations under the [SuperShuttle] System, including, without limitation, changes reflecting SuperShuttle's adoption and use of new or modified Marks, services, equipment and new techniques relating to the promotion and marketing of shuttle services." If this is not control "by the agreement . . . over the details of the work" (in the *Restatement's* formulation), then it is hard to grasp what control could be—even excluding the fact that the UFA prohibits drivers from working for another transportation company, a demonstration of employer control under Board precedent (as already shown).

The majority virtually ignores what the Unit Franchise Agreement is and what it does. Instead, the majority insists that drivers "are free from control by SuperShuttle in most significant respects in the day-to-day performance of their work." The majority points out that drivers may decide when to work and which trips to accept. But this hardly demonstrates freedom from control, in light of the fact that if and when the drivers work—and they can only work for SuperShuttle—they must operate entirely within SuperShuttle's Nextel trip generating system, which generates job "bids" and which can lead to fines if a driver accepts a bid, but fails to complete the pickup.[64] There is no other way for drivers to perform their services for SuperShuttle. And, of course, drivers need to work, because they are required to make substantial weekly payments to SuperShuttle, whether or not they are working; SuperShuttle, as noted, uniformly fixes both the payments to be made and the fares the drivers receive.[65]

[61] Id., comment j ("If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him."). In this respect, as several others, driving for SuperShuttle is very much SuperShuttle's job—not the drivers'.

[62] *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984).

[63] The UFA, imposed by the SuperShuttle on the drivers, is distinct from the Airport Contract between SuperShuttle and the DFW Airport Board, which allows SuperShuttle to operate at the airport subject to certain conditions. The conditions required by the Airport Contract do not include the UFA or its provisions, of course.

The majority points out that the Airport Contract does effectively impose certain requirements on SuperShuttle drivers: they must wear a uniform, maintain grooming standards, display SuperShuttle decals and markings on their vans, and maintain the interior condition of their vans. Because these requirements are imposed by a governmental agency, they are immaterial (under current Board law) to the issue of SuperShuttle's control over the drivers. But, as I show here, SuperShuttle's control is easily demonstrated without relying at all on the Airport Board-imposed requirements. The majority identifies no example of SuperShuttle's control on which I rely that is, in fact, required by the Airport Contract. The UFA goes far beyond anything required by the Airport Contract, and the majority does not argue otherwise. Instead, it equivocates, pointing to the fact the UFA "states that many restrictions imposed by the Airport Contract are effectively passed along in the UFA." But the Airport Contact does not (for example) require SuperShuttle to impose the UFA on its drivers, to prohibit drivers from working for other transportation companies, to buy or lease a van that meets SuperShuttle's detailed specifications, to charge drivers a "franchise fee" and a weekly system fee, to provide training in SuperShuttle's "brand standards" and the operation of its communications systems, and to use SuperShuttle's specialized equipment and the Nextel trip generating system.

[64] The majority insists that the "Nextel device does not allow SuperShuttle to exercise control over the" drivers, but certainly it does. The drivers must use the device, and without the device, they have no way to find passengers. The *Restatement* considers "the extent of control which, by the agreement, the master may exercise over the details of the work." Finding passengers is surely a detail of the drivers' work—and SuperShuttle controls it.

[65] The majority necessarily acknowledges that "[f]ares received . . . are set by SuperShuttle," but still insists that even if drivers "could negotiate their own fares, those fares are unlikely to vary significantly from SuperShuttle's fares" because "[a]s a practical matter, fares are set by the competitive airport transportation market." There is no evidence in the record here to support the majority's claim. Indeed, given the crucial role of the Dallas/Fort Worth International Airport Board—whose contract with SuperShuttle makes the company's operations

The only SuperShuttle-imposed requirements on the drivers that the majority is prepared to acknowledge involve (in addition to fare-setting) the required acceptance of fare vouchers and coupons, vehicle inspections, a "How am I driving?" sticker, and training. These "limited employer controls are vastly outweighed by the general control that [the drivers] have over their working conditions."[66] If these supposedly "limited employer controls" were really all that was involved in this case, then the "extent of control" factor might pose a closer question here. But what the majority omits from its analysis, the failure to see the bigger picture, is what actually matters most.

The majority relies on four other factors to find independent-contractor status, but none provide much help to SuperShuttle in carrying its burden of proof here. Indeed, contrary to the majority, some of these factors actually further support a finding of employee status.

Under Board precedent, the "method of payment" factor[67] points away from an employment relationship, because the drivers do not share the fares they collect from customers with SuperShuttle. As the majority explains, the rationale for this principle is that "[w]hen an employer does not share in a driver's profits from fares, the employer lacks motivation to control or direct the manner and means of the driver's work." But here, as explained, SuperShuttle does indeed have the authority to control the manner and means of the driver's work—and exercises it. Its "motivation" is obvious: it wishes to retain its contract with the Airport Board. Thus, the "method of payment" factor—a secondary consideration, at least as the Board has explained it—should be given relatively little weight.[68]

The majority cites the terms of the Unit Franchise Agreement as evidence that the parties believed that they were creating an independent-contractor relationship.[69] Certainly the terms of the UFA are clear. But the agreement itself is imposed by SuperShuttle on the drivers, with no opportunity for negotiation, and at least 30 percent of the drivers demonstrated their (correct) view that they are employees, by signing union-authorization cards in connection with the Union's representation petition filed with the Board. In similar circumstances, the Board has held that the parties'-belief factor "point[ed] in no clear direction,"[70] and it does little here toward satisfying SuperShuttle's burden of proof.

Contrary to the majority, the "instrumentalities, tools, and place of work" factor at best (for the majority) points in no clear direction either, while there are very good reasons to treat it as weighing in favor of employee status. True, drivers own or lease their vans. But SuperShuttle plays an important role in this process through its affiliated leasing company (never mentioned by the majority)—which makes it possible for drivers with bad credit, in particular, to acquire a van (then outfitted to meet SuperShuttle's specifications).[71] The majority says that drivers' "full-time possession of their vans facilitates their ability to work whenever and wherever they choose," but under the UFA, the drivers are *never* free to use their vans to work for any business except SuperShuttle. Perhaps even more significant, the drivers undeniably could not perform their work without SuperShuttle's required communications equipment, which the company supplies and owns—and which drivers are also not free to use independently, unlike the traditional independent contractor and his work tools.

Finally, the majority cites the "supervision" factor as favoring independent-contractor status, invoking the drivers' supposed "near-absolute autonomy in performing their daily work without supervision." But drivers are subject to the SuperShuttle System at all times. Pursuant to the UFA, drivers must adhere to the "mandatory specifications, standards, operating procedures, and rules for the SuperShuttle system" set forth in the UFA and the Drivers' Operations Manual, as well as the specific oper-

possible in the first place—it is not at all clear that there *is* a "competitive airport transportation market." And SuperShuttle itself, in the UFA, has taken steps to eliminate competition in whatever market there is, by prohibiting drivers from working for competing companies. In short, the majority's claim here is at best an unsupported speculation.

[66] The majority also cites, as evidence of independent-contractor status, that the drivers are required to indemnify SuperShuttle, citing *Dial-A-Mattress*, supra, for the proposition that "[i]n employment relationships, employers generally assume the risk of third-party damages." 326 NLRB at 891. However, SuperShuttle's contract with the Airport Board requires that all drivers be covered under its insurance policy, and SuperShuttle, in turn, requires the drivers to reimburse SuperShuttle for the insurance it provides to them. In short, the insurance-related dealings between SuperShuttle and the drivers are mediated by the Airport Board, making the situation in *Dial-A-Mattress* easily distinguishable. The majority insists that the role of the Airport Board here is immaterial, but just as controls on the drivers effectively imposed by the Airport Board (not SuperShuttle) are not probative of an employment relationship, so the role of the Airport Board in connection with liability insurance must be taken into account.

[67] See *Restatement (Second) of Agency* §220(2)(g) (distinguishing between "by time" or "by the job").

[68] See *Metro Cab*, supra, 341 NLRB at 724–725 (inference of minimal control overcome by "evidence of the [e]mployer's extensive control" over drivers' work).

[69] See *Restatement (Second) of Agency* §220(2)(i).

[70] *Lancaster Symphony*, 357 NLRB at 1766.

[71] One might compare this case to *Argix Direct*, supra, where the Board observed that the putative employer did not own or lease any of the independent-contractor drivers' trucks or provide them with financial help to acquire trucks. 343 NLRB at 1020.

ating procedures imposed by the trip generating system. It is certainly true that no SuperShuttle supervisor sits in the front passenger seat, telling drivers what to do, but under the UFA, SuperShuttle clearly would have the right to adopt such a practice, and drivers would have to no choice but to accept it. SuperShuttle enjoys broad authority, meanwhile, to discipline and terminate drivers, both for driving-related infractions and for other violations of the UFA. In any case, the *Restatement* notes that the "control or right to control needed to establish the relation of master and servant may be very attenuated."[72] The "supervision" factor, as described in the *Restatement*, addresses "the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or *by a specialist without supervision*."[73] Here, the unskilled drivers cannot fairly be called "specialists." Indeed, as the *Restatement* notes, "[u]nskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contact to do a specified job for a specified price."[74]

4. Overall assessment of the Restatement factors

Having addressed the *Restatement* factors, the majority sums them up to conclude that the SuperShuttle drivers are independent contractors—without ever mentioning the established rule that it is SuperShuttle that bears the burden of proof.[75] The factors that the majority concedes support *employee* status—the drivers are unskilled, driving is not a distinct occupation, and "SuperShuttle's involvement in the business"—are deemed "relatively less significant" and as "not outweigh[ing] those factors that support independent-contractor status." But the majority makes little attempt to explain *why* this is so, beyond claiming that certain factors that assertedly support independent-contractor status—control of the "principal instrumentality" (i.e., the drivers' vans), the drivers' "nearly complete control . . . over their daily work schedules and working conditions," and the "method of payment—all provide the drivers with "significant entrepreneurial opportunity."

As already shown with reference to Board precedent and the *Restatement*, the majority's analysis of the "control" factor is badly mistaken, largely ignoring the Unit Franchise Agreement and the extensive power it gives SuperShuttle over the drivers. Just as mistaken, for the same reasons, is the majority's unjustified attempt to minimize the importance of the factors that everyone acknowledges support finding employee status. Invoking "entrepreneurial opportunity" does not cure the fundamental flaws in the majority's reasoning, not only because this move has no good basis in traditional common law principles, but also because the drivers' supposed "entrepreneurial opportunity" here is minimal at best. As already demonstrated, it is SuperShuttle that creates, controls, and constrains that "opportunity."

SuperShuttle drivers "bid" on trips, but unlike in conventional bidding (in which contractors contend for work), drivers here lack the ability to compete on price, quality of service, or any other distinguishing variable. Instead, drivers compete primarily to be the first to register interest in a job via the mandated Nextel device—hardly the type of competition that favors entrepreneurial skill. Moreover, drivers' job selections are guided largely by geographic proximity—what one driver characterized as "commonsense stuff"—rather than any business strategy. In every instance of bidding, drivers are providing what amounts to the same service for fixed fares. Such a compensation arrangement "leaves little room for the drivers to increase their income through their own efforts or ingenuity."[76] Indeed, it cannot be said that a driver "takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder."[77] Notably, SuperShuttle is seemingly free to enter into non-negotiable franchise agreements with as many drivers as it wishes, allowing it to control the number of drivers "competing" for jobs, while continuing to fix fares that drivers may charge and the weekly payments they must make to SuperShuttle.

Unlike independent businesspeople who operate in the marketplace, SuperShuttle drivers are expressly prohibited from working for competing transportation companies.[78] The fact that vehicles are tailored specifically for use as part of the SuperShuttle system significantly limits their suitability for other business ventures in any case. And, as a practical matter, drivers' considerable financial commitment to working for SuperShuttle—including their vehicle investment and their weekly system fees and insurance payments—all but requires them to work exclusively for the company simply to recoup expenses. Drivers do not set fares, offer discounts, solicit customers, or generate business in any way; nor do they "advertise for business or maintain any type of business opera-

[72] *Restatement (Second) of Agency* §220, comment d.

[73] Id., §220(2)(c) (emphasis added).

[74] Id., §220, comment i.

[75] See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001). Early in its opinion, citing *BKN*, the majority does recite that "[t]he party asserting independent-contractor status bears the burden of proof on that issue"

[76] *Slay Transportation*, supra, 331 NLRB at 1294.

[77] *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002).

[78] See *Stamford Taxi, Inc.*, supra, 332 NLRB at 1373.

tion or business presence."[79] All these features of SuperShuttle's relationship with its drivers "severely restrict the drivers' entrepreneurial opportunities to engage in . . . business independent of the [employer]"[80] and "weigh heavily in favor of employee status."[81]

The SuperShuttle drivers, in crucial respects, resemble the insurance agents found to be employees by the Supreme Court in *United Insurance*: (1) the drivers "do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations;" (2) they "need not have any prior training or experience, but are trained by company supervisory personnel;" (3) they "do business in the company's name and with considerable assistance from the company and its managerial personnel;" (4) the agreement "that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company;" and (5) they have what amounts to "a permanent working relationship with the company and which they may continue as long as their performance is satisfactory."[82] In short, applying traditional common-law principles, and even taking "entrepreneurial opportunity" into account—in a way that recognizes the "reality of the actual working relationship"[83]—the Board should find that SuperShuttle has failed to carry its burden of proof to establish that the drivers are independent contractors.

IV.

Nearly 75 years ago, the *Hearst* Supreme Court recognized the difficulties inherent in applying common-law agency principles to employee-status questions under the National Labor Relations Act—and accordingly concluded that Congress could not have intended the common law to control.[84] But Congress responded by making clear that this was precisely what it intended. As the Court then observed in *United Insurance*, it is not for the Board, or even the federal appellate courts, to somehow mitigate the consequences of Congress' choice by deploying magic phrases or shorthand formulas to simplify or rationalize the unwieldy common-law test. The majority's approach here might easily be called the "economic *un*realities" test—impermissibly departing from the common law (just like the "economic realities" test endorsed in *Hearst* and overruled by Congress), but in no way based on a real-world appraisal of working relationships.

If workers are independent contractors under the common law, then they cannot be employees under the National Labor Relations Act. But if, as here, workers are employees under the common law, then they must be treated as such for labor-law purposes. Calling the SuperShuttle drivers "entrepreneurs" or "small business owners" does not make them any less employees entitled to the protection of the National Labor Relations Act. The drivers sought that protection presumably because they understood, all too well, how limited their "entrepreneurial opportunity" really is. An agency charged with "encouraging the practice and procedure of collective bargaining" (in the words of the statute) should act accordingly, so that, if the drivers choose, the non-negotiable Unit Franchise Agreement might be replaced by a collective-bargaining agreement.

Dated, Washington, D.C. January 25, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[79] See *Metro Cab Co.*, 341 NLRB at 724; *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002).

[80] *Stamford Taxi*, supra, 332 NLRB at 1373.

[81] Id.; see also *Prime Time Shuttle*, supra, 314 NLRB at 840.

[82] 390 U.S. at 259. In two respects, the SuperShuttle drivers differ from the insurance agents: they do not account to SuperShuttle for the fares they collect, and they do not participate in the company's benefit plans. But, for reasons explained, those distinctions do not outweigh the overwhelming similarities here.

[83] Id.

[84] The *Hearst* Court observed that the "assumed simplicity and uniformity, resulting from application of 'common-law standards,' does not exist." 322 U.S. at 122. "Few problems in the law have given greater variety of application and conflict in results than the cases arising at the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." Id. at 121 (footnote omitted).

FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc. *and* International Brotherhood of Teamsters, Local Union No. 671. Cases 34–CA–012735 and 34–RC–002205

September 30, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA, JOHNSON, AND SCHIFFER

The issue in this case is whether drivers who operate out of FedEx Home Delivery's Hartford, Connecticut terminal are employees covered under Section 2(3) of the National Labor Relations Act or, instead, are independent contractors, excluded from coverage.

The Regional Director found the drivers to be statutory employees, and following the Union's victory in an election, certified it as the drivers' representative.[1] We denied review of that finding. When FedEx Home Delivery (the Respondent) refused to recognize and bargain with the Union, the General Counsel issued a complaint. Ordinarily, we would grant the General Counsel's motion for summary judgment and find that the Respondent violated Section 8(a)(5) and (1) of the Act.[2] Following our denial of review, however, the U.S. Court of Appeals for the District of Columbia Circuit held that drivers performing the same job at two FedEx Home Delivery facilities in Wilmington, Massachusetts, were independent contractors.[3]

FedEx argues that the court's holding compels the Board to revisit its earlier denial of review. We agree. The court's decision raises important and timely questions about the Board's approach in independent-contractor cases. Accordingly, we have reexamined the merits of the underlying representation issue.[4] Today, we restate and refine the Board's approach.

First, we reaffirm the longstanding position—based on the Supreme Court's *United Insurance* decision[5]—that, in evaluating independent-contractor status "in light of the pertinent common-law agency principles," "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[6] Consistent with Supreme Court precedent, our inquiry remains guided by the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency § 220 (1958).

Second, we more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss, a factor that the Board has traditionally considered. In this respect, we decline to adopt the District of Columbia Circuit's recent holding, insofar as it treats entrepreneurial opportunity (as the court explained it) as an "animating principle" of the inquiry.[7] In our view, the Board should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity. Mindful of the Supreme Court's admonition in *United Insurance* that "there is no shorthand formula or magic phrase that can be applied to find the answer,"[8] the Board should evaluate—in the context of weighing all relevant common-law factors—whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.

After careful consideration of the entire record and the briefs of the parties, and for the reasons that follow, we find that FedEx Home Delivery's Hartford drivers are employees under Section 2(3) of the Act. The Respondent thus violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union that represents them.[9]

I. LEGAL BACKGROUND

Before offering a detailed statement of the facts relevant to our inquiry here, we set out the basic, and by now uncontroversial, legal principles that govern cases like this one.

Section 2(3) of the Act, as amended by the Taft-Hartley Act in 1947, excludes from the definition of a covered "employee" "any individual having the status of an independent contractor." 29 U.S.C. § 152(3). The party asserting independent-contractor status bears the

[1] The Union, International Brotherhood of Teamsters, Local Union No. 671, was certified on May 27, 2010, as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All contract drivers employed by Respondent at its Hartford terminal, but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

[2] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Sec. 102.67(f) of the Board's Rules and Regulations.

[3] *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

[4] The Board initially granted the Acting General Counsel's Motion for Summary Judgment here and found that the Respondent violated the Act. 356 NLRB 39 (2010). Following the Respondent's filing of a petition for review with the District of Columbia Circuit, the Board vacated its decision in an unpublished Order.

[5] *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968).

[6] *United Insurance*, supra, 390 U.S. at 258.

[7] *FedEx Home Delivery*, supra, 563 F.3d at 497.

[8] *United Insurance*, supra, 390 U.S. at 258.

[9] Member Miscimarra recused himself and took no part in the consideration of this case.

burden of proof on that issue. See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001). Accord: *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001) (upholding Board's rule that party asserting supervisory status in representation cases has burden of proof).

In applying the independent-contractor exclusion, the Board is bound by the Supreme Court's decision in *United Insurance*, supra. There, the Court held that "[t]he obvious purpose of [the 1947] amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors." 390 U.S. at 256. The Court acknowledged that the application of the common-law agency test may be challenging, given the "innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." Id. at 258. Nonetheless, the Court emphasized that "there is no shorthand formula or magic phrase that can be applied to find the answer." Id. Instead, the Court stated that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." Id.

In identifying the relevant common-law factors to consider in distinguishing between employees and independent contractors under the Act, the Board must also conform to the Supreme Court decisions that have applied the same common-law test under other Federal statutes. In those cases, the Court has cited with approval the nonexhaustive, multifactor test articulated in the Restatement (Second) of Agency § 220 (1958), and has reiterated that no single factor of that test is determinative. See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323–324 (1992) (applying Employee Retirement Income Security Act (ERISA)); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 751–752 and fn. 31 (1989) (Copyright Act). Restatement § 220 provides that:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
>
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
>
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
>
> (d) The skill required in the particular occupation.
>
> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
>
> (f) The length of time for which the person is employed.
>
> (g) The method of payment, whether by the time or by the job.
>
> (h) Whether or not the work is part of the regular business of the employer.
>
> (i) Whether or not the parties believe they are creating the relation of master and servant.
>
> (j) Whether the principal is or is not in the business.

Following Supreme Court precedent, the Board has applied the Restatement factors, with no one factor being determinative. The Board's seminal decision in this area is *Roadway Package System*, 326 NLRB 842 (1998) (*Roadway III)*. There, the full Board rejected the notion that the predominant factor in its independent-contractor analysis is whether an employer has a "right to control" the manner and means of the work performed by an individual. 326 NLRB at 850. Such an approach, the Board found, was foreclosed by the Supreme Court's teachings. *Roadway* laid out the following principles for evaluating independent-contractor status: (1) all factors must be assessed and weighed; (2) no one factor is decisive; (3) other relevant factors may be considered, depending on the circumstances; and (4) the weight to be given a particular factor or group of factors depends on the factual circumstances of each case. Since 1998, the Board has uniformly adhered to this analytical approach.[10]

[10] See, e.g., *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011); *St. Joseph News-Press*, 345 NLRB 474, 477–478 (2005). Indeed, the Board has continued to repudiate efforts to give primary emphasis to any factor in evaluating an individual's status. See *St. Joseph News-Press*, supra, 345 NLRB at 478; *Argix Direct, Inc.*, 343 NLRB 1017, 1020 fn. 14 (2004); *Slay Transportation Co.*, 331 NLRB 1292, 1293 (2000). The Board has similarly reiterated that the list of Restatement factors "is not exhaustive, and the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors in another case." *Lancaster Symphony*, supra at 1763.

In addition to the factors set forth in Restatement § 220, the Board has considered, as one factor among the others, whether putative contractors have "significant entrepreneurial opportunity for gain or loss."[11] Related to this question, the Board has assessed whether purported contractors have the ability to work for other companies,[12] can hire their own employees,[13] and have a proprietary interest in their work.[14] As we will explain, however, we do not share the view of the District of Columbia Circuit that, over time, the Board has come to treat entrepreneurial opportunity as the decisive factor in its inquiry.

We turn now to the factual background of this case.

II. FACTUAL BACKGROUND

FedEx Ground Package Systems comprises two operating divisions: FedEx Ground Delivery, which primarily serves business customers, and FedEx Home Delivery, which primarily serves residential customers. FedEx Home Delivery (FedEx, hereafter) was established around 1998, when FedEx Corporation acquired Roadway Package System, Inc.[15] At the time of the hearing, FedEx Home Delivery operated around 500 terminals with about 4000 drivers nationwide. In this proceeding, the Union seeks to represent about 20 FedEx drivers who work out of the Respondent's Hartford terminal.

The Hartford terminal, which was established in March 2000, operates from Tuesday through Saturday and covers areas in northern Connecticut. Within this territory, FedEx maintains about 26 primary service areas or routes. FedEx assigns each route to a driver; the routes generally correspond to different zip codes. At the time of the hearing, 18 of these routes were assigned to single-route drivers, 2 routes were open, and the remaining routes were assigned to three multiple-route drivers whom the Union does not seek to represent.[16]

A. Recruitment and Training

FedEx holds nationwide job fairs and runs advertisements seeking drivers. After a candidate completes a job application, FedEx reviews her driving and criminal records pursuant to Department of Transportation (DOT) regulations. FedEx requires candidates with acceptable records to take a physical exam and pass a DOT-required drug test. If successful, FedEx hires candidates as temporary drivers through Kelly Services, a temporary agency. Temporary drivers are required to undergo a physical examination by a FedEx-approved physician and complete a DOT-required driver-training course administered by FedEx at no cost. FedEx pays temporary drivers for time spent in training, which includes 5 days of classroom training, 4 days of behind-the-wheel instruction, and 5 days accompanying managers as they make deliveries. The classroom segment covers how to load packages into a vehicle, use the package scanner, read road plans, and leave packages for residents who are not home. Following training, the new hires may continue as temporary drivers, who assist permanent drivers and cover existing and open routes as necessary, or they may acquire vehicles and become permanent drivers, whose status is at issue here.

B. Operating Agreement

Prospective drivers who have completed training and have acquired a vehicle are presented with FedEx's Standard Contractor Operating Agreement (the Agreement). The Agreement, which spells out the respective rights and obligations of each party, is used by FedEx on a nationwide basis; it covers topics such as equipment requirements, vehicle operations, insurance coverage, compensation, and termination of services. The Hartford terminal manager reviews the Agreement with prospective Hartford drivers and allows them to review the Agreement independently with a lawyer, accountant, or other person of their choosing. At the outset, the Agreement states that a driver provides services for FedEx "strictly as an independent contractor, and not as an employee of FHD for any purpose." With two exceptions, prospective drivers do not have the ability to negotiate over the terms of the Agreement. Drivers may negotiate over which particular route is assigned to them, and over one aspect of their compensation: the Temporary Core Zone Density Settlement, described

[11] *Roadway III*, supra, 326 NLRB at 851; *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998); *Roadway Package System*, 288 NLRB 196, 198 (1988). See also *Standard Oil Co.*, 230 NLRB 967, 971 (1977) (finding that "all meaningful decisions of an entrepreneurial nature which affect profit or risk of loss are controlled by the Company").

[12] See *C.C. Eastern, Inc.*, 309 NLRB 1070, 1070–1071 (1992), enf. denied 60 F.3d 855 (D.C. Cir. 1995); *Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000).

[13] See *C.C. Eastern*, supra, 309 NLRB at 1071; *Slay Transportation*, supra, 331 NLRB at 1294.

[14] See *Roadway III*, supra, 326 NLRB at 853.

[15] In three previous decisions, the Board found Roadway Package System drivers to be statutory employees. See *Roadway Package System I*, 288 NLRB 196 (1988); *Roadway Package System II*, 292 NLRB 376 (1989), enfd. 902 F.2d 34 (6th Cir. 1990); *Roadway Package System III*, 326 NLRB 842 (1998).

[16] In addition, FedEx employs an unspecified number of temporary and supplemental drivers, who among other things, cover the open routes. These drivers are also excluded from the petitioned-for unit.

more fully below. Otherwise, the Agreement is presented on a take-it-or-leave-it basis to all drivers. The Agreement gives drivers the option of incorporating as a business; at the time of the hearing, three Hartford drivers had incorporated.

FedEx typically makes unilateral changes to the Agreement once a year after which drivers are given 30 days' notice to review the changes and sign the modified agreement. Drivers may choose to enter into a 1-year or 2-year Agreement, which is automatically renewed for successive 1–year periods after the expiration of the initial term, unless either party provides the other with 30 days' notice of nonrenewal. FedEx has the right to terminate the Agreement without notice if the Hartford terminal closes, there is a decline in business, or the driver breaches the Agreement by engaging in misconduct, reckless or willful negligent operation of equipment, or failure to perform her contractual obligation. In the event of a dispute over a termination decision, the Agreement provides for arbitration. Drivers are required to place $500 in an escrow account controlled by FedEx to cover any debts owed to FedEx when the Agreement is terminated. The Agreement also enumerates 25 specific unsafe driving acts or omissions for which FedEx may suspend the driver.

C. Vehicles

In order to service their routes, drivers must purchase a van or truck that FedEx deems appropriate. Although the Agreement does not specify the make or size of a driver's vehicle, it provides that the vehicle is subject to FedEx's "determination of its suitability for the service called for." The Regional Director found that most Hartford terminal drivers purchase their vehicles from a local or national truck dealer, or from a current driver looking to relinquish her route. FedEx provides drivers with the names of local and national dealers, but drivers are not obligated to purchase or lease their vehicles from those sources. FedEx also maintains a web database listing the names and contacts for all current drivers who are seeking to sell their vehicles. Drivers negotiate the terms of all vehicle sales without FedEx's involvement. FedEx does not provide financing or guarantee loans obtained by drivers, but it does provide drivers with the names of lenders, whom drivers are not obligated to patronize.

FedEx requires that the vehicles be white, have a backing camera, and be maintained in a clean condition, free of damages or extraneous markings. Pursuant to DOT regulations, and to foster brand recognition, FedEx requires all vehicles to display the FedEx logo, which is larger than the DOT minimum size. Drivers can opt to have FedEx paint its logo onto the vehicle, or purchase a removable magnetic logo; FedEx directs drivers to a particular business for applying the logo to the vehicles. Drivers who operate vehicles of a certain size must install, at their own expense, a shelving system that prevents packages from getting crushed during delivery. Pursuant to DOT regulations, drivers must submit daily driver logs and vehicle inspection reports, and the vehicles must pass an annual safety inspection.

Drivers bear all expenses in operating their vehicles, including costs of repair, maintenance, fuel, oil, taxes, tires, insurance, and license fees. In order to track the vehicle's fitness, FedEx requires drivers to submit a monthly maintenance form noting the vehicle's tire tread depth and attaching any receipts for maintenance and completed repair work. If a vehicle becomes inoperable for any length of time, drivers are required to provide a suitable alternative at their expense; drivers generally rent replacement vehicles from a national car rental firm such as Enterprise.

The Agreement provides that, while the vehicle is in the service of FedEx, "it shall be used by [the driver] exclusively for the carriage of the goods of FHD, and for no other purpose." At all other times, drivers may use their vehicles for other commercial or personal purposes, provided they remove or mask FedEx's logos. The Regional Director found no evidence that any driver at the Hartford terminal had ever used her vehicle for other commercial purposes.

D. Route Acquisition

Individuals who are interested in becoming permanent drivers may obtain routes from FedEx. FedEx does not sell routes; rather, if FedEx has a vacant or open route, it provides that route at no cost to a prospective driver or an existing driver who is seeking a different or additional route. Routes become available if the previous driver of a route resigns or is terminated, or if FedEx creates a new route. Drivers may also acquire routes from existing drivers, who are permitted under the Agreement to convey their routes, as described below. The Agreement states that drivers have a "proprietary interest" in their assigned routes.

Each Agreement includes an addendum that sets forth the specific route to be serviced by the driver. The Agreement provides that "as the customer base and package volume in the Primary Service Area increases, the geographic size of the area which Contractor will be able to serve with the Equipment can be expected to decrease." The Agreement thus permits FedEx, with 5 days' written notice, to unilaterally reconfigure any driver's route in order to "take account of customer service requirements," such as addressing a growing or shrinking customer base in that area. During the 5-day

notice period, the driver has the opportunity to demonstrate that she can meet the level of service called for in the Agreement. FedEx may then reconfigure the route if it determines that the driver has failed to make such a demonstration. If a reconfiguration reduces the average number of packages on a driver's route, that driver will be compensated for the lost work under a formula set forth in the Agreement.

E. Business Support Package

Drivers have the option to purchase FedEx's Business Support Package (BSP) at a cost of $4.25 per day; if purchased, the cost is deducted from the driver's compensation. The BSP includes various items that drivers need to make deliveries: uniform and identification badges bearing FedEx's name; vehicle decals bearing FedEx's logo; a scanner and related communications equipment; mapping software; driver assistance programs; and a weekly vehicle washing service necessary to comply with both government regulations on waste water runoff and with contractual standards. Although drivers are free to purchase these required goods and services elsewhere, there is no evidence that any Hartford-based driver has ever done so, or that all components of the BSP would even be available for purchase elsewhere.

F. Duties and Responsibilities

The Agreement requires that drivers make their vehicles available for delivery from Tuesday through Saturday. The process of package delivery from the Hartford facility begins when FedEx's three trailers arrive from its New Jersey and Connecticut hubs between 4 and 6:30 a.m. During that period, FedEx's package handler employees sort, scan, and assemble approximately 3000 daily packages onto pallets (during peak periods, the number of daily packages swells to around 9000). Most Hartford-based drivers arrive at the terminal between 6 and 7 a.m. and begin loading the packages from the pallets onto their respective vehicles. Drivers use scanners to report their on-duty time and to scan each loaded package; once they have finished loading, drivers report to the Respondent's terminal managers, who close the route by resetting the scanner. Managers also provide each driver with a route manifest and turn-by-turn instructions that list the driver's stops and suggest a delivery sequence. Drivers are not obligated to follow the suggested sequence; in fact, they can and do deliver packages in any order and by any route they choose.

The Agreement compels drivers to deliver all packages assigned to their route on the same day the packages arrive at the Hartford terminal. In making the deliveries, drivers must meet FedEx's nationwide standard of providing services in a way that "can be identified as being part of the [Respondent's] system." This means that drivers must: wear FedEx's uniforms and badges, maintained in good condition; present personal appearances consistent with FedEx's standards; and leave packages for recipients not at home in accordance with FedEx's protocols. Drivers are also discouraged from delivering packages after 8 p.m.

Upon completing each delivery, a driver is required by FedEx to input information regarding the delivered package, including the identification of the person who signed for the package, into the scanner. The scanned information tracks the movement of packages and is instantly transmitted to FedEx. When drivers go off-duty, they must enter their off-duty time into the scanner. They must also submit a daily delivery report to FedEx that indicates whether they failed to deliver any of the packages assigned to their route. FedEx uses these reports to determine if drivers are failing to provide proper service and if so, whether termination of a driver's contract is warranted.

Drivers must follow specific protocols for deliveries if the recipient is not home; if they fail to adhere to protocols, fail to obtain a required signature, or release a package to the incorrect address, they may be liable for the loss of the package. FedEx maintains the right to conduct up to four driver audits per year during which a manager rides along with a driver to verify that the driver is meeting customer service standards and protocols. FedEx also maintains the right to conduct two customer service rides annually, during which a manager rides along for a day to evaluate the driver's customer contacts and driving methods, and may suggest operational improvements to the driver related to package loading, delivery sequencing, scanning practices, and other responsibilities. The manager also evaluates whether the driver has an appropriate workload and rates the driver's performance in areas such as professional appearance and customer courtesy. FedEx may memorialize these evaluations and rely on them in deciding whether to terminate a driver's agreement.

Aside from requiring drivers to deliver all packages on the same day they arrive at the terminal, drivers have discretion to operate their routes and perform deliveries in the sequence and manner they see fit. FedEx does not have the authority to direct drivers regarding their specific hours of work, whether or when they take breaks, the order in which they make deliveries, or other details of their work. Drivers are free to use their vehicles to perform personal duties during the day, and most park their vehicles at their homes at night.

FedEx retains the right to adjust the volume of a driver's daily deliveries. Any day when the volume of packages on a driver's route exceeds the volume that she can be reasonably expected to timely deliver, FedEx may reassign packages to another driver. FedEx also maintains a practice known as "flexing" whereby the terminal manager adjusts the number of packages delivered by each driver by directing drivers to deliver packages to locations outside of their route; this occurs when a driver has an excessive number of packages or FedEx needs to cover a regularly-assigned route because of illness or other reasons. A driver may not reject "flexed" packages assigned to her. Drivers, without FedEx's permission, may "flex" packages to each other, principally to drivers who service adjacent routes.

Drivers play no role in generating customers or establishing prices to be charged to customers; instead, customers contact FedEx to arrange a delivery and FedEx exclusively sets delivery prices, which are quoted and charged to customers. Customer complaints about drivers are directed to FedEx and are investigated by managers at the Hartford terminal.

G. Compensation

Under the Agreement, FedEx unilaterally determinates drivers' rates of compensation and pays them with a weekly settlement check that is based on, among other things, the number of packages delivered, the number of stops made, the distance traveled, and the number of days a driver's vehicle is available to provide service. FedEx also pays various bonuses to drivers, including a quarterly bonus for drivers who service two or more routes; a quarterly service bonus based on years of service; a bonus for meeting certain accuracy goals; and a group bonus if all drivers at the terminal meet an inbound service goal for the period. In addition, the settlement check includes a Temporary Core Zone Density payment ranging from $27 to $127 daily to drivers who service routes where customer density and package volume are still developing. The record does not indicate a typical or average income for Hartford drivers.

FedEx provides other financial support to drivers. For instance, if fuel prices rise substantially, the Agreement provides that FedEx will pay drivers a fuel/mileage settlement of up to 10 cents per mile depending on fuel prices within a 5-mile radius of the terminal. The Agreement also authorizes FedEx to pay certain vehicle-related "licenses, taxes and fees" on behalf of each driver; it then deducts those expenses from the driver's compensation. In order to encourage drivers to accumulate a fund to cover vehicle maintenance expenses and other costs of operation, FedEx maintains and pays interest on a Service Guarantee Account into which the drivers can deposit money. For each quarter in which a driver's average balance in the account is $500 or more, FedEx contributes $100. The Regional Director found that FedEx also periodically assists drivers with other vehicle-related issues, including lending drivers money for repairs, and intervening on behalf of drivers involved in repair and warranty disputes.

FedEx does not provide drivers with any fringe benefits, such as vacations or paid holidays, nor does it withhold taxes from their settlement checks. Most Hartford drivers participate in FedEx's time-off program, under which FedEx makes available approved drivers to service the routes of permanent drivers while they are on vacation.

H. Insurance

The Agreement requires that drivers carry three forms of insurance in types and amounts specified by FedEx: (1) general liability insurance; (2) deadhead insurance, which insures drivers against damages they incur while operating their vehicles for personal use; and (3) work accident insurance, which is akin to workers' compensation coverage. Failure to maintain any of these constitutes a contractual breach that could lead FedEx to terminate the Agreement. DOT regulations require that FedEx carry insurance for property damage, personal injuries, cargo loss, or damage caused by its vehicles or its drivers' vehicles. FedEx maintains a self-insured general liability program that indemnifies it and its drivers against such claims resulting from the operation of equipment in connection with FedEx's business. FedEx does not charge drivers for the cost of general liability insurance, but all drivers are responsible for the first $500 in damages resulting from the operation of their vehicles; after 1 year, that amount is reduced to $250, and after 2 years, it is eliminated altogether. Driver indemnification does not occur if the driver engages in willfully negligent or intentional misconduct, or if she fails to comply with FedEx's safe driving program standards. Drivers are responsible for maintaining both deadhead insurance and work accident insurance at their own expense. FedEx has a relationship with Protective Insurance, which will provide drivers with the required insurance; if the drivers choose to insure through Protective, FedEx deducts insurance premiums from their settlement checks. The record shows that drivers frequently obtain insurance through Protective because it offers rates that are significantly lower than the rates drivers can obtain elsewhere on their own.

I. Entrepreneurial Opportunities

In arguing that Hartford drivers are independent contractors, FedEx relies heavily on what it identifies as

three specific entrepreneurial opportunities: (1) drivers' ability to hire other drivers; (2) drivers' ability to sell routes; and (3) drivers' ability to operate multiple routes.

1. Hiring of supplemental drivers and helpers

Single-route drivers need not personally perform all of their contractually-obligated deliveries. Instead, a driver may hire another DOT-qualified and Respondent-approved driver, typically one of FedEx's temporary drivers or another permanent driver, to perform her deliveries. If the volume of deliveries on a driver's route is beyond the capacity of a single vehicle, the driver may choose to lease a second vehicle, referred to as a supplemental vehicle, and hire a supplemental driver to fulfill the route's demands. The Regional Director found that at least half of the Hartford drivers have used supplemental vehicles and drivers, usually during the peak holiday season. Drivers may also hire helpers who ride alongside the driver and assist in delivering packages. Helpers' employment terms and conditions are negotiated exclusively between the driver and the helper. At the time of the hearing, only one Hartford driver had ever employed a helper.

2. Route sales

Drivers may also sell their routes to buyers deemed qualified by FedEx and willing to enter into the Agreement with FedEx "on substantially the same terms and conditions" as the original driver. Although drivers need not receive FedEx's permission regarding a pending route sale, FedEx must be notified once the sale is complete so that the buyer can sign the Agreement. FedEx is not involved in the negotiations between the parties, but it retains the right to approve the individual acquiring the route. The Regional Director found that the overwhelming majority of drivers acquired their routes from FedEx or from a previous driver at no cost for the route itself. For example, in some instances, the former driver merely relinquished her route at no cost to the new driver, or sold her vehicle to the new driver, but did not receive further consideration for conveying the route itself. The record indicates that there had been only two route sales at the Hartford terminal since it opened in 2000. If a driver wishes to give up her route but cannot find any takers, she must relinquish her route to FedEx for no compensation.

3. Multiple-route operators

Finally, drivers have the right to obtain and operate multiple routes; supplemental routes can be obtained from FedEx or another driver. To service an additional route, the driver acquires an additional vehicle and either hires her own driver to regularly service the route, or contracts with one of FedEx's temporary drivers. All hired drivers must be DOT-qualified and approved by FedEx. Hired drivers must follow all of the applicable work rules and protocols, including using the package scanner and wearing FedEx's uniform and badge while making deliveries. Multiple-route operators have sole authority to hire and dismiss their drivers, to supervise them, and determine the terms and conditions of their relationship with their drivers, including hours, bonuses, and approval of time-off requests. Multiple-route operators are responsible for paying their drivers' compensation, and for all expenses associated with hiring drivers, such as the cost of training, exams, employment taxes, and accident insurance. If FedEx learns of delivery problems with one of the hired drivers, it has the contractual right to pursue the matter with the multiple-route operator. The Regional Director found that, since the Hartford terminal opened in 2000, a total of six drivers have operated multiple routes; at the time of the hearing, three drivers were operating multiple routes. Here, however, the Union does not seek to represent multiple-route drivers, or the drivers that they hire.

III. THE REGIONAL DIRECTOR'S DECISION

The Regional Director found that FedEx failed to establish that its drivers are independent contractors. At the outset, the Regional Director indicated that, consistent with Board precedent, he would apply the common-law agency test and consider all the incidents of the individuals' relationship with the employing entity. Using this approach, the Regional Director relied on the following factors in finding the drivers to be employees: (1) FedEx exercises substantial control over details of drivers' job performance; (2) drivers perform a regular and essential part of FedEx's business; (3) drivers do not need significant skill or experience to perform delivery functions; (4) FedEx provides drivers with necessary instrumentalities, tools, and workplace; and (5) FedEx unilaterally establishes compensation rates for all drivers.

The Regional Director acknowledged that several factors, such as drivers' obligation to purchase their own vehicles and drivers' discretion over delivery schedules, supported finding independent-contractor status. He noted, however, that the same factors were present in *Roadway III*, supra, where the Board, in substantially similar circumstances, found them insufficient to satisfy the employer's burden. Finally, the Regional Director rejected FedEx's argument that drivers' options to operate multiple routes and sell their routes established independent-contractor status. Regarding drivers' option to operate multiple routes, the Regional Director found that the record did not indicate that drivers incurred an entrepreneurial risk in choosing to operate more than one route, nor did the record show that multiple-route drivers

realized a greater net per-route profit than single-route drivers. He also noted that none of the drivers in the petitioned-for unit are multiple-route drivers.

In addition, the Regional Director discounted the import of drivers' right to sell their routes, noting that routes originating out of the Hartford terminal are available from FedEx at no cost or in conjunction with a vehicle sale. Moreover, drivers are required to sell only to buyers approved by FedEx and willing to enter into the Standard Contractor Operating Agreement. Finally, he observed that there had been only two route sales since the Hartford terminal opened in 2000, an insufficient number to support independent-contractor status.

In light of all the record evidence, the Regional Director concluded that FedEx failed to establish that its drivers are independent contractors.

IV. ANALYSIS

FedEx contends that the District of Columbia Circuit's holding, on "virtually identical" facts, that FedEx Home Delivery drivers in Wilmington, Massachusetts, were independent contractors requires the Board to reach the same result here. We acknowledge that the court's decision cannot be squared with the Regional Director's determination here. But, after careful consideration, we decline to adopt the court's interpretation of the Act.

Nothing in the text of the Act, or its legislative history, speaks directly to the precise issue in this case: how to interpret and apply common-law agency principles in distinguishing between employees and independent contractors and so determining statutory coverage under Section 2(3) of the Act. Notably, the Supreme Court has held that the "task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the [National Labor Relations] Act," the Board. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984), quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944). In turn, the Court has applied the principle of *Chevron*[17] deference to the Board's interpretation of at least one exclusion from employee coverage in Section 2(3) of the Act.[18] Finally, in *United Insurance*, supra, a pre-*Chevron* decision, the Court described the independent-contractor inquiry as involving the "application of law to facts" and held that the Board's determination should not be rejected by a reviewing court so long as the Board "made a choice between two fairly conflicting views." 390 U.S. at 260.

In *FedEx Home Delivery*, in contrast, a divided panel of the court concluded that it would not "grant great or even 'normal' deference to the Board's status determinations" "because the line between worker and independent contractor is jurisdictional—the Board has no authority whatsoever over independent contractors." 563 F.3d at 492. However, as the Supreme Court subsequently reaffirmed, deferential review does, indeed, apply in "cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers." *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013).[19]

Below, we explain why we have chosen not to adopt the court's interpretation of the independent-contractor exclusion in Section 2(3) of the Act. Neither Supreme Court nor Board precedent mandates that position, and adopting it would mean a broader exclusion from statutory coverage than Congress appears to have intended. To eliminate any uncertainty about the Board's test and its application going forward, we restate and refine our approach. Finally, applying our refined formulation of the Board's standard, we find that the Hartford drivers are employees under the Act, and thus conclude that FedEx violated Section 8(a)(5) and (1) of the Act by refusing to bargain with their representative.

A.

The *FedEx Home Delivery* court stated that the common-law agency test was the appropriate legal standard. It observed, however, that over the course of several recent decisions, the standard had changed its focus from the employer's right to exercise control over the means and manner of the worker's performance to the "significant entrepreneurial opportunity for gain or loss." 563 F.3d at 497. "[W]hile all the considerations at common law remain in play," the court observed, "an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." Id.

As we understand the court's decision, it treats the existence of "significant entrepreneurial opportunity" as the overriding consideration in all but the clearest cases posing the independent-contractor issue under the Act.

[17] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[18] *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996) (upholding as reasonable Board's interpretation of "agricultural laborer" exclusion); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977)(same).

[19] Among the cases cited by the *City of Arlington* Court was a decision involving the Board, *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 fn. 7 (1984). There, the Court rejected the argument that it was not required to defer to the Board's reasonable interpretation of Sec. 7 of the Act inasmuch as its scope was "essentially a jurisdictional or legal question concerning the coverage of the Act." 133 S.Ct. at 1871.

Whether or not the Supreme Court's decision in *United Insurance*, supra, permits this approach, we do not believe that the decision compels it. *United Insurance* does not reflect the use of a single-animating principle in the inquiry or identify entrepreneurial opportunity as that principle. To the contrary, as explained, *United Insurance* (and subsequent Supreme Court decisions) emphasized that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 390 U.S. at 258; *Community for Creative Non-Violence v. Reid*, 490 U.S. at 752. The Supreme Court's decisions look to the Restatement (Second) of Agency as capturing the common-law standard, and the Restatement teaches that the factors enumerated there are "*all* considered in determining the question [of employee status]."[20] (Emphasis added.) The Restatement makes no mention at all of entrepreneurial opportunity or any similar concept. That silence does not rule out consideration of such a principle, but it cannot fairly be described as requiring it. At least arguably, the court's approach is in tension with the admonition of *United Insurance* that "there is no shorthand formula or magic phrase that can be applied to find the answer" as to who is an employee and who an independent contractor under the Act. 390 U.S. at 258.

In turn, we do not read the Board's precedent, as grounded in *Roadway III*, as adopting the position reflected in the court's decision. Indeed, the Board decisions cited by the court confirm that the Board has adhered to the "all incidents of the relationship" approach set forth in *Roadway III* and earlier cases.[21] The Board has never held that entrepreneurial opportunity, in and of itself, is sufficient to establish independent-contractor status.

In *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002), the Board, "weighing all incidents of their relationship with the Respondent," found that the owner-operators who delivered packages for the employer were employees rather than independent contractors. Id. The Board noted that those owner-operators "had no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss,"—but it did so as part of a thorough and balanced accounting of all relevant factors. Id. Accordingly, the Board found, among other factors routinely considered under the common-law test, that owner-operators performed an essential part of the employer's business; worked full time and were fully trained by the employer; were not permitted to use their vehicles to make deliveries for anyone other than the employer; were required to wear uniforms and display the employer's logo; and received routes, base pay, and daily freight allocations that were unilaterally determined by the employer. Id. Contrary to the court, the Board did not give more weight to entrepreneurial opportunity than any of the other factors that it assessed.[22]

Similarly in *Arizona Republic*, 349 NLRB 1040 (2007), another decision on which the *FedEx Home Delivery* court relied, the Board evaluated entrepreneurial opportunity as one factor in its analysis, but gave it no special prominence as an "animating principle." The Board found that the newspaper carriers' entrepreneurial opportunities—including their ability to operate multiple routes, negotiate piece rates, and deliver other products while on their routes—weighed in favor of independent-contractor status. But the Board gave comparable weight to other facts: that the employer did not exercise control over details of the carriers' work; that the employer did not supervise or subject carriers to discipline; that carriers provided and maintained their own vehicles and tools; and that the parties clearly intended to form an independent contractor relationship. Id. at 1043–1046. Thus, the Board concluded that "the bulk of the evidence"—not merely evidence of entrepreneurial opportunity—"establishe[d] that the carriers [were] independent contractors." Id. at 1046.

B.

In examining one exclusion in Section 2(3) of the Act, the Supreme Court has observed that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp.*, supra, 517 U.S. at 399 (applying agricultural laborer exclusion). Consistent with this admonition, we believe that, within the framework of common-law agency principles, the Board should construe the independent-contractor exclusion narrowly. But to be clear, in declining to adopt

[20] Restatement (Second) of Agency § 220(1), comment c.

[21] See, e.g., *Operating Engineers Local 701 (Lease Co.)*, 276 NLRB 597, 600–601 (1985); *Perrysville Coal Co.*, 264 NLRB 380, 381 (1982); *Kentucky Prince Coal Corp.*, 253 NLRB 559, 560 (1980).

[22] We do not share the *FedEx Home Delivery* court's view that the General Counsel, in defending the Board's *Corporate Express* decision, urged the court to focus primarily on entrepreneurial opportunity. The General Counsel's brief in that case reiterated the Board's position that "all of the incidents of the work relationship must be assessed and weighed with no one factor being decisive." 2001 WL 36039100 (D.C. Cir. 2001). The General Counsel urged the court to consider the absence of entrepreneurial opportunities, but only as a single factor. In any case, of course, the General Counsel's position on appeal could not substitute for, much less displace, the view of the Board itself. See generally *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

the view of the court, we do *not* hold that the Board may not, or should not, give weight to evidence demonstrating that a putative contractor exercises significant entrepreneurial opportunity for gain or loss. The Board has done so in the past, and we will continue to do so. We take this opportunity, however, to restate and refine the Board's approach, in two respects. First, we make clear what the Board understands by entrepreneurial opportunity: an actual, not merely theoretical, opportunity for gain or loss. Second, in restating and refining our approach, we explain the place of entrepreneurial opportunity in the Board's analysis, as part of a broader factor that—in the context of weighing all relevant, traditional common-law factors identified in the Restatement—asks whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.

1.

In a decision that preceded *FedEx Home Delivery*, the District of Columbia Circuit observed that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the company's claim that the workers are independent contractors." *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855 (D.C. Cir. 1995). We agree, and we reaffirm that principle today.

The Board has been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial autonomy, and those that are circumscribed or effectively blocked by the employer. In *Roadway III*, supra, for instance, the Board rejected the employer's argument that delivery drivers' proprietary interest in their routes and their ability to sell their routes made them independent contractors. The Board noted that the employer "imposed substantial limitations and conditions on both . . . features of the driver's relationship such that neither one retains any significant entrepreneurial characteristics." 326 NLRB at 853. Specifically, the employer exercised control over whether a driver could sell her route, to whom, and under what circumstances. Id. In addition, the employer retained the right to unilaterally reconfigure all routes, and it was unclear whether any drivers had ever realized any gain or profit from the sale of their routes. Id.[23]

Similarly, in *Slay Transportation*, supra, the Board rejected the Regional Director's finding that drivers possessed entrepreneurial opportunities via their ability to hire drivers and control costs to enhance their income. 331 NLRB at 1294. The Board noted that the employer established and controlled the rates of compensation, leaving little room for drivers to increase income through their own efforts. Id. Moreover, although drivers were permitted to hire other drivers, they could do so only at the wage rates set by the employer. Id. Accordingly, the Board concluded that "despite this theoretical potential for entrepreneurial opportunity, the control exercised by the Employer over the other aspects of its relationship with the owner-operators severely circumscribes such opportunity. In reality, there is little economic independence realized by the owner-operators." Id.[24]

The approach taken by the court in *FedEx Home Delivery* was different. There, the court accepted FedEx's assertions of entrepreneurial opportunity with little weight given to these countervailing considerations. In finding, for example, that drivers had a genuine entrepreneurial opportunity to assign their routes without the employer's permission, the court relied solely on the fact that two drivers were able to sell their routes for a nominal profit. 563 F.3d at 500. In fact, employees' opportunities in this area were significantly constrained: drivers could sell only to buyers that the employer accepted as qualified; the employer awarded routes to drivers without charge; and the employer retained the unilateral right to reconfigure routes. Nonetheless, the court concluded that the drivers' ability to assign their routes was a "significant . . . and novel" indicator of contractor status. Id.

The court also relied heavily on the fact that drivers were permitted to operate multiple routes. Id. at 499.[25] But the record showed that only three drivers operated multiple routes, and that those individuals had been excluded from the unit as statutory supervisors. Likewise, the court emphasized that drivers could use their trucks to conduct business independently of FedEx, despite the fact that no current drivers had ever done so, and that drivers' weekly work commitment to FedEx would have realistically prevented them from taking on extra business during nonwork hours. Id. at 498–499.

Insofar as the court's decision holds that even a showing of theoretical entrepreneurial opportunity supports a finding of independent-contractor status—and, indeed, will prove decisive if other factors point in conflicting directions—we disagree. Such an expansive approach departs from the mainstream of Board precedent, lacks clear support in traditional common-law

[23] See also *Roadway I*, supra, 288 NLRB at 198–199.

[24] See also *Stamford Taxi*, supra, 332 NLRB at 1373 (finding that rules maintained and enforced by the employer "severely restrict[ed] the drivers' entrepreneurial opportunities to engage in taxicab business independent of the [employer]").

[25] Here, of course, multiple-route drivers are not part of the bargaining unit that the Union seeks to represent.

principles, and could dramatically broaden the independent-contractor exclusion under the Act. The fact that only a small percentage of workers in a proposed bargaining unit have pursued an opportunity demonstrates that it is not, in fact, a significant aspect of their working relationship with the putative employer. Indeed, if the day-to-day work of most individuals in the unit does not have an entrepreneurial dimension, the mere fact that their contract with the employer would permit activity that might be deemed entrepreneurial is not sufficient to deny them classification as statutory employees.[26]

For similar reasons, we disagree with the court's assertion in *FedEx Home Delivery* that the Board was required to admit and assess systemwide evidence of the number of route sales and the amount of profit, if any, on such sales. We find instead that to be relevant, evidence of entrepreneurialism must pertain directly to the individuals that the petitioner actually seeks to represent.[27] Indeed, our focus on actual opportunity demands that we assess the specific work experience of those individuals in the petitioned-for unit. Evidence that goes only to employees who are outside of the petitioned-for unit is unlikely to have probative value. Thus, unless a multifacility or systemwide unit is sought, evidence regarding the entrepreneurial experience of workers at other facilities cannot substantiate or refute the entrepreneurial opportunity of the individuals at issue.[28] The hearing officer's decision here to exclude from the record similar systemwide evidence of entrepreneurial opportunity was fully consistent with his duty to "protect the integrity of [the Board's] processes against unwarranted burdening of the record and unnecessary delay."[29] Here, systemwide evidence of entrepreneurial opportunity cannot substitute for the absence of similar evidence relating to employees in the petitioned-for unit. In any case, as we will explain, even if the systemwide evidence that FedEx sought to introduce had been admitted and credited, it would not affect our ultimate conclusion here, given the weight of the record evidence supporting a finding of employee status.[30]

2.

Actual entrepreneurial opportunity for gain or loss, then, remains a relevant consideration in the Board's independent-contractor inquiry. We address here how such evidence is to be properly assessed as part of the analysis of the traditional common-law factors. In the past, the Board has been less than clear about this point: In some cases, entrepreneurial opportunity has been analyzed expressly as a separate factor; in others, it has been integrated into the Board's analysis of other factors.[31] The Board has also spoken in terms of the "economic independence" of putative contractors from their employing entities.[32] Today, we make clear that entrepreneurial opportunity represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*.

This formulation is grounded in established law. In *United Insurance*, for example, the Supreme Court observed that the insurance agents involved did "not operate their own independent businesses." 390 U.S. at 259. And citing *United Insurance*, the Board in *Roadway III* explained that the drivers did not operate an independent business but rather "performed functions

[26] In *Arizona Republic*, supra, 349 NLRB at 1045, the Board stated that "the fact that many carriers choose not to take advantage of [an] opportunity to increase their income does not mean that they do not have the entrepreneurial *potential* to do so." Applying this principle, the Board determined that newspaper carriers were independent contractors after finding that 363 carriers, or 29 percent of them, had multiple routes. Id. at 1045 fn. 6. To the extent that the Board's approach in *Arizona Republic* is inconsistent with today's holding, it is overruled.

[27] This approach is consistent with the Board's practice in other representation contexts. See, e.g. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 698 (2006) (refusing to consider the supervisory characteristics of employees not included in petitioned-for unit); *Crittenton Hospital*, 328 NLRB 879 fn. 6 (1999) (same); *Dayton Tire & Rubber Co.*, 206 NLRB 614 fn. 3 (1973), enfd. 503 F.2d 759 (10th Cir. 1974) (same). See also *D&L Transportation*, 324 NLRB 160, 161 (1997); *Tele-Computing Corp.*, 125 NLRB 6 fn. 6 (1959).

[28] In *Roadway III*, supra, the Board relied on evidence showing that only a small percentage of drivers in the employer's nationwide system had taken advantage of purported entrepreneurial opportunities. For instance, the Board noted that only 3 out of Roadway's 5000 drivers nationwide had used their vehicles for other commercial purposes. 326 NLRB at 851. The Respondent argues that *Roadway III* supports the consideration of systemwide evidence, but we do not read the decision as compelling such consideration. In any case, for the reasons explained here, we have clarified the Board's approach today.

[29] *Jersey Shore Nursing & Rehabilitation Center*, 325 NLRB 603 (1998). See also *Bennett Industries*, 313 NLRB 1363, 1363 (1994) ("[I]n order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute.").

[30] FedEx faults the Regional Director for "preclud[ing] a full and complete record," and barring FedEx from "proving its case to the fullest," but it does not explain why systemwide evidence would be relevant to the drivers in the petitioned-for unit. We believe that the Regional Director's ruling was correct, but at worst, it was harmless error, considering the record as a whole.

[31] See, e.g., *Lancaster Symphony Orchestra*, supra, 357 NLRB 1761, 1763 (treating entrepreneurial opportunity as a separate factor); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004) (same). Cf. *Roadway III*, supra, 326 NLRB at 851–853 (considered in tandem with other factors); *Stamford Taxi*, supra, 332 NLRB at 1373 (same).

[32] *Slay Transportation*, supra, 331 NLRB at 1294.

that are an essential part of one company's normal operations." 326 NLRB at 851.[33]

The independent-business factor encompasses considerations that the Board has examined in previous cases, including not only whether the putative contractor has a significant entrepreneurial opportunity (as defined above), but also whether the putative contractor: (a) has a realistic ability to work for other companies;[34] (b) has proprietary or ownership interest in her work;[35] and (c) has control over important business decisions,[36] such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital.[37]

In applying this factor, the Board must necessarily consider evidence (as it has previously) that the employer has effectively imposed *constraints* on an individual's ability to render services as part of an independent business.[38] Such evidence would include limitations placed by the employer on the individual's realistic ability to work for other companies,[39] and restrictions on the individual's control over important business decisions.[40] Pursuant to this inquiry, the Board will consider whether the terms or conditions under which the individuals operate are "promulgated and changed unilaterally by the company."[41] *United Insurance*, supra, 390 U.S. at 259.

To the extent that the Board's decisions in *Arizona Republic*, supra, 349 NLRB at 1045, and *St. Joseph News-Press*, supra, 345 NLRB at 481–482, may have mistakenly suggested that such considerations are *not* relevant to the Board's independent-contractor inquiry, the two decisions are in tension with prior precedent, as well as inconsistent with the view articulated today. Those decisions are now overruled.

The more comprehensive independent-business factor we set out today synthesizes the full constellation of considerations that the Board has addressed under the rubric of entrepreneurialism. Our formulation tracks the forthcoming Restatement of the Law Third Employment Law, and thus is consistent with contemporary developments in jurisprudence.[42] At the same time, the independent-business factor supplements—without supplanting or overriding—the traditional common-law factors, to which the Board will continue to give full consideration and appropriate weight. As with all other relevant factors, the weight given to the independent-business factor will depend upon the factual circumstances of the particular case.

V. APPLICATION

Consistent with the preceding discussion, we now carefully consider all relevant factors and find that the drivers who operate out of FedEx Home Delivery's Hartford terminal are statutory employees under Section 2(3) of the Act. Our discussion tracks the factors set out in § 220 of the Restatement (Second) of Agency—cited with approval by the Supreme Court and routinely applied by the Board—before concluding with the newly-articulated independent-business factor. As explained, under established law, the burden of proof is on the party asserting independent-contractor status, here FedEx.[43]

A. Extent of Control by Employer

FedEx exercises pervasive control over the essential details of drivers' day-to-day work. It requires that drivers make their vehicles available for delivery from Tuesday through Saturday, configures all of their service areas, and controls the number of packages to be

[33] See also *Slay Transportation*, 331 NLRB at 1294 (owner-operators do not operate independent businesses; rather they work exclusively for the employer). Compare Restatement of the Law Third Employment Law (Tentative Draft No. 2) Sec. 1.01 ("[A]n individual renders services as an employee of an employer if . . . the employer's relationship with the individual effectively prevents the individual from rendering the services as part of an independent business.").

[34] See *DIC Animation City*, 295 NLRB 989, 991 (1989) (noting that "for 10 months out of the year, the writers do not work for the Employer and do work for other companies"); Cf. *C.C. Eastern*, supra, 309 NLRB at 1070–1071.

[35] *Roadway III*, supra at 846–848, 853; *BKN*, supra, 333 NLRB at 145.

[36] See *Penn Versatile Van Division of Penn Truck*, 215 NLRB 843, 845 (1974) ("One of the basic factors in determining that an individual is an independent contractor is his opportunity to make business decisions affecting his profit or loss.").

[37] See, e.g. *AAA Cab Services*, 341 NLRB 462, 465 (2004) (weighing these considerations); *R. W. Bozell Transfer*, 304 NLRB 200, 200–201 (1991) (same); *Daily Express*, 211 NLRB 92, 94 (1974) (same).

[38] See *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008) ("[The employer's] restrictions against its drivers' operating independent businesses or developing entrepreneurial opportunities strongly supports the NLRB's determination that [its] drivers are employees.").

[39] See *Time Auto Transportation*, 338 NLRB 626, 638–639 (2002), enfd. 377 F.3d 496 (6th Cir. 2004) ("The witnesses credited testimony reveals that Respondent's procedures and its policies prevented drivers from performing similar services for other companies, a factor relied on by the Board and courts in concluding that individuals are statutory employees.").

[40] See *Standard Oil*, supra, 230 NLRB at 971 (finding employee status where the company made all "significant business decisions").

[41] See also *Stamford Taxi*, supra, 332 NLRB at 1373 (noting that employer's ability to unilaterally draft, promulgate, and change the terms of the driver's lease arrangements "weigh[s] heavily in favor of employee status").

[42] See Restatement of the Law Third Employment Law, Reporter's Notes, comment D, and the cases cited therein.

[43] See, e.g., *BKN*, supra, 333 NLRB at 144.

delivered and stops to be made. FedEx accurately points out that drivers enjoy some discretion over minor facets of their work, namely the order in which to deliver packages and the specific routes they travel. But "for a rational driver, these decisions are mainly or wholly dictated by the location of customers who need delivery that day and the amounts they need. Such 'decisions' are made every day by deliverymen whose employment status is never questioned and involve little if any independent judgment."[44] Similarly, while drivers have some say over starting times and when to take breaks, their freedom is limited by FedEx's requirement that all packages be delivered on the day of assignment, and by 8 p.m. Drivers' minimal discretion over logistical choices does not outweigh FedEx's fundamental control over their job performance.[45] We find that the extent of control factor weighs in favor of employee status.

B. Whether or not Individual is Engaged in a Distinct Occupation or Business

By virtue of their uniforms and logos and colors on their vehicles, drivers are, in effect, doing business in the name of FedEx rather than their own. Even those drivers who operate as incorporated businesses do business in FedEx's name.[46] In practice, drivers are fully integrated into FedEx's organization and receive "considerable assistance and guidance from the company and its managerial personnel."[47] Drivers also rely extensively on FedEx's BSP, scanner system, and package handlers—who sort, scan, and assemble packages on pallets for drivers—to perform their jobs. Absent their affiliation with FedEx, drivers would lack the infrastructure and support to operate as separate entities.[48] We find that the distinct-occupation factor weighs in favor of employee status.

C. Whether the Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision

Although drivers are ostensibly free of continuous supervision in their work duties, FedEx essentially directs their performance via the enforcement of rules and tracking mechanisms. Drivers are required to adhere to a strict company protocol, with guidelines governing dress, appearance, safety, and the details of package delivery.[49] FedEx conducts periodic audits and appraisals of driver performance, and has the ability to track all major work activities—including signing in and out, and deliveries—in real-time via scanner. Significantly, FedEx may also impose disciplinary measures—including suspension or termination—if drivers fail to comply with contractual rules and procedures.[50] Accordingly, we find that the direction factor weighs in favor of employee status.

D. Skill Required in the Occupation

Drivers are not required to have any special training or skills; in fact, drivers receive all necessary skills via 2 weeks of training provided by FedEx. The skill factor thus weighs in favor of employee status.[51]

E. Whether the Employer or Individual Supplies Instrumentalities, Tools, and Place of Work

Drivers own their vehicles and pay for most costs associated with their operation, characteristics that the Board has, in some instances, found to be supportive of independent-contractor status.[52] But the significance of vehicle ownership is undercut considerably here by the fact that FedEx plays a primary role in dictating vehicle specifications and facilitating the transfer of vehicles between drivers. FedEx eases drivers' burden in acquiring vehicles by providing prospective drivers with the names of dealers, and by operating a vehicle-sales database.[53] In addition, drivers operate out of the FedEx

[44] *Standard Oil Co.*, supra, 230 NLRB at 972 (finding that drivers' control over minor job performance details, such as determining their routes and sequence of deliveries, are "hardly significant indicators of entrepreneurial activity or controlling the means of performance").

[45] FedEx asserts that much of the control it exerts over drivers—namely the administration of drug tests and physical exams, display of the FedEx logo on vehicles, and its safety inspection requirements—is mandated by regulations. As explained, however, we find that FedEx's control over drivers far surpasses what is required by law. See *Stamford Taxi*, supra, 332 NLRB at 1385.

[46] See *Roadway III*, supra, 326 NLRB at 851 (noting that "the drivers' connection to and integration in Roadway's operations is highly visible and well publicized"). Cf. *Argix Direct*, supra, 343 NLRB at 1020–1021(finding independent-contractor status where trucks could be any make, model, or color, and drivers could place their own corporate names or logos on trucks).

[47] See *United Insurance*, supra, 390 U.S. at 259.

[48] See *Gateway Chevrolet Sales*, 156 NLRB 856, 866 (1966) (finding individuals' work to be "completely integrated into Respondent's regular business in a manner characteristic of an employer-employee relationship").

[49] See *Slay Transportation*, supra, 331 NLRB at 1293–1294; *Lancaster Symphony*, supra, 357 NLRB 1761, 1763.

[50] See *Slay Transportation*, supra, 331 NLRB at 1294; *Lancaster Symphony*, supra, 357 NLRB at 1763.

[51] See *United Insurance*, supra, 390 U.S. at 259. See also *Corporate Express*, supra, 332 NLRB at 1522; *Prime Time Shuttle*, 314 NLRB 838, 840–841 (1994).

[52] See *Argix Direct*, supra, 343 NLRB at 1020. But see, e.g., *Adderly Industries*, 322 NLRB 1016, 1022–1023 (1997); *R. W. Bozell Transfer*, supra, 304 NLRB at 201 (truck ownership unsupported by other factors does not suggest independent contractor status).

[53] See *Roadway III*, supra, 326 NLRB at 851–851. Accordingly, "[a]lthough it does not directly participate in these van transfers, [the

Hartford facility, where they work in tandem with FedEx's package handlers. Because aspects of the instrumentalities factor cut both ways, we find it to be neutral.

F. Length of Time for which Individual is Employed

Although drivers enter into 1-year or 2-year Agreements, those Agreements are automatically renewed for successive 1-year periods after the expiration of their initial terms. In effect, drivers "have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory."[54] Drivers' sizeable capital investment in vehicles, which must meet FedEx's specifications, and other FedEx-related equipment also suggests the expectation of a continuous working relationship rather than a short-term arrangement. We find that the length-of-time factor weighs in favor of employee status.[55]

G. Method of Payment

FedEx establishes and controls drivers' rates of compensation, which are generally nonnegotiable.[56] While drivers are not paid an hourly wage, FedEx's system of compensation nonetheless greatly minimizes the possibility of genuine financial risk or gain. Specifically, FedEx insulates drivers against loss by: (1) guaranteeing a daily "vehicle availability payment" to drivers simply for showing up on contractually-mandated days; (2) subsidizing drivers in emerging routes via a Temporary Core Zone Density settlement that compensates them for what FedEx deems to be a "normal" level of packages and deliveries; (3) granting drivers a compensatory payment if FedEx reduces customer volume on their routes; and (4) providing a fuel/mileage subsidy if gasoline prices increase substantially. All of these mechanisms "serve[] as an important safety net . . . to shield [drivers] from loss" and "guarantee[] an income level predetermined by [FedEx] . . . ."[57]

FedEx likewise minimizes the possibility for meaningful economic gain. To this end, FedEx retains the right to curtail or reconfigure service areas in response to growing customer bases, and to reduce the volume of packages on a driver's route if FedEx determines that it exceeds the volume she can reasonably deliver. Accordingly, even though FedEx's compensation formula nominally accounts for incentive factors, drivers' ability to increase earnings based on deliveries, stops, or mileage is broadly constrained by FedEx's control over service areas. "[U]nlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits."[58]

Concededly, FedEx does not provide fringe benefits, such as vacations or paid holidays, withhold taxes from settlement checks, or pay for drivers' work accident insurance, all of which weigh in favor of independent-contractor status. We find these considerations to be outweighed, however, by the fact that FedEx "establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers."[59] For these reasons, we find that the method of payment factor weighs in favor of employee status.

H. Whether or not Work is Part of the Regular Business of the Employer

The drivers devote a "substantial amount of their time, labor, and equipment to performing essential functions that allow [FedEx] to compete in the package delivery market."[60] FedEx's central mission is the delivery of packages to customers; the drivers' job is to effectuate that purpose. Accordingly, drivers "perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business."[61] The regular-business factor thus weighs heavily in favor of employee status.

I. Whether or not the Parties Believe they are Creating an Independent-Contractor Relationship

FedEx believes that it is creating an independent-contractor relationship when it requires that drivers sign a contract acknowledging that characterization. But drivers do not have an opportunity to negotiate over that term, and a majority of unit members voted to be represented as employees in collective bargaining with FedEx. The intent factor is therefore inconclusive.[62]

Respondent's] involvement in these deals undoubtedly facilitates and ensures that a fleet of vehicles, built and maintained according to its specifications, is always readily available and recyclable among the drivers." Id. at 852.

[54] *United Insurance*, supra, 390 U.S. at 259.

[55] See *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984) ("open-ended duration" of workers' relationship with employer weighs in favor of employee status); Cf. *Pennsylvania Academy*, supra, 343 NLRB at 847.

[56] *Lancaster Symphony*, supra, 357 NLRB 1761, 1766.

[57] *Roadway III*, supra, 326 NLRB at 853.

[58] Id. at 852.

[59] Id.

[60] Id. at 851.

[61] Id.; *United Insurance*, 390 U.S. at 259; *Slay Transportation*, supra, 331 NLRB at 1294.

[62] *Lancaster Symphony*, supra, 357 NLRB at 1766.

J. Whether the Principal is or is not in the Business

FedEx, by the terms of the Agreement, "is engaged in providing a small package information, transportation, and delivery service throughout the United States." Because FedEx is engaged in the same business as the drivers, we find that this factor weighs in favor of employee status.[63]

K. Whether the Evidence Tends to Show that the Individual is, in Fact, Rendering Services as an Independent Business

FedEx has adduced limited evidence of actual entrepreneurial opportunity for drivers, even if we considered the systemwide evidence described in its offer of proof and properly excluded by the Regional Director. We agree with FedEx that drivers' right to hire and supervise supplemental drivers (which more than half have exercised) is indicative of independent-contractor status.[64] But we give little weight to the drivers' right to sell their routes, which is more theoretical than actual. FedEx exercises considerable control over whether a driver may sell at all, to whom, and under what circumstances. FedEx retains the right to approve all individuals acquiring routes and obliges them to enter into the Agreement "on substantially the same terms and conditions" as the original driver. Moreover, the nature of FedEx's operation necessarily limits the actual value of routes and any proprietary interest that drivers might have in them. Specifically, FedEx does not charge drivers to acquire new or existing routes, and it is permitted to reconfigure or discontinue routes at any time.[65] It is perhaps unsurprising then that the Regional Director found that only two route sales had taken place in the history of the Hartford terminal.[66] As FedEx acknowledges in its brief, multiple-route drivers are expressly excluded from the petitioned-for unit. Finally, the actual exercise of the opportunity to sell her route takes a single-route driver *out* of the unit because the sale ends the driver's relationship with FedEx. The ability to sell a route, then, has limited bearing on the status of drivers who remain in the unit.[67] It is not an incident of their ongoing relationship with FedEx, but an aspect of its severance.

It is also highly significant that drivers' arrangement with FedEx effectively prevents them from working for other employers. Although drivers have a nominal right to use their vehicles for other commercial purposes when they are not delivering packages for FedEx, the Regional Director found no evidence that any Hartford driver had ever done so. As a practical matter, drivers' work commitment to FedEx—typically from 6 a.m. to 8 p.m. from Tuesday through Saturday—occupies the time when most other commercial opportunities would be available.[68] The availability of overnight hours to procure other work, in between mandatory daylong shifts, is hardly indicative of true entrepreneurial freedom.[69] On top of that, drivers' vehicles are specifically tailored for FedEx's operation, and drivers must mask FedEx's logo before using vehicles for other purposes.[70] In our view, drivers' "lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice . . . and more a matter of the obstacles created by their relationship with [FedEx]."[71]

We note finally that drivers have no control over important business decisions. Indeed, FedEx has total command over its business strategy, customer base and recruitment, and the prices charged to customers.[72] Moreover, FedEx unilaterally drafts, promulgates, and changes the terms of its Agreements with drivers, features that "weigh heavily in favor of employee status."[73] There is no evidence in the record that the drivers advertise for business or maintain any type of business operation or business presence. For all of these reasons, we find that drivers "do not have the

[63] See *Community Bus Lines/Hudson County Executive Express*, 341 NLRB 474, 475 (2004) (observing that "owner-operators' work is the precise business of the Respondent").

[64] See *Dial-A-Mattress*, supra, 326 NLRB at 893. We note that the existence of such an opportunity, in itself, does not preclude a finding of employee status. See *Roadway I*, 288 NLRB at 198–199.

[65] See *Roadway III*, supra, 326 NLRB at 853.

[66] In its motion for reconsideration, the Respondent asserts that, since the issuance of the Regional Director's decision, "there have been more than 20 route sales at Hartford." Even assuming that to be true, the Respondent's assertion tells us nothing about the circumstances of each sale or whether any profit was realized by the drivers. Nor would it change the fact that all of these sales would have been made pursuant to the terms imposed by the Respondent, as described above. For the same reason, systemwide evidence of route sales would not weigh significantly in favor of independent-contractor status.

[67] We thus find immaterial the Respondent's assertion, in its motion for reconsideration, that the number of multiple-route operators has increased from three to six since the Regional Director issued his decision.

[68] Indeed, the Agreement states that FedEx "seek[s] to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment."

[69] See *Time Auto Transportation*, supra, 338 NLRB at 638–639. The record also reveals that DOT regulations prohibit drivers from working more than 12 hours a day or 60 hours a week.

[70] See *Roadway III*, supra, 326 NLRB at 851.

[71] Id. Cf. *Argix Direct*, supra, 343 NLRB at 1020–1021 (finding contractor status where employer placed no restriction on the use of drivers' trucks, trucks could be of any model or color, and drivers placed their own names and logos on trucks).

[72] See *C.C. Eastern*, supra, 309 NLRB at 1072.

[73] *Stamford Taxi*, supra, 332 NLRB at 1373.

independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor."[74]

We conclude, that considering the evidence as a whole, this factor weighs in favor of finding employee status.

VI. RESPONSE TO MEMBER JOHNSON'S DISSENT

In dissent, Member Johnson makes three principal arguments, which, after careful consideration, we reject. First, he argues that the approach we adopt today is not permitted by the Act, because it is somehow inconsistent with the common-law test that Congress has required the Board to apply. Second, he endorses the approach taken by the District of Columbia Circuit in *FedEx Home Delivery* as the best option statutorily open to the Board. Third, he argues that, our approach, even if permissible, reflects a flawed "entrepreneurial opportunity methodology." We address each argument in turn.

A.

Member Johnson begins by asserting that the "unmistakable origin and inspiration" for our approach today is the Supreme Court's 1944 decision in *Hearst Publications*,[75] which endorsed the Board's then-prevailing "economic realities" test. Congress rejected that approach in adopting the Taft-Hartley Act in 1947, as the Supreme Court explained in *United Insurance*, supra. The "obvious purpose of this amendment," in the Court's words, "was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act," as opposed to a standard based on "economic and policy considerations within the labor field." Contrary to the dissent's claim—and in clear contrast to *Hearst*—our approach today is demonstrably faithful to *United Insurance* and the common-law test.

We have carefully applied the traditional, nonexclusive common-law factors identified in the Restatement (Second) of Agency and endorsed by the Supreme Court. Consistent with prior Board case law, we have integrated an examination of entrepreneurial opportunity into the test, but without making that factor decisive or neglecting other incidents of the relationship between the drivers and FedEx.[76] On this score, it is worth pointing out that the U.S. Court of Appeals for the Ninth Circuit, applying a California common-law test that closely resembles the Restatement approach, recently concluded that FedEx drivers in California are employees, not independent contractors.[77] The Ninth Circuit concluded that the "entrepreneurial opportunities" cited by FedEx did not support independent-contractor status, given the company's control over those opportunities.[78]

Member Johnson's attempt to link our approach to *Hearst*, supra, then, has no basis. Nor does his related claim that we have adopted the test articulated by then-Member Liebman, dissenting from the Board's decision in *St. Joseph News-Press*, supra. As explained, we overrule *St. Joseph News-Press*, 345 NLRB 474 (2005), today, insofar as that decision mistakenly suggested that the Board cannot consider evidence that a putative employer has effectively imposed constraints on an individual's ability to render services as part of an

[74] *United Insurance*, supra, 390 U.S. at 258.

[75] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

[76] If anything, it is our colleague whose position is grounded in a particular set of "economic and policy considerations" (though not considerations clearly drawn from the history and purposes of the Act), at the expense of traditional agency principles.

[77] *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014). See also *Slayman v. FedEx Ground Package System, Inc.*, 765 F.3d 1033 (9th Cir. 2014) (holding that FedEx drivers are employees under Oregon law, applying State right-to-control test and State economic-realities test).

In *Alexander*, supra, the Ninth Circuit applied the "multi-factor test set forth in [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989)]." 2014 WL 4211107 at *5, slip op. at 14. The Ninth Circuit described the test this way:

> California's right-to-control test requires courts to weigh a number of factors: "The principal test of an employment relationship is whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired."
>
> . . . .
>
> California courts also consider "several 'secondary' indicia of the nature of a service relationship." The right to terminate at will, without cause, is "[s]trong evidence in support of an employment relationship."
>
> . . . .
>
> Additional factors include:
>
> (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.
>
> These factors "[g]enerally . . . cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations."

Id. at *6, slip op. at 14–15. (Internal citations omitted.) The Ninth Circuit accordingly addressed FedEx's right to control the manner and means in which the drivers performed their work, as well as the remaining secondary factors. The similarity between the approach followed by the Ninth Circuit and that of the Restatement (Second) of Agency § 220, examined here, is clear, despite our dissenting colleague's contrary suggestion.

[78] *Alexander*, supra, 2014 WL 4211107 at *11, slip op. at 24–26.

independent business. To reject the view of the *St. Joseph News-Press* majority on this point, of course, is not to adopt the test of the dissent in that case—and we do not. Our test is the test articulated here.

B.

In Member Johnson's view, the Board can and should adopt the approach of the District of Columbia Circuit in *FedEx Home Delivery*, supra. We have already explained why we have chosen not to do so. In short, we believe that the court's approach would create a broader exclusion under Section 2(3) of the Act than Congress actually intended, denying the protections of the Act to workers who are, in fact, employees under common-law agency principles. The Ninth Circuit's recent *FedEx Ground* decisions suggest as much.

We do not understand Member Johnson to argue that the Board is *required* to adopt the District of Columbia Circuit's approach, which approach the court incorrectly ascribed as the Board's own view. Member Johnson points to no decision of the Supreme Court that treats "entrepreneurial opportunity" as an "animating principle" of the common-law agency test.[79] Nor does he point to anything in the Restatement (Second) of Agency—which has guided the Court in this area—that clearly refers to the concept of "entrepreneurial opportunity," much less makes it the "animating principle" of the inquiry.[80] As we have shown, the very notion of such an "animating principle" is hard to reconcile with the Supreme Court's admonition against the use of a "shorthand formula or magic phrase" in making the independent-contractor determination.[81] The dissent, then, does not persuade us that "entrepreneurial opportunity" should be the focus of the Board's analysis.

[79] Remarkably, after wrongly asserting that *our* approach is drawn from the Congressionally abrogated "economic realities" test of the Supreme Court's *Hearst* decision, Member Johnson invokes another Supreme Court decision, *Silk*, that applied the same economic realities test. *U.S. v. Silk*, 331 U.S. 704 (1947) (applying Social Security Act). The *Silk* Court made plain that it was following *Hearst*. Id. at 713–714 ("Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the Hearst case."). The *Silk* Court did not apply common-law agency principles.

Member Johnson also cites appellate decisions where courts have pointed to the *absence* of entrepreneurial opportunities as supporting a finding of employee status. See *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008); *Painting Co. v. NLRB*, 298 F.2d 492 (6th Cir. 2002). But those decisions cannot be fairly read to say that the *presence* of some entrepreneurial opportunities would suffice to establish independent-contractor status. Nor do those cases support the D.C. Circuit's analysis or undermine the approach we take here.

[80] Member Johnson explains that he "would apply entrepreneurial opportunity as an important element in determining the factors b, c, e, f, i, and j in the Restatement," but he does not argue that the Restatement itself does so.

[81] *United Insurance*, supra, 390 U.S. at 258.

C.

Much of Member Johnson's dissent is taken up by his attempt to show that, in distinguishing between actual and theoretical entrepreneurial opportunity (as he concedes the Board must do), we have placed too much emphasis on the degree to which bargaining unit workers in fact *take* an opportunity. For our colleague, this point is crucial, because of the overriding weight he would give to the entrepreneurial-opportunity factor (at the expense of the traditional common-law factors) and, in particular, to route sales as the determining evidence of entrepreneurial opportunity. Our commonsense approach, by contrast, looks to demonstrable facts, not speculative theories. As we have suggested, however, in this case the debate is academic. Even if we employed precisely the "methodology" that Member Johnson demands, and even if we considered and credited the systemwide evidence that FedEx proffered here,[82] our ultimate conclusion would be the same, given the weight of the evidence supporting the other common-law factors.

Most of the traditional common-law factors strongly support a finding of employee status. The independent-business factor, as we denominate it today, also points toward employee status. In that context, we have considered the entrepreneurial opportunities available to FedEx drivers, and found them to be minimal. In particular, we accord little weight to the right of drivers to sell their routes, given the control FedEx exercises not only over that right, but also over the existence and configuration of the route itself.[83] A driver's actual sale of her route, in turn, takes her out of the bargaining unit. All of these considerations persuade us that a driver's right to sell her route is of very limited significance here, in its own right and, more particularly, in the context of the record as a whole. Simply put, and contrary to Member Johnson's view, this case does not turn on "sample size," "business valuation principles," and whether there was a "market for route sales."[84] Member

[82] FedEx's offer of proof regarding systemwide evidence asserts that, as of March 2007, there were 933 multiple-route operators, and that, from 2005–2006, there had been at least 11 route sales in the northeast region. As we have noted, multiple-route operators are not in the unit and a driver's actual sale of her only route would terminate her employment relationship with FedEx.

[83] Accord: *Alexander v. FedEx Ground*, supra, 2014 WL 4211107 at *11, slip op. at 26 (describing control exercised by FedEx with respect to route sales as negating significance of asserted entrepreneurial opportunities).

[84] Member Johnson describes route sales as a "hallmark of entrepreneurial opportunity," but he does not convincingly demonstrate why. What the selling driver conveys to the buyer is the creation of FedEx and remains subject to the control of FedEx in every important

Johnson endorses the "assessment of entrepreneurial opportunity" while recognizing the Board's lack of expertise. Indeed, it seems to us highly implausible that Congress intended to make the Board's independent-contractor inquiry turn on an economic mode of analysis it objected to the Board performing.[85]

VII. CONCLUSION

Here, it was FedEx's burden to establish that the drivers are independent contractors, and it has failed to carry that burden.

As explained, the great majority of the traditional common-law factors, as incorporated in the Restatement (Second) of Agency, point toward employee status:

> that FedEx exercises control over the drivers' work;
>
> that the drivers are not engaged in a distinct business;
>
> that the work of the drivers is done under FedEx's direction;
>
> that the drivers are not required to have special skills;
>
> that drivers have a permanent working relationship with FedEx;
>
> that FedEx establishes, regulates, and controls the rate of drivers' compensation and financial assistance to them;
>
> that the work of the drivers is part of the regular business of FedEx; and
>
> that FedEx is in the same business as the drivers.

Two of the traditional factors—who supplies the instrumentalities of work, and whether the parties believed they have created an independent-contractor relationship—we view as inconclusive, but they would in any case not outweigh the remaining factors. Finally, we have carefully considered an additional factor: whether the evidence tends to show that the drivers render services to FedEx as part of their own, independent businesses. We have determined that, on the whole, it does not—and we would reach the same conclusion even considering the systemwide evidence that FedEx proffered, but that the Regional Director excluded from the record.

Weighing all the incidents of drivers' relationship with the Respondent, we conclude that FedEx Home Delivery's Hartford drivers are statutory employees and not independent contractors.[86] Accordingly, we grant the General Counsel's Motion for Summary Judgment.[87] On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation, with a place of business in Windsor, Connecticut, the Respondent's facility, has operated a home package delivery service.[88]

During the 12-month period ending June 30, 2010, the Respondent, in conducting its operations described above, derived gross revenues in excess of $500,000 and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Connecticut.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Brotherhood of Teamsters, Local Union No. 671, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on May 11, 2007, the Union was certified on May 27, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All contract drivers employed by Respondent at its Hartford terminal, but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and

respect: FedEx has both the right to adjust the volume of daily deliveries and the right to reconfigure the route at any time. Moreover, it has exclusive control over the customer base, recruitment, and pricing.

[85] As noted by Member Johnson, the Board is prohibited from employing individuals for the purpose of economic analysis. 29 U.S.C. § 154(a).

[86] Consistent with *Roadway III*, supra, we note that "the same set of factors that was decisive [here] may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other." 326 NLRB at 850, quoting *Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982).

[87] The Respondent's request that the complaint be dismissed in its entirety is therefore denied.

[88] In its answer to the complaint, the Respondent admits that FedEx Ground Package System, Inc. is a Delaware corporation with a place of business in Windsor, Connecticut, and that the corporation has a home delivery service offering.

guards, professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated June 2 and 11, 2010, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about June 2, 2010, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about June 2, 2010, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc., Windsor, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters, Local Union No. 671 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All contract drivers employed by Respondent at its Hartford terminal, but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Windsor, Connecticut, copies of the attached notice marked "Appendix."[89] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since on or about June 2, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 34 a sworn certification of a responsible official on a form provided

[89] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER JOHNSON, dissenting.

In light of the U.S. Court of Appeals for the District of Columbia's decision that delivery truckdrivers at two FedEx facilities in Massachusetts are independent contractors,[1] the Board must today reexamine its earlier denial of review of the Regional Director's finding, in a factually indistinguishable case, that drivers at FedEx's Hartford, Connecticut terminal are statutory employees. We all nominally agree that, in resolving independent-contractor issues, the Board applies the common-law agency test "with no one factor being decisive," as required by the Supreme Court.[2] As with many multifactor tests, however, the agency test is amenable to substantial variations in the weight assigned to each factor and, thereafter, in the resulting conclusions.[3] In response to the court's emphasis on the factor of entrepreneurial opportunity, my colleagues have done more than clarify and return to the analysis previously articulated by the Board in *Roadway Package Systems, Inc.*, 326 NLRB 842, 849 (1998) (*Roadway III*), and subsequently applied in *St. Joseph News-Press*, 345 NLRB 474 (2005). They have essentially adopted the view of the dissenting Board Member in the latter case, and thereby fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of "right to control" factors relevant to perceived economic dependency.

In my view, this shift goes beyond the established limits of our agency discretion to define independent contractors under the traditional common-law agency test; even if permissible, it arbitrarily fails to give adequate weight to entrepreneurial opportunity as part of the test. Further, my colleagues compound that failure by both incorrectly measuring and then artificially restricting the relevant evidence for assessing what opportunity actually exists for FedEx delivery drivers. I therefore respectfully dissent.

[1] *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

[2] *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968).

[3] Even when concurring with the Board's holding in recent cases, I have noted that tests that rely on an extensive array of factors are susceptible to results-oriented analysis and the dangers posed by same. *Los Angeles Airport (LAX) Hilton Hotel & Towers*, 360 NLRB 1080, 1089 fn. 3 (2014) (Member Johnson, concurring). However, under Supreme Court precedent, we are bound to apply such a multifactor test here.

I. THE MAJORITY'S TEST IS AN IMPERMISSIBLE RESURRECTION OF THE CONGRESSIONALLY REJECTED *HEARST* STANDARD, IN THAT IT WARPS THE COMMON LAW TEST TO SUBORDINATE EVIDENCE OF ENTREPRENEURSHIP TO THAT OF "DEPENDENCY"

The majority's "refinement" of the Board's approach to independent-contractor cases begins with the proposition that "entrepreneurial opportunity" must be understood to mean actual, not merely theoretical, opportunity for gain or loss. That is reasonable to a point, as I discuss later in this opinion, but my colleagues go beyond that point both legally and factually. Legally, they refine the analysis of the entrepreneurial opportunity factor by reformulating it as simply one minor aspect of a new, nondeterminative factor looking to whether the alleged independent contractor is, in fact, rendering services as part of an independent business. Notwithstanding the majority's disclaimers, I contend that this is the standard advocated in the *St. Joseph News-Press* dissent,[4] and it is implicitly founded on the policy-based notion that the Act should be construed to protect as many service providers as possible from any imbalance in economic bargaining power between them and the other party to the service contract.

The majority is convinced that accepting the court's position would result in "a broader exclusion from statutory coverage than Congress appears to have intended," contravening the Supreme Court's admonition that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996). However, the majority errs by applying this admonition in a vacuum. The particular exemption reformulated in this case—the independent-contractor exemption—has a long and storied history. That history is replete with a Congressional mandate reversing the Board, as fully recognized by the Supreme Court many years ago, that forbids us from journeying down the path the majority chooses now. Specifically, the majority acknowledges but fails to give meaningful weight to a legal background manifesting a clear Congressional intent that the Board must apply the common-law agency test in determining the scope of the independent-contractor exemption, and that it do so in a way that does not reflect the more

[4] "Here, then, it is entirely appropriate to examine the economic relationship between the [r]espondent and the carriers to determine whether the carriers are *economically independent business people*, or substantially dependent on the [r]espondent for their livelihood." 345 NLRB at 484 (Member Liebman, dissenting) (emphasis added).

expansive and specifically rejected "economic realities" or "economic dependence" test.[5]

Whether or not admitted, the unmistakable origin and inspiration for the majority's test is *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), where the Supreme Court articulated a policy-based economic reality test for determining independent-contractor status in cases involving the scope and coverage of New Deal social legislation, such as the Wagner Act. As later summarized by the Court in *U.S. v. Silk*, 331 U.S. 704 (1947), applying the same test to the Social Security Act,

> The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, 29 U.S.C.A. s 151 et seq., we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, s 220. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act."[6]

Adverse Congressional reaction to this more expansive alternative to the common-law test led to the specific exclusion of independent contractors from the Act's coverage in the Taft Hartley Amendments of 1947. As explained in the House report on this legislation

> [I]n . . . *National Labor Relations Board v. Hearst Publications, Inc.*, the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. . . . 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 passes the act, not new meanings that, nine years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." . . . It is inconceivable that Congress, when it passes 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. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of 'employee.[7]

Subsequently, the Supreme Court recognized that Congress had effectively abrogated the holdings in *Hearst* and *Silk* to the extent they authorized policy-based alternatives to the common-law agency test of employee and independent-contractor status in the absence of express statutory language.[8] Thus, unlike our Act's exemption for the "agricultural laborer" at issue in *Holly Farms*, which Congress specifically intended to be narrowly construed,[9] the legislative history on the exemption for "independent contractors" shows that Congress clearly and specifically intends that the exemption for independent contractors *not be* too narrowly construed, and that the common-law agency test must apply. In short, Congress has declared a wide gulf between the concepts of (a) the independent contractor left uncovered by the Act, and (b) the employee covered by the Act, and, thanks to the 1947 reforms, the only bridge over that gulf is Congress' own legislative action, not our reformulation of a legal test or our purported economic analysis.

[5] *NLRB v. United Insurance Co. of America*, 390 U.S. at 256.

[6] 331 U.S. at 713.

[7] H.R. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947).

[8] *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324–325 (1992).

[9] *Holly Farms Corp.*, 517 U.S. at 399 fn. 6 (noting that legislative history suggests that Congress intended for the agricultural laborer exclusion to be narrowly construed).

In overruling *St. Joseph News-Press* and effectively adopting the rationale expressed by the dissent there, my colleagues apparently cling to the belief that an economic dependence test of independent-contractor status is still permissible if engrafted onto the common-law agency test. I disagree, as did the *St. Joseph News-Press* majority.[10] Notwithstanding their protestations to the contrary, my colleagues' articulation of an economic dependency test, even dressed in the common-law agency wrappings, cannot be divorced from the policy-based rationale endorsed in the *Hearst* and *Silk* opinions, which the Supreme Court has itself deemed to be "feeble precedents for unmooring the term ['employee'] from the common law."[11] In sum, the Board's discretion to redefine the limits of the independent-contractor exemption as the majority does today is therefore not as broad or entitled to judicial deference as my colleagues suppose it to be.[12] None of the factors of *Roadway Express III*, either singly or in combination, can serve as a Trojan Horse for the proposition that any nonequivalency of bargaining power in a service contract must then create Board jurisdiction. It is for Congress, not the Board, to address the policy-based concerns the majority may have regarding the common-law test and the significance of entrepreneurial opportunity under that test, even as applied to individuals providing exclusive service to one entity with superior economic power.[13]

[10] 345 NLRB at 481 ("It is not appropriate, as advocated by the dissent, for the Board to implement such an alteration of the legal landscape without Congressional direction.").

[11] *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 324. The majority's reference to the recent decision in *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014), is singularly unhelpful to their disavowal of reliance on the discredited rationale of *Hearst* and *Silk*. The issue litigated in *Alexander* was whether FedEx drivers should be considered employees or independent contractors under the *California* Workmen's Compensation Act. That issue was governed by a State law standard, not the independent-contractor standard pertinent to the Act that I discuss herein. Indeed, the Ninth Circuit panel repeatedly made the point that it was deciding this issue under the applicable State law test, which the parties agreed was the multifactor test set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). The California Supreme Court there expressly stated that

> the concept of "employment" embodied in the [California Workmens Compensation] Act *is not inherently limited by common law principles*. We have acknowledged that the Act's definition of the employment relationship must be construed with particular reference to the "history and fundamental purposes" of the statute.
>
> . . . .
>
> Federal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting "employees." *Where not expressly prohibited by the legislation at issue, the federal cases deem the traditional "control" test pertinent to a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover*. [Id. at 352. (Emphasis added.)]

The Court cited *Hearst* and *Silk*, inter alia, in support of the highlighted social policy proposition. It specifically distinguished the law applicable to determinations of independent-contractor status under the Federal Insurance Contributions Act and Federal Unemployment Tax Act where, as in our own Act, Congress affirmatively amended the statutes in 1948 to provide that the employment relationship must be determined by "usual common-law rules." Id., citing *U.S.* v. *Webb, Inc*., 397 U.S. 179, 183-190 (1970). In an accompanying footnote, the Court stated "[w]e find no similar express confinement to common law principles in our workers' compensation scheme." Id. at 352 fn. 6. It could not be clearer, then, that the test articulated by the California Supreme Court in *Borello & Sons* and applied by the Ninth Circuit in *Alexander* is not the common-law test that Congress requires us to apply, even if its "secondary indicia," as the majority points out, overlap with the common-law factors of Restatement § 220. This test is instead a variant of the policy-based economic realities test of *Hearst*, *Silk*, and the *St. Joseph*'s dissent. Similarly, the other Ninth Circuit decision cited by the majority applied Oregon State right-to-control and economic realities tests, neither of which is equivalent to the common-law test we are required to apply under the National Labor Relations Act. *Slayman v. FedEx Ground Package System, Inc.*, 765 F.3d 1033 (9th Cir. 2014). Indeed, it proves my point that these State tests ultimately declare themselves "not inherently limited by common law principles" and in favor of making "a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover" (*Borello*, 48 Cal.3d at 352), despite technically including common-law agency factors. Just like the majority's new test, the State tests are inquiries ultimately tilted on policy grounds to favor statutory coverage even where they may contain some common-law agency factors. As described above, Congress made a different coverage determination with the Act.

[12] In contending that the Board is entitled to substantial judicial deference in determining the scope of its jurisdiction with respect to defining independent-contractor status, the majority misplaces reliance on *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013). That case involved deference to the so-called gap-filling discretion of an administrative agency where Congress has not spoken directly addressed the precise statutory question at issue. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842–843 (1984). Here, Congress has spoken, and the Supreme Court has interpreted its intent to require the traditional common-law agency test. The deference issue here is therefore comparable to the issue in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc*., 416 U.S. 267, 289 (1974), where the Supreme Court held that the Board had no authority to depart from past practice, in contravention of Congressional intent, by narrowing the definition of managerial employees excluded from the Act's jurisdiction.

[13] The majority's analysis provides no real distinction from the issues facing any sole proprietorship or small business that contracts as a service provider to a company as immense as FedEx Ground. Large, modern corporations will always be able to set the terms of engagement in such dealings, yet this does not make the owners of the contractor businesses their employees. The majority's analysis, indeed, if applied to small government contractors bound to the extensive obligations typically imposed by the national Government in its contracts, would seemingly make all of them government employees.

II. THE MAJORITY'S TEST, REGARDLESS OF ITS INTRODUCTION OF ECONOMIC DEPENDENCE, IMPERMISSIBLY GIVES THE CONCEPT OF ENTREPRENEURIAL OPPORTUNITY SHORT SHRIFT

Even considered apart from the limitations imposed by Congress and judicial precedent, the majority's approach impermissibly and arbitrarily discounts the historical significance of evidence pertaining to entrepreneurial opportunity under the traditional common-law agency test and fails to provide an accurate and practical measure of "actual" entrepreneurial opportunity. On this point, I do not read the *FedEx* court's decision as a major departure from the traditional test or as giving inordinate emphasis to entrepreneurial opportunity over all other factors. At most, as discussed in section III below, the *only* responsive refinement necessary in the Board's independent contractor analysis is to define factors relevant to "actual" entrepreneurial opportunity, using a realistic, practicable, and economically valid methodology.[14]

As set forth in *Roadway III*,[15] the Board applies the nonexclusive 10-factor common-law agency test from the Restatement (Second) of Agency § 220,[16] cited with approval in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–752 (1989). In applying this test, the Board follows the Supreme Court's direction that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[17] In the majority's view, the *FedEx* court's decision contravenes this direction because it now treats the entrepreneurial opportunity factor as dispositive in cases where the common-law factors equally support both independent-contractor status and employee status. A more precise interpretation of the court's decision, however, is that it merely and correctly recognizes the importance of the entrepreneurial opportunity factor in the independent-contractor analysis. This interpretation fully comports with Supreme Court and Board precedent.

Although the Board does not treat any factor as generally dispositive, it has observed:

> Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.[18]

The *FedEx* opinion is not to the contrary. The court observed that the common-law test "is not merely quantitative[,]" not just a matter of counting up the factors on each side of the question, but that "[i]nstead, there also is a qualitative assessment to evaluate which factors are determinative in a particular case, and why."[19] It went on to hold that "while all the considerations at common law remain in play, an *important animating principle* by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." Id. at 496 (emphasis added). In this context, it is clear that the court did not intend that the entrepreneurial opportunity factor be treated as dispositive in every factual context. It certainly did not run afoul of the Supreme Court's observation in *United Insurance*, quoted by the *FedEx* court, that there is no "shorthand formula or magic phrase that can be applied to find the answer" in an independent-contractor analysis.[20] Indeed, the court

[14] As I will later explain, systemwide evidence excluded from the preelection hearing in the underlying representation case is relevant and necessary in order to have an accurate understanding of the actual opportunities available to the drivers here. Thus, in my view, the preferable alternative is to remand this case to the region to reopen the record and to allow the parties to submit this systemwide evidence.

[15] 326 NLRB 842, 849 and fn. 32 (1998).

[16] § 220 provides, in pertinent part:

> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
> (d) The skill required in the particular occupation.
> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
> (f) The length of time for which the person is employed.
> (g) The method of payment, whether by the time or by the job.
> (h) Whether or not the work is part of the regular business of the employer.
> (i) Whether or not the parties believe they are creating the relation of master and servant.
> (j) Whether the principal is or is not in the business.

[17] *NLRB v. United Insurance Co.*, 390 U.S. at 258. The Supreme Court added that "[w]hat is important is that the total factual context is assessed in light of the pertinent common-law agency principles." Id.

[18] *Argix Direct, Inc.*, 343 NLRB 1017, 1022 fn. 19 (2004) (quoting *Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982)).

[19] 563 F.3d at 497 fn 3.

[20] 390 U.S. at 258.

noted that this "emphasis" on entrepreneurship did not make applying the test "purely mechanical."[21]

It bears noting here that, although the policy-based economic reality test has been abrogated by Congress, one holding from the Supreme Court's *Silk* decision still stands. This holding solidly emphasizes the decisive significance of entrepreneurial opportunity *even in the context of the test applied there—which is the same test that the majority applies here*. Two cases were consolidated for consideration in *Silk*. In one, the Court affirmed the decision of the Seventh Circuit that drivers who worked exclusively for Greyvan Lines and had its name on their trucks were independent contractors. In relevant part, the Court stated: "These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance [*Greyvan*] they haul for a single business, in the other [*Silk*] for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."[22] Simply put, it would be incongruous to hold that drivers who own, possess, and use their own trucks as, by definition, the central instrumentality of their work were not contractors, absent substantial offsetting circumstances beyond the fact that they work exclusively for one company. Thus, there is nothing remarkable at all about citing this aspect of *Silk* as contrary to the result reached by my colleagues even under the test they advocate.[23]

Furthermore, the *FedEx* court's emphasis on the entrepreneurial opportunity factor is not only consistent with Supreme Court precedent, it is shared by other lower courts as well, whether or not identified as a separate factor in the analysis. See, e.g., *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1097 (9th Cir. 2008) ("In finding that the incidents of the relationship between Friendly and its drivers militate in favor of 'employee' status, we place particular significance on Friendly's requirement that its drivers may not engage in any entrepreneurial opportunities."); *Painting Co. v. NLRB*, 298 F.3d 492, 500 (6th Cir. 2002) (finding no independent-contractor status where employer "controlled the employment" of the two individuals at issue and where neither individual "exhibited any meaningful entrepreneurial or proprietary characteristics that would lead one to believe that they controlled the terms of the work they completed"); *Collegiate Basketball Officials Assn., Inc.*, 836 F.2d 143, 145 (3d Cir. 1987) (applying "right to control" test, court examined factors such as type of services rendered, the potential for additional profits through the exercise of entrepreneurial skill, ownership and maintenance of equipment); *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d at 974 ("While a balancing of the various indicia of control is somewhat inconclusive, the entrepreneurial characteristics of the owner-operators tip decidedly in favor of independent contractor status.").[24]

As my colleagues acknowledge, the Board itself has long considered whether individuals have "significant entrepreneurial opportunity for gain or loss"[25] in the context of its analysis of independent-contractor issues. Originally it did so as part of the "right to control" test.[26] More recently, particularly since *Roadway Express III*, the Board has increasingly recognized the significance of evidence of entrepreneurial opportunity, including considering it as a separate factor.[27]

In sum, the *FedEx* court's decision can be easily reconciled with extant judicial and Board precedent. Contrary to my colleagues' rationale, it clearly did not represent a sharp departure from that precedent, nor does it justify a response from us that *is* a sharp departure

[21] 563 F.3d. at 497.

[22] *Silk*, 331 U.S. at 719.

[23] I note that at least two Supreme Court justices have expressed this view of *Silk*. See then-Judge Breyer's opinion for the court in *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57, 64 fn. 8 (1st Cir. 1981) ("That the [*Silk*] Court reached this result is particularly significant in that it applied a more expansive definition of the term 'employee' than that applicable here") and then-Judge Kennedy's opinion of the court in *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d 966, 975–976 (9th Cir. 1978) ("in view of its consideration of the economic reality test, the Court's determination that the Greyvan drivers were independent contractors assumes greater significance for our purposes").

[24] See also *Labor Relations Division of Construction Industries of Massachusetts, Inc. v. Teamsters Local 379*, 156 F.3d 13, 19–20 (1st Cir. 1998) (in affirming district court's reversal of arbitrator's decision finding that truckdrivers were employees under the LMRA, the First Circuit reaffirmed that fundamental inquiry is "right to control" test, but that, "[w]hile no one factor is decisive in this determination, there can be little doubt of the prominence of the factor of entrepreneurial risk and reward . . . .").

[25] *Roadway III*, 326 NLRB at 851.

[26] See, e.g., *BKN, Inc.*, 333 NLRB 143, 145 (2001) (finding writers to be employees because they "perform functions that are an essential part of the Employer's normal operations" and have "no substantial proprietary interest and no significant entrepreneurial opportunity for gain or loss when they are writing scripts for the Employer"); *DIC Animation City*, 295 NLRB 989, 991 (1989) (finding that writers are independent contractors "because they control the manner and means by which the results are accomplished and are subject to certain risks involved in an entrepreneurial enterprise" and because employer's "limited control is insufficient to warrant a finding that the writers are employees").

[27] E.g., *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004) (listing the entrepreneurial opportunity factor as separate factor).

from precedent by diminishing the significance of the entrepreneurial opportunity factor to the point where it will rarely be considered as among the decisive factors in determining independent-contractor status. My colleagues have made entrepreneurial opportunity a mere subfactor in their analysis. This gives short shrift to what should be an "animating principle," especially entrepreneurship—a form of economic opportunity that most believe marks a clear dividing line between operating one's own business and merely performing a work assignment.[28]

III. THE MAJORITY'S VIEW OF ENTREPRENEURIAL OPPORTUNITY FAILS TO GIVE SUFFICIENT WEIGHT TO THE SIGNIFICANCE OF ROUTE SALES

Although I do view the *FedEx* court's decision as consistent with Supreme Court and Board precedent, I agree with the majority that the Board needs to clarify that when it refers to entrepreneurial opportunity, it means *actual* entrepreneurial opportunity, as opposed to *theoretical* entrepreneurial opportunity. The Board already considers whether entrepreneurial opportunities—because the employer exercises restrictive controls in some manner—are rendered more theoretical than actual entrepreneurial opportunities.[29] In this respect, the majority merely reaffirms the principle, espoused by the D.C. Circuit, that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the company's claim that the workers are independent contractors," *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995). I agree with this principle, but more needs to be said about its application to determine what constitutes an actual "*significant* entrepreneurial opportunity for gain or loss" *Roadway III*, 326 NLRB at 851 (emphasis added).

A. Contrary to the Majority's Position, the Sales in this Case are Evidence of Actual Entrepreneurial Opportunity

As previously discussed, the majority tilts its analysis against giving appropriate weight to evidence of entrepreneurial opportunity by cabining consideration of such evidence as relevant only to a mere subpart of the single factor of "rendering services as an independent business." My colleagues pay lip service to the argument that drivers' right to hire and supervise supplemental drivers, which more than half have exercised, indicates independent-contractor status. I agree more whole-heartedly than the majority that the fact of hiring others to help perform the object of a contract indicates independent-contractor status.

However, it is far more troubling that the majority also gives "little weight" to the drivers' right to sell their routes, which is deemed "more theoretical than actual," because of the extent of FedEx controls over a sale.[30] Given these controls, the majority finds it "perhaps unsurprising" that the Regional Director found only two route sales had taken place at the Hartford terminal. Then, diminishing the significance of route sales to the vanishing point, the majority opines that their analysis would be the same even under FedEx's rejected proffer of additional sales at Hartford, as well as of systemwide sales. They reason that a route sale at Hartford would either remove the seller from the petitioned-for unit because the driver's relationship with FedEx would terminate or it would remove the purchaser of an additional route from the petitioned-for unit because multiple-route drivers are excluded. Thus, they contend, evidence of route sales has limited bearing, if it is not altogether immaterial, with respect to the status of drivers remaining in the unit.

In marked contrast to the majority's approach here, the *FedEx* court had found that drivers had significant entrepreneurial opportunity where two drivers were able to sell their routes for profit ranging from $3000 to $16,000, drivers could operate multiple routes, and drivers could use their trucks to conduct other business outside of FedEx work. 563 F.3d at 499, 500. For the panel majority, the fact that at least one person had availed of an opportunity was sufficient to establish that an actual opportunity exists because "there is no unwritten rule or invisible barrier" preventing others from availing of such opportunities. Id. at 502 (quoting *C.C. Eastern*, 60 F.3d at 860). That view is consistent as well with the Board's statement in *Arizona Republic*, 349 NLRB 1040, 1045 (2007), which the majority today also overrules, that "the fact that many carriers choose not to take advantage of [an] opportunity to increase their

[28] To be specific, I would apply entrepreneurial opportunity as an important element in determining the factors b, c, e, f, i, and j in the Restatement (Second) of Agency § 220, in the particulars of this case. See fn. 16, above. This application leads me to the conclusions set forth below.

[29] See, e.g., *Slay Transportation*, 331 NLRB 1292, 1294 (2000) (finding employee status where, "despite [a] theoretical potential for entrepreneurial opportunity, the control exercised by the [e]mployer over the other aspects of its relationship with the owner-operators severely circumscribed such opportunity"); *Roadway III*, 326 NLRB at 853 (finding employee status where employer "imposed substantial limitations and conditions").

[30] For the sake of clarity, the FedEx "route" is not the same as the classic delivery route. It is a delineated delivery territory where the driver has the right under the Agreement to deliver packages and receive a settlement check from FedEx, based on various factors, for that service.

income does not mean they do not have the entrepreneurial *potential* to do so."[31]

In my view, the *FedEx* court supplied us with both the correct definition of actual entrepreneurial opportunity from a route sale, if the analysis is reduced to a basic theory of proof, and the weight to be assigned evidence of this opportunity in proper application of the required common-law test. *The fact that someone actually took an entrepreneurial opportunity is proof positive that the opportunity existed in the first place.* If the Board cannot or does not deploy a more accurate econometric analysis due to the state of a factual record, that should suffice to carry the employer's burden. What the Board cannot do, and exactly what the majority has done here, is declare that the actual taking of the entrepreneurial opportunity (here, at least one sale) amounts to nothing, because "not enough people in the proposed unit" took the opportunity and, in any event, those who take the opportunity remove themselves from the unit, making evidence of the sale of minimal relevance to the remainder. Specifically, my colleagues maintain that the facts relied upon by the D.C. Circuit show that FedEx drivers have only a theoretical entrepreneurial opportunity and that the court gave "little weight" to countervailing considerations.[32] In both respects, I believe the opposite is true. The facts in the FedEx case before us and the one decided by the D.C. Circuit, which all agree are not meaningfully distinguishable, provide sufficient evidence of entrepreneurial opportunity, and my colleagues give far too little weight to them, particularly as to the evidence of route sales, in balancing all of the traditional common-law test factors.

First, it seems the majority and I have a basic disagreement on whether sales of the "business" at issue from one putative contractor to another signify anything at all in terms of actual entrepreneurial opportunity. In my view, sales of routes between drivers in this case are highly important in demonstrating actual entrepreneurial opportunity: (1) they constitute a type of actually realized opportunity; (2) they show that the asserted business actually has an independent value derived from an arm's-length exchange between two individuals; (3) they show that potential participants (i.e., potential buyers and sellers) are actually sizing up a market that actually exists for the asserted business (see fn. 49, below); (4) they show that the value of the asserted business is actually greater than zero, i.e., two common-law employees typically don't negotiate and fix a price when one replaces another who quits a job; and (5) they provide a price—a measure of the value that can help us determine whether the entrepreneurial opportunity is actual.[33] Sales thus tend to be a hallmark of entrepreneurial opportunity, not immaterial or irrelevant to it.[34] The majority rejects this principle, based on the power of FedEx to potentially change certain terms of its Agreement with the drivers. But the majority's analytical reliance upon *FedEx's potential use of contractual power* in order to minimize

[31] I note, however, that the Board also considered that the carriers were allowed to hire other carriers at their discretion; that several carriers delivered other papers in addition to the Arizona Republic; that many carriers held other jobs; and that carriers could negotiate piece rates and accept tips from subscribers. 349 NLRB at 1044–1045.

[32] Both the majority's departure from the teaching of the 1947 amendments, *United Insurance*, and *Darden*, as well as the majority's specific failure to give due weight to entrepreneurial opportunity shown by the facts here, amount to reversible error. However, in addition, I strongly disagree with the majority's assumptions that (1) FedEx's emphasis on branding so that its customers would have a seamless perception of the FedEx delivery system, or (2) FedEx's "business service package" monitoring tools and their use here, would constitute evidence in favor of control, and thus employee status. As to the first point, any delivery service might want to present the consumer with the "look" of a unified service while having little actual control over the person driving the vehicle. As to the second point, monitoring is not "control over the details of the work," which is what the Restatement test specifies as relevant. There is no evidence in this case that FedEx is constantly dispatching drivers or giving mandatory directions for deliveries. At most, it adds emergency deliveries, something any contractor has to contend with, and it gives drivers optional directions, something that is commonly available today through various mobile phone apps. Notably, the drivers themselves can trade particular deliveries by "flexing" them to each other. Finally, government-based control should not be counted as evidence of FedEx Ground's control of the details of the work or of route sales transactions.

[33] A uniform series of sales for a nominal amount typically would not be evidence of actual opportunity. However, the mere existence of a no or a low price does not rule out that an actual entrepreneurial opportunity exists. Some businesses have been bought for $1, with the hope of "unlocking" significant or even massive potential value under new management. For example, this happened with Newsweek in 2010. See http://dealbook.nytimes.com/2010/10/07/newsweeks-price-tag-1 (last visited September 13, 2014).

[34] The majority assails the conclusion that sales are a hallmark of opportunity, but its premises are faulty. Even if "[w]hat the selling driver conveys to the buyer is the creation of FedEx," that is true of any third-party contractual right that is assigned. Moving on, I dispute the majority's contentions that the economic opportunity "remains subject to the control of FedEx in every important respect." First, that FedEx *potentially* can alter the contract (but only with notice, not "at any time" as the majority posits) in terms of the overall volume of deliveries and route reconfiguration should be immaterial to a consideration of *actual* economic opportunity, especially an opportunity that has been demonstrated by sales for considerable monetary value. Indeed, the majority's argument here reinforces my conclusion that their approach is simply an economic dependence test looking primarily to *potential control* by FedEx. Moreover, contrary to the majority, FedEx does not have "exclusive control over the customer base, recruitment, and pricing." The customer base is determined by who, nationwide, uses FedEx on any particular day to deliver a package within the route's territory; the drivers can recruit helpers or replacements themselves; and FedEx cannot and does not instantaneously change its compensation formula at its whim.

the relevance of *the drivers' actual sales* clearly highlights that the majority is applying an economic realities test. Respectfully, I do not think the majority has considered the full impact of what a sale signifies in the context of the common-law test.

Second, I disagree with the majority's central claim that the court gave too little weight to countervailing considerations. In my view, the court fully and correctly considered the same constraints FedEx placed on a driver's ability to take advantage of opportunities that the majority does above. The court gave those considerations little weight, and that is all the weight those considerations deserve. For example, although the majority does not dispute the fact that drivers have sold their routes, it claims their ability to sell was "significantly constrained" because they could only sell to buyers that FedEx "accepted as qualified." But as the court found, being "qualified" merely meant that the buyer also satisfied Department of Transportation regulations, *FedEx Home*, 563 F.3d at 499, and the Board has held that government-imposed rules and regulations generally do not constitute control by the employer. *A.K.A. Metro Cab Co.*, 341 NLRB 722, 724 (2004). Moreover, the existence of some approval condition or some other paper restrictions on the assignment of a contract, if they are typically not exercised to thwart the sale, is not a meaningful barrier to selling. Our Federal procurement regulations, for example, also pose restraints on the ability of government contractors to freely assign government contracts to each other, but none would argue that this transforms the contractors into government employees. Here, it is not the fact of any conditional restraint that is relevant—most business contracts pose some restriction on assignment to a new party—but whether assignments are *totally forbidden* by the contract, as they typically would be regarding the services of a common-law employee. A common-law employee typically cannot assign out work duties to another to perform in his or her stead.

The majority also emphasizes that FedEx awards "routes to drivers without charge" without explaining how that offsets the fact that there had been route sales of $3000 to $16,000 (or higher, according to the proffer by FedEx). Indeed, I believe that the price differentials establish that the purchasers of those routes viewed them as having some entrepreneurial potential beyond those routes they could have for free. The significant differentials in route prices across routes in general, including the FedEx-assigned "free routes" and those sold among drivers, become apparent once one surveys all the proffered evidence (see fn. 49, below) and indicate at least *a $55,000 route price differential*. In my view, such a differential also indicates that individual driver management of a route can cause that much "swing" in route profitability inside the FedEx route system. That "swing" in potential reward is a key measure—if not the ultimate measure—of the actual entrepreneurial opportunity with which the Board should be concerned. The D.C. Circuit also pointed out that the routes do not come with a truck and driver, which presumably would be provided by the driver with his funds and time. *FedEx Home*, 563 F.3d at 500. Again, I agree with the court.

Admittedly, the *FedEx* court did not address the above-mentioned argument that evidence of route sales is of little fundamental significance to determination of the employee status of individuals in the petitioned-for unit because the seller of a single route has terminated any relationship with FedEx and the single-route purchaser of another route is thereby excluded from the unit. By this reasoning, of course, and assuming the veracity of the Respondent's proffer of evidence of a substantial systemwide increase in route sales and multi-route drivers (as my colleagues apparently do), then evidence of route sales can *never be consequential* in my colleagues' analysis no matter how often it occurs in a unit such as defined here. But, as pointed out above, a sale is a realized opportunity. It is thus evidence of opportunity, not evidence of the absence or termination of opportunity. It shows continuing entrepreneurial opportunity in the putative bargaining unit because the "new participant" has joined the unit, not left it. It also shows such opportunity in that this new participant (i.e., the buying "entrepreneur") gauged the facts and thought that the route he or she purchased was worth something more than zero. In fact, from this buyer's perspective, the buyer believes the route—under his or her new management—to be worth *more* than the price he or she paid for it, or else the buyer would have not paid that price.[35]

However, leaving out all the economics, I have a problem with the logic of the majority's characterization of sales as irrelevant because the sellers exit the proposed bargaining unit. Let's imagine two people standing on a hill overlooking a bay on the coast. One asks the other, "I wonder if there is an actual opportunity for whales to live in this bay?" A whale then breaches in the middle of the bay and then swims out for the open ocean. I don't think the two observers would then turn to each other and

[35] The buyer may think that he or she can run the route better, and create more profit than the prior driver could. See fn. 33, above.

conclude, "there is no actual opportunity for whales to live in this bay."[36]

I interpret the majority's position to be simply that "FedEx's route sales are irrelevant." However, I may be incorrect and the majority's assessment is not that "sales are irrelevant" but rather the majority believes instead (or as well) that "[t]he fact that only a small percentage of workers in a proposed bargaining unit have pursued [a route sale] opportunity demonstrates that it is not, in fact, a significant aspect of their working relationship with the putative employer." Inasmuch as my colleagues would find any number of sales to be of little significance to their application of the independent-contractor test, and they claim they would reach the same result here if systemwide evidence were considered, it is not clear why they even bother to make this statement. However, looking to the "small percentage" theory, in order for an entrepreneurial opportunity to be actual, there has to be a showing that a certain number of individuals have seized that opportunity. In other words, the majority considers all evidence of entrepreneurial opportunity to be theoretical—notwithstanding lack of employer constraints[37]—if an insufficient "percentage" of individuals in the proposed unit are taking advantage of the opportunities.

But there is a fundamental problem with the premise that a low number of sales transactions automatically evidences that there is no actual opportunity. Fully functional markets may exist even when both (1) few observable transactions occur and (2) they occur rarely over time. As an extreme example, consider the market for aircraft carriers. Ten Nimitz class carriers were constructed by Newport News Shipbuilding Company in Virginia. The *USS Nimitz*, the lead ship of the class, was commissioned on May 3, 1975, and *USS George H.W. Bush*, the tenth and last of the class, was commissioned on January 10, 2009.[38] On average, we can deduce that only one aircraft carrier was produced every 3.4 years. Despite the rarity of these transactions, none would argue that no market for aircraft carriers exists. A more down-to-earth example is residential real estate in a typical suburban market (unlike the District of Columbia metropolitan area). Depending on the neighborhood, houses may sell slowly over time, and any particular house might sell only once every few decades. Other examples of relatively low rates of transactions abound in the economy, such as mergers and acquisitions or unique items. Both these categories are instructive, given that the employer claims that route sales are a form of business acquisition and that most of its sales routes, from a functional perspective on a day-to-day basis, are relatively exclusive and thus unique. In other words, FedEx's contention essentially is that these route sales are acquisitions of businesses that also have near-exclusive geographic rights; that contention would dovetail with a low rate of sales transactions from a common sense perspective.[39] Going beyond this mistaken premise, there are also problems with the methodology of the majority's "small percentage" assumptions.

B. The Majority's Entrepreneurial Opportunity Methodology is Flawed: The Wrong Tools are Used to Ask the Wrong Questions about Opportunity

The majority and the D.C. Circuit use the same evidence to support opposing positions. Perhaps this divergence stems from the fact that the Board and the court have not explained how counting the number of times individuals have availed of certain opportunities is an accurate measurement of the significance or *value* of actual entrepreneurial opportunity. As noted above, the Board has analyzed entrepreneurial opportunity for gain or loss in terms of constraints on the ability to take such opportunities (e.g., whether a putative contractor has the ability to work for other companies or hire employees without approval); and entrepreneurial risks or losses (e.g., whether a putative contractor has proprietary interest in the work or capital expenditures). The Board, however, has never really discussed entrepreneurial

[36] The "whale-as-sale" analogy works for an additional reason. Much of what we could conceivably use to determine the existence of an actual opportunity for entrepreneurship comes from observing realized opportunities, one of which is sales. Like the observers on the hilltop, we cannot measure much more than the occasional appearance of the whale above the waterline.

[37] Apart from route sales, the majority also asserts that no current drivers have ever used their trucks to conduct business independently of FedEx, and the work commitment would have prevented them from taking on extra business during nonwork hours. Id. In fact, even when FedEx required its logos and markings to be removed or masked for both commercial and personal purposes, there was evidence that drivers had used their trucks for "personal uses like moving family members," and a multi-route driver had used his truck for a separate delivery service for a repair company. *FedEx Home*, 563 F.3d at 498–499. Moreover, as the court pointed out, the drivers were only obligated to provide service 5 days a week, a schedule which certainly would not preclude operating another part-time business. Id. at 499 fn. 5.

[38] See Jane's Fighting Ships, 107th edition, edited by Commodore Stephen Saunders, RN, New York, NY Arco 2004–2005, at 893; "USS George H.W. Bush Aircraft Carrier Commissioned," Roger Runningen and Tony Capaccio, Bloomberg News, January 10, 2009. Admiral Chester W. Nimitz and President Bush both served with distinction in World War Two, the first as Commander in Chief of our Pacific fleet and a major, visionary architect of the strategy employed in that theater of war, and the second as a frontline pilot of a Grumman TBM Avenger, who fought in several major engagements.

[39] This would be especially true if the capital investment (a truck) is not insignificant relative to the net income of the entrepreneur.

opportunity for gain beyond counting the number of individuals who have taken advantage of opportunities. Thus, beyond defining actual entrepreneurial opportunity, it is imperative that the Board adopt an analysis that is grounded in concepts under which entrepreneurship actually operates, and which can answer the relevant question in the independent-contractor analysis of whether putative contractors have actual entrepreneurial opportunity for *significant* gain or loss.

Notably, as the majority's discussion makes apparent, the assessment of entrepreneurial opportunity is fundamentally an attempt to use economic concepts to delineate where the jurisdictional line of the Act should fall. As a Board, we are forbidden to directly employ economists. *See* 29 U.S.C. § 154(a). Our resulting lack of expertise is another reason why the Board's claim to deference is particularly weak in this case. As I note above, I empathize with and fully understand that the majority is duty-bound in this case to tackle the concept of entrepreneurial opportunity, and I agree with the majority on the general proposition that we should separate the actual economic opportunities from the merely theoretical. But here, if the Board is to determine what is an actual entrepreneurial opportunity and what weight that opportunity must be given in assessing whether an individual is rendering services as an "independent business," it cannot overlook staple concepts of economics and econometrics in conducting its evidentiary review. I fear the majority has done that here, making any claim to deference even weaker. Although I am neither economist nor statistician, I will do my best to demonstrate the apparent weaknesses in the majority's approach.

Here, the majority's position is demonstrably incorrect in categorically asserting that: "[t]he fact that only a small percentage of workers in a proposed bargaining unit have pursued an opportunity demonstrates that it is not, in fact, a significant aspect of their working relationship with the putative employer." The majority, although it apparently does not recognize this, is essentially claiming that because a sample (the bargaining unit and its routes) had few observed transactions, there is no entrepreneurial opportunity because no meaningful market activity exists. Here, the "sample size" of routes associated with the proposed bargaining unit in this case is 18 single-driver routes, from which the majority assumes it can measure whether there is overall economic opportunity.[40]

But making statistical claims about economic opportunity (or anything else) based on low sample sizes is inherently problematic. Samples smaller than 30 typically are not useful in drawing empirically valuable inferences about broader phenomena, with the potential exception of randomized samples that also have a normal distribution curve of data (i.e., the archetypal "bell curve"[41]) within the sample. See Frank L, Schmidt, John E. Hunter, Vern W. Urry, "Statistical Power in Criterion-Related Validation Studies," *Journal of Applied Psychology*, 1976, Vol. 61, No. 4, 473–485. This is because:

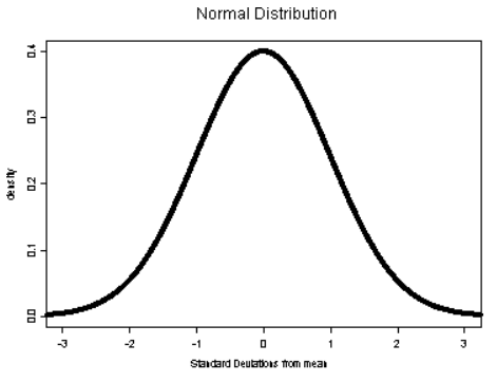
> [t]he law of large numbers does guarantee that very large random samples will be highly representative of the population from which they are drawn. Those who falsely assume that small samples will be similarly representative are endorsing the law of small numbers. The result is a gross overestimation of the amount of information contained in small samples and the correlated overestimation of the power of statistical tests to extract this "information."

Id. at 473.[42] See also Jacob Cohen, *Statistical Power Analysis For The Behavioral Sciences* (1987 ed.) at 7 ("The

[40] The routes should comprise the correct sample, as we are looking to measure sales. This is because entrepreneurial opportunity—one measurable form of it at least—comes from the sale of a route, not the sale of a driver.

I note, however, an independent flaw in the majority's limitation of the analysis of economic opportunity to single-route drivers in the petitioned-for unit. Multiple-route drivers are conveniently excluded from consideration as supervisors. This avoids the question whether they are FedEx supervisors *or supervisors of their own enterprise* who, by investing capital to purchase more than one route, have demonstrated the economic opportunity in doing so.

[41] See, e.g., John E. Freund, *Modern Elementary Statistics* (7th ed. 1988) at 218–224 for a basic discussion of the normal distribution, its characteristics, and appearance. Suffice it to say that the normal distribution shows a distribution of values clustering around some arithmetic mean (represented at "0" below) that resembles the below figure:



[42] Two of the three authors of this study were officials at the Personnel Research and Development Center of the U.S. Civil Service Commission. The authors note that sample sizes of 30 to 60 persons

larger the sample size, other things being equal, the smaller the error and the greater the reliability or precision of the results.").

Courts, including the Supreme Court, have recognized the problem with using small sample sizes to draw general inferences, in disparate impact discrimination cases, a class of cases where statistical proof is commonly used. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996–997 (1988) (discussing use of statistical evidence in disparate impact discrimination cases; "Without attempting to catalog all the weaknesses that may be found in such [statistical] evidence, we may note that typical examples include small or incomplete data sets and inadequate statistical techniques.") (internal citation omitted); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 621 (1974) (in race discrimination case, "the District Court's concern for the smallness of the sample presented by the 13-member panel was also well founded"); *Pollis v. New School for Social Research*, 132 F.3d 115, 121 (2d Cir. 1997) ("The smaller the sample, the greater the likelihood that an observed pattern is attributable to other factors and accordingly the less persuasive the inference of discrimination to be drawn from it."); *Coble v. Hot Springs School District No. 6*, 682 F.2d 721, 734 (8th Cir.1982) (sample of 15 employment decisions over a course of 8 years "too small to support any inference of a discriminatory pattern or practice"). The sample of 18 routes present in this case, then, is too small to draw an overall conclusion about the absence of an economic opportunity. Moreover, there are fewer than 30 in the majority's posited sample, even if we looked at "individuals in the potential unit" rather than routes as comprising the relevant group to measure market activity. To compound matters, the majority is attempting to make a much more difficult inference than usually asserted from a sampling analysis, which typically is trying to prove the existence of something (e.g., discrimination in a hiring process). Instead, the majority is essentially trying to prove a negative, i.e., that "there is no functioning market for route sales" (and thus there is no entrepreneurial opportunity). In a statistical sense, trying to prove the absence of anything requires a much larger sample than a typical test.[43] See Cohen, *Statistical Power Analysis*, at 4 (the "power" of a statistical test is the probability that it will result in the conclusion that a phenomenon exists where it does in fact exist; discussing how statistical tests should have considerable statistical power in order to be useful); Table 2.4. at 54–55 (showing how, to conduct an analysis with the recommended statistical power of .80, and holding statistical significance constant, sample size must increase dramatically in order to detect phenomena of smaller and smaller effect); Douglas G. Alonan, J. Martin Bland, "Statistics," *Absence of evidence is not evidence of absence*, British Medical Journal, Vol. 311, No. 7003 (Aug. 19, 1995), p. 485. The majority appears to have fallen victim to a "belief in the law of small numbers," i.e., that viewing the experiences of a relatively small group of people in a large population can tell us anything about the economic opportunities present for either.[44]

Low sample size is not the only problem. Obviously, the sample we are presented with in this case was *not* randomly selected; it represents instead a group consciously selected by the petitioner for election victory

were considered adequate by government entities at that time in 1976 for criterion-related validation studies (e.g., the type of study then used to detect evidence of race discrimination). Id. at 473. However, they conducted an independent analysis of 406 studies with a much larger median size of 68, demonstrating that even with this larger sample size, there was a significant chance of "false positives." Id. at 482. They further demonstrated that once sample size was reduced to 30, a criterion known to be *valid across nearly half* of the sample would now be reported by the studies *as "invalid" 73 percent of the time*. Id. Even I, with a layperson's view of statistics, can see their point—attempting to make inferences with small samples can be little better than a coin toss. See also Shinichi Nakagawa, "Forum: A farewell to Bonferroni: the problems of low statistical power and publication bias," *Behavioral Ecology*, Vol. 15 No. 6 (June 2004): 1044–1045 (measuring an experimental and control group, both of a sample size of 30, for a five variable test, and finding that the statistical power of such test to detect even a "medium"-level statistical effect is significantly less than acceptable).

[43] I note in this regard that the *Roadway III* Board drew its conclusions *only after examining sales across Roadway's entire national system*:

> Furthermore, it is unclear whether any driver has gained or profited materially from the sale of his service area. For the most part, the evidence consists of unverified and incomplete information contained in e-mail messages between Director Breese and some other managers, none of which were parties to these transactions. . . .
>
> The testimonial evidence shows that the sales by drivers Gonzales, Irions, Hawkins, and Steenburgen took place at Roadway's behest, if not direction to the drivers, to sell or risk having their entire contract terminated. No gain was shown. *In a system of over 5000 drivers assigned to over 300 terminals*, we find that these few forced sales, given their circumstances, are insufficient to support a finding of independent contractor status.

326 NLRB at 853 (emphasis added).

[44] Amos Tversky and Daniel Kahneman, Hebrew University of Jerusalem, "Belief in the Law of Small Numbers," *Psychological Bulletin*, 1971, Vol. 76, No. 2. 105–110 (erroneous intuitions about the laws of chance include believing that (1) a sample randomly drawn from a population is highly representative, i.e., similar to the measured population in all essential characteristics and (2) sampling is a self-correcting process; these beliefs lead to expectations about characteristics of samples that underestimate true variability, at least for small samples).

purposes and that petitioner believed was arguably appropriate as a bargaining unit. Another problem is that the group of transactions that actually would supply us with meaningful information across this sample is equally small. In other words, we only have binary data on "sales" versus "no sales" (with no information on attempted sales, for example), and there is only one "sale" versus "non-sale" data point for each route. To put it mildly, this is not a "robust data set." There is no assurance that any distribution would be normal enough to justify drawing inferences about a market for sales from only this sample, and the majority posits none.[45]

The majority does not address any of these core problems in its methodology. Indeed, it does not even recognize that these are problems, or even views sales as relevant at all in this case. This omission should not inspire judicial deference. The linchpin of the majority's test—that the mere measurement of (1) a low number of sales within; (2) a small group of persons thus shows that; and (3) there is no "real" economic market in existence for those persons—simply isn't so.[46]

C. The Correct Approach Would Have Been to Review Whether There was a Market for Route Sales, and Using this Approach, the Case Should Have Been, at the Least, Remanded to Allow the Employer and Petitioner to Submit Evidence on a Systemwide Basis

Besides its failure to give sales any weight at all, or use the right tools and correct premises, the majority fails to identify any value benchmark for sales that would satisfy the test of actual entrepreneurial opportunity. Unfortunately, the majority applies an inchoate "significant aspect of the working relationship" standard. But an entrepreneur's economic decision to exploit an entrepreneurial opportunity does not look to something that amorphous. It depends instead on an assessment whether "the expected value of the entrepreneurial profit will be large enough to compensate for the opportunity costs."[47] This would suggest use of the widely recognized and accepted *fair market value* standard to measure the actual value of route sales. "Fair market value" is "the price at which the property would change hands between a willing buyer and a willing seller" in a market consisting of all potential buyers and sellers of like business.[48] Once the Board has ascertained or at least estimated the fair market values of the entrepreneurial opportunities available to the drivers, it can then examine whether the entrepreneurial opportunity factor is significant enough to weigh in favor of finding independent contractor status.

The relevant information necessary to determine the fair market value of an entrepreneurial opportunity will vary depending on the nature of the business in each case. At this stage, and in this case, there is insufficient evidence in the record to provide anything more than minimal guidance. As noted previously, one entrepreneurial opportunity available to all drivers and which has already been taken by at least a couple of drivers is the opportunity to buy a route. Thus, route sales would be a centrally important transaction and evidence of route sales would thus be equally central. For example, there is evidence of at least one driver who purchased his route for $6000. That price did not include a vehicle and there is no other evidence about the transaction, such as the seller's ultimate profit from the sale. There is also evidence that one of the drivers, before working at the Hartford terminal, had sold his route at a FedEx facility in Bethpage, New York, to another driver for $42,000. Thus, in addition to the monetary value of the route sale, evidence submitted should also include details as to whether a vehicle was included in the sale and the seller's ultimate profit. Another factor that affects the value of the routes is how often routes become available for sale. At the time of the hearing, there were only 26 routes overall (the total number of routes serviced by single- and multiple-route drivers) at the Hartford terminal, but there is no evidence as to how many routes since 2000 have become available for purchase.[49] Furthermore, there is little evidence here

[45] Indeed, it should be obvious that the 18 routes presented in the "sample" used by the majority—with one value of $6000 and 17 values of zero—are not distributed in any pattern like a normal bell curve. See fn. 41, above. The distribution within the sample instead has a standard sample deviation of *over 300 units*, which would then dictate using an extremely large number of routes to ensure a statistically probative sample. See George Snedecor and William Cochran, *Statistical Methods* (7th ed. Iowa State Univ. Press, 1980), at 31, 53 (containing formulas for calculation of sample standard deviations and estimating an optimal sample size from an observed standard deviation).

[46] That, conversely, the existence of many transactions tend to show a functioning market is in place, however, is plausible to me, depending on what kind of transactions they are.

[47] Shane, Scott, and S. Venkataraman, "The promise of entrepreneurship as a field of research." *Academy of Management Review*, Vol. 25, No. 1, 217–226, 223 (Jan. 2000) ("The decision to exploit an opportunity involves weighing the value of the opportunity against the costs to generate that value and the costs to generate value in other ways.").

[48] *U.S. v. Cartwright*, 411 U.S. 546, 551 (1973); Pratt, Shannon P., and Alina Niculita, *Valuing a Valuing a Business: The Analysis and Appraisal of Closely Held Companies*, (5th ed. 2008), pp. 41–42.

[49] In this respect, I note that FedEx's proffer regarding systemwide evidence asserts that a "representative listing" of route sales in the New Jersey and New England areas contains *no fewer than 10* such

that would allow us to establish the relevant market for these routes, whether it be national, regional, or local.[50]

The majority's approach disdains the need for complete information about the fair market value of the route sales. Such evidence, they say, would not change the result reached here because their assessment of economic opportunity does not turn on "sample size," "business valuation principles," and whether there was a "market for route sales." They are agnostic, at best, as to the relevance of such evidence. They maintain that even accepting all the systemwide evidence of route sales that FedEx presented here and in the associated cases (see fn. 49, above), the outcome is still a finding of employee status. I obviously disagree with their methodology. The fact that many sales are occurring with that much money changing hands between the drivers indicates that there are businesses of independent value being evaluated and sold by business owners who control these enterprises, as opposed to being mere episodes of work force reshuffling controlled by FedEx.

Although the FedEx court did not necessarily require systemwide evidence for the same reasons as I do, it recognized that such evidence was relevant to the extent that multiroute drivers and other FedEx drivers nationwide operated under the same Operating Agreement as the petitioned-for drivers in that case.[51] If the issue being examined were whether certain daily tasks support finding independent contractor or employee status, what other drivers in other terminals are doing would be irrelevant. But that is not the case here; the Board is required to analyze an "opportunity for entrepreneurship" factor which necessitates *trying to prove or disprove the existence of a marketplace* where profit can result. Consequently, I think a far more prudent and accurate alternative to the task of determining the existence of a route sales market based only on "those individuals in the [18 route, 26 person] petitioned-for unit" would be to consider detailed evidence of other FedEx drivers—multiroute and nationwide. To that end, I would remand the case back to the Regional Director to reopen the record and accept relevant systemwide evidence to allow a proper determination of the fair market value of the entrepreneurial opportunities available to the drivers here, in line with my more comprehensive approach outlined above. However, inasmuch as my colleagues state they would reach the same result here even if they were to consider the proffered systemwide evidence, I would hold, consistent with the *FedEx* court's determination, that the existence of the actual sale or sales[52] evidenced here were enough to show entrepreneurial opportunity in that aspect of the relationship between the Hartford drivers and FedEx. This evidence, considered with other factors in a proper application of the statutorily-required common-law test, is sufficient to warrant finding the employer satisfied its burden to show independent contractor status.

Conclusion

My colleagues maintain that entrepreneurial opportunity for gain or loss remains a relevant consideration in the Board's independent-contractor analysis, albeit, in a minimized role as "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*." I wish this were so. In my view, the test they articulate is an impermissible diminution of the significance of entrepreneurial opportunity and, in any event, an unwarranted response to a judicial decision that has substantial support in court and Board precedent. This test relegates evidence of entrepreneurial opportunity factor to such minor significance as to contravene the principle that the "weight to be given a particular factor or group of factors *depends on the factual circumstances of each case*." [Emphasis added.] (Maj. Op. at 2.) In this and virtually all future cases where independent-contractor status is contested, the majority has essentially determined that little weight be assigned to the entrepreneurial opportunity factor. Because the majority has failed to articulate a compelling

sales, with amounts paid ranging from $15,000 to $55,000. The parties have also agreed to incorporate the transcripts, decisions and directions of elections, and proffers of entrepreneurial activity from prior FedEx cases into the record in the instant case. *FedEx Home Delivery (FHD) (Wilmington, MA)* (Cases 1–RC–22034 and 1–RC–22035, review denied 11/8/06); *FHD (Worcester, MA)* (Case 1–RC–21966, review denied 3/23/06); *FHD (Barrington, NJ)* (Case 4–RC–20974, review denied in relevant part 8/3/05); *FHD (Fairfield, NJ)* (Case 22–RC–12508, review denied 1/26/05). The systemwide evidence in those cases shows that terms of routes sales vary with some transactions only involving the route, some including both the route and vehicle, and some including some financing such as a down payment and the assumption of vehicle loan payments. The evidence also shows that at least two transactions involved a broker and broker fees.

[50] Determining a relevant market might be synonymous with determining a correct sample size.

[51] *FedEx Home*, 563 F.3d at 499 fn. 6. In his partial dissent in *FedEx Home*, Judge Garland disagreed with the majority's "view that the common-law test has gradually evolved until one factor . . . has become the focus of the test . . . and can be satisfied by showing a few examples, or even a single instance, of a driver seizing an entrepreneurial opportunity." 563 F.3d at 504. Judge Garland found no such evolution but agreed that the Regional Director erred in preventing FedEx from introducing systemwide evidence concerning the number of route sales and the amount of profit and would have remanded the case for further proceedings "to give FedEx a fair opportunity to make its case under the appropriate test." Id. at 519.

[52] See fn. 49, above.

reason as to why such a drastic response is necessary to respond to the court's decision and to resolve this case, I respectfully dissent. As I explained above, only after the case has been remanded back to the Regional Director to reopen the record and accept systemwide evidence can the Board have the ability to conduct a comprehensive analysis of the entrepreneurial opportunity factor. Lacking that comprehensive evidence, and in the alternative as explained above, I would hold that that the employer satisfied its burden to show independent contractor status.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters, Local Union No. 671 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All contract drivers employed by us at our Hartford terminal, but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

FEDEX HOME DELIVERY, AN OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEMS, INC.

The Board's decision can be found at – www.nlrb.gov/case/34-CA–012735 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

S.A.M. DATE: April 16, 2019

TO: Jill Coffman, Regional Director
Region 20

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Uber Technologies, Inc.
Cases 13-CA-163062, 14-CA-158833,
and 29-CA-177483

177-2484-5000
177-2484-5033-0100
177-2484-5067-2000
177-2484-5067-4700
177-2484-5067-6000

These cases were submitted for advice as to whether drivers providing personal transportation services using the Employer's app-based ride-share platform were employees of the Employer or independent contractors. Applying the common-law agency test as explicated in *SuperShuttle DFW, Inc.*,[1] we conclude that the drivers were independent contractors. The Regions should therefore dismiss the charges, absent withdrawal.

BACKGROUND

In 2013, Uber Technologies, Inc. (the "Employer" or "Uber"), based in San Francisco, California, released a smart-phone application allowing consumers to request personal transportation by car and for drivers to fulfill those requests (the "App"). Since that time, rides through the App have become available in an increasing number of regions throughout the United States and abroad. Uber has always asserted that the drivers providing those rides are independent contractors.

The instant charges assert the contrary. The first of the three charges was filed in Region 14 on (b) (6), (b) (7)(C), 2015. The second was filed in Region 13 on (b) (6), (b) (7)(C) 2015. These two charges allege, among other things, that Uber unlawfully terminated its relationships with drivers who had provided Uber rides under a general tier of service known as UberX. UberX rides involve standard passenger cars of diverse makes and economical fares. To begin offering UberX rides, drivers provided the necessary car and entered contracts in their individual capacity with a subsidiary of Uber. The third charge was filed in Region 29 on (b) (6), (b) (7)(C) 2016. It alleges, among other

[1] 367 NLRB No. 75 (Jan. 25, 2019).

things, that Uber provided unlawful assistance to or unlawfully dominated a labor organization representing Uber drivers in New York City. According to one of the Charging Parties, the alleged labor organization represented not only UberX drivers, but also drivers offering rides under Uber's other general tier of service, UberBLACK. UberBLACK rides involve higher-end black-colored vehicles and higher fares than UberX. Some UberBLACK drivers contracted directly with Uber; others entered employment or independent-contractor relationships with separately-owned business entities that contracted with Uber.

Between Uber's beginnings in 2013 and the present, the company significantly revised its operations and policies numerous times. The facts recounted herein relate to the period of February 27, 2015, to August 11, 2016, which includes the filing dates of the three charges and the six months preceding the filing of the first charge.[2]

During that period, basic UberX and UberBLACK rides proceeded in the same general manner. Riders opened the App, selected the tier of service, entered their pickup location and, optionally, their destination, and then submitted their request. Upon receiving a request, Uber offered the trip, through the App, to a driver in the rider's vicinity who was logged in to the App. The driver could accept or reject the trip. If rejected, Uber offered the trip to other nearby drivers in succession until someone accepted it, though there was no guarantee that a driver would accept the trip. If a driver did accept it, the rider could then see, on the App, the driver's real-time location and estimated time of arrival at the pickup location. The driver learned the trip's destination when picking up the requesting rider, and then drove the rider (and any others accompanying the rider) to the destination. Uber tracked the ride by GPS, and used the distance traveled, in combination with base fare amounts and time charges, to calculate the total fare for the rider. The rider paid the fare cash-free through the App. Uber retained a percentage of fares and, later, remitted the remaining fare amount to the driver.

A somewhat different procedure applied to a subtype of UberX service called UberPOOL. Such service involved the bundling of ride requests of distinct riders with at least roughly overlapping itineraries. Riders selecting the UberPOOL option could obtain a ride at a reduced price in exchange for the willingness to share the car's passenger space with unrelated riders, plus the additional time required to make any other stops along the way to the rider's destination. The fares Uber collected for a combined UberPOOL trip of given length fluctuated depending on the extent to which Uber could bundle separate riders into the trip. The amounts Uber remitted to a driver for each UberPOOL trip approximated what the driver would have earned from a basic UberX trip of similar length.

[2] Because some current terms may differ, we use the past tense to describe the terms of drivers' work during the relevant period.

A feature of the App applicable to every type of Uber ride was (and is) Uber's rating system. At the end of each ride, Uber prompted riders, through the App, to rate the ride on a scale of 1 (worst) to 5 (best) and elaborate on the rating with narrative feedback. Also, drivers could rate each rider on the same scale. Uber calculated average ratings for both drivers and riders. A high average rating could qualify a driver for exclusive types of rides that were potentially more lucrative, and a low average rating could result in Uber terminating its relationship with the driver.

ACTION

Applying the common-law agency test, we conclude that UberX and UberBLACK drivers were independent contractors. Accordingly, the Regions should dismiss the charges, absent withdrawal.

Section 2(3) of the Act defines "employees" entitled to the Act's protection.[3] The definition explicitly excludes "independent contractors."[4] The burden of proving that workers are independent contractors rests with the party asserting independent-contractor status.[5] To determine whether workers are employees or independent contractors, the Board applies the common-law agency test as explicated in *SuperShuttle*.[6] The inquiry involves application of ten nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency:

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
>
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
>
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
>
> (d) The skill required in the particular occupation.

[3] 29 U.S.C. § 152(3).

[4] *Id.*

[5] *SuperShuttle*, 367 NLRB No. 75, slip op. at 1 (citing *BKN, Inc.*, 333 NLRB 143, 144 (2001)).

[6] *Id.*, slip op. at 1, 8 n.14.

> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
>
> (f) The length of time for which the person is employed.
>
> (g) The method of payment, whether by the time or by the job.
>
> (h) Whether or not the work is part of the regular business of the employer.
>
> (i) Whether or not the parties believe they are creating the relation of master and servant.
>
> (j) Whether the principal is or is not in business.[7]

The Board's analysis of these factors is "qualitative," rather than "strictly quantitative."[8] There is no "shorthand formula" and "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[9] However, "an important animating principle by which to evaluate those factors . . . is whether the position presents the opportunities and risks inherent in entrepreneurialism."[10] "[W]here the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, [the Board] will likely find independent-contractor status."[11]

Additionally, in the shared-ride and taxicab industries, the Board gives significant weight to two factors: (1) the extent of the company's control over the manner and means by which drivers conduct business and (2) the relationship between the company's compensation and the amount of fares collected.[12] In *SuperShuttle*, the Board found that drivers who transported passengers by van were

[7] *Id.*, slip op. at 1-2 (citing Restatement (Second) of Agency § 220 (1958)).

[8] *Id.*, slip op. at 11 (citing *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 n.3 (D.C. Cir. 2009)).

[9] *Id.*, slip op. at 2 (quoting *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968)).

[10] *Id.*, slip op. at 8 (quoting *FedEx*, 563 F.3d at 497).

[11] *Id.*, slip op. at 11.

[12] *See id.*, slip op. at 2-3, 12-14.

independent contractors where the drivers had total control over their work schedules, kept all fares they collected, and had discretion over which trips to perform.[13] The *SuperShuttle* drivers had "nearly unfettered opportunity to meet and exceed their weekly overhead," indicating significant opportunity for economic gain.[14] Conversely, in *Elite Limousine Plus*,[15] the Board found the black-car drivers to be employees where the company controlled drivers by restricting their work locations, punishing drivers for rejecting even a single dispatch trip, enforcing extensive and detailed rules and regulations through extensive and detailed sanctions, using a quality assurance committee to monitor compliance on the road, and retaining a portion of most fares in addition to weekly fees from the drivers.

Thus, the level of company control should be assessed in the context of its effect on entrepreneurial opportunity. As the Board observed in *SuperShuttle,* "control and entrepreneurial opportunity are two sides of the same coin: the more of one, the less of the other. Indeed, entrepreneurial opportunity often flowers where the employer takes a 'hands off' approach."[16]

I. UberX

Consideration of all the common-law factors, viewed through the "prism of entrepreneurial opportunity,"[17] establishes that UberX drivers were independent contractors. The drivers had significant entrepreneurial opportunity by virtue of their near complete control of their cars and work schedules, together with freedom to choose log-in locations and to work for competitors of Uber. On any given day, at any free moment, drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether. As explained in detail below, these and other facts strongly support independent-contractor status and outweigh all countervailing facts supporting employee status.

[13] *See id.*, slip op. at 3, 12-15.

[14] *See id.*, slip op. at 12.

[15] 324 NLRB 992, 992, 1002-04 (1997).

[16] *SuperShuttle,* slip op. at 11.

[17] *Id.*, slip op. at 9.

A. Extent of Control by the Company[18]

Three features of the Uber system afforded drivers significant opportunities for economic gain and, ultimately, entrepreneurial independence. First, drivers had virtually unfettered freedom to set their own work schedules—they chose when to log in to the App to receive trip requests and how long to remain online.[19] Drivers needed only to fulfill one trip request per month, and there was no upper limit. For any reason or no reason, the driver could simply log off.[20] Second, drivers controlled their work locations by choosing where to log in to the App, within the broad confines of a geographic market, rather than being restricted to assigned routes or neighborhoods.[21] Even though drivers' later locations over the course of an outing depended on riders' destinations, drivers could predict likely destinations from particular origins and choose their log-in locations accordingly.[22] Third, drivers could, and often did, work for competitors.[23] In fact, drivers could toggle between different ride-sharing apps at will over the course of an outing.[24] Moreover, Uber placed no limits on this freedom such as restrictions on drivers' use of their cars or fees that drivers must pay even if they perform no Uber rides.

[18] Drivers were subject to certain requirements imposed by state and local governments. We exclude such requirements from our discussion as they do not constitute employer control under well-established Board law. *See id.*, slip op. at 3 (citing *Elite Limousine*, 324 NLRB at 1002).

[19] *See id.*, slip op. at 12; *cf. Yellow Cab Co.*, 312 NLRB 142, 145 (1993) (employer determined drivers' shifts).

[20] *See SuperShuttle*, 367 NLRB No. 75, slip op. at 12 (drivers could take breaks at will by turning off dispatch device); *cf. Elite Limousine*, 324 NLRB at 997, 1002 (employer limited number of breaks drivers could take without losing position in dispatch queue).

[21] *See SuperShuttle*, 367 NLRB No. 75, slip op. at 12; *cf. Elite Limousine*, 324 NLRB at 1002 (employer restricted drivers' work locations, which was "telling" sign of control).

[22] As stated above, drivers learned riders' destinations upon picking up the riders.

[23] *See AAA Cab Services*, 341 NLRB 462, 465 (2004); *cf. Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000) (drivers prohibited from operating taxicabs independently or for another taxicab company).

[24] We note, however, that drivers could not independently transport additional riders or deliveries at the *same time* as Uber customers.

Together, these three features of the Uber system imbued drivers with significant control over their earnings. On any given day, and, indeed, at any free moment, drivers could decide how best to serve their own economic objectives: by accepting ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether. And, because Uber forwarded ride requests to drivers based on their proximity to the pickup location, drivers further controlled their earning potential by choosing log-in locations and times based on their own assessment of ride demand and traffic.

In fact, Uber amplified the entrepreneurial opportunity inherent in those decisions through variable fare pricing and promotions aimed at drivers. At times of high ride demand in particular locations, Uber applied higher-than-usual "surge" fares to trips starting from those locations. Drivers knew when and where surge pricing was in effect because Uber provided a real-time "heat map" on the App showing this information. In addition to surge pricing, Uber offered minimum earnings guarantees and other financial incentives for being online at certain locations and times and performing certain numbers of trips. Whether to take advantage of these opportunities were among the many entrepreneurial judgments UberX drivers made due to their freedom to set their work schedules, choose log-in locations, and pursue earnings opportunities outside the Uber system.

Drivers' unlimited freedom to look elsewhere for better earnings also minimized the impact that certain other features of the Uber system would otherwise have on their entrepreneurial opportunity. Thus, although Uber set baseline fares (subject to a driver's contractual right to negotiate a lower fare)[25] and drivers could not subcontract their work,[26] routinely reject trips based on expected profitability,[27]

[25] *See SuperShuttle*, 367 NLRB No. 75, slip op. at 13 (company set fares). During the relevant period, Uber prohibited drivers from accepting tips. Presently, drivers can accept tips, and the App even includes an option for riders to leave a tip cash-free.

[26] *See Metro Cab Co.*, 341 NLRB 722, 724 (2004) (drivers could not sublease vehicles leased from employer), *supplemented by Friendly Cab Co.*, 344 NLRB 528 (2005), *enforced sub nom. NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008); *cf. AAA Cab Services*, 341 NLRB at 465 (drivers could sublease their vehicles).

[27] Drivers could be locked out of the App temporarily for excessively rejecting trips. *See Elite Limousine*, 324 NLRB at 1002 (drivers who rejected fares lost place in dispatch queue and, depending on time of day, were barred from queue for 30 minutes); *City Cab Co. of Orlando v. NLRB*, 628 F.2d 261, 264-65 (D.C. Cir. 1980) (drivers risked losing future dispatch calls if they refused fares); *cf. SuperShuttle*, 367 NLRB No. 75, slip op. at 12 (except in very limited circumstances, drivers could decide whether to accept offered trips); *AAA Cab Services*, 341 NLRB at 464-65 (drivers could reject dispatch calls for any reason without penalty). And, until around 2016, an

or attempt to divert business from Uber to competitors,[28] these terms only affected drivers' entrepreneurial opportunity while performing rides through the App. Since drivers had unlimited freedom to drive or perform other work outside the App, the impact on drivers' overall entrepreneurial independence was diminished.

Drivers' entrepreneurial independence is also apparent in contractual requirements that they indemnify Uber and hold it harmless for liability based on their own conduct. To similar effect is a provision through which Uber disclaimed responsibility for the conduct of riders.[29] These contractual provisions greatly lessened Uber's motivation to control drivers' actions, since Uber was not liable for drivers' or riders' negligent or intentionally harmful acts.[30]

Like certain other companies in the taxicab and shared-ride industries that lack an employment relationship with drivers, as well as many companies concerned with protecting their product or brand, Uber maintained minimum service standards and customer feedback channels to learn of and respond to any relevant customer service issues. Uber's standards included approving a vehicle before a driver could use it to provide Uber rides, adhering to dispatch procedures such as waiting a minimum time for riders to arrive at the pickup location, keeping up the appearance of cars and a comfortable in-car environment, appropriate communication with riders, professional driver appearance, competent driving and navigation,[31] minimal training (often via a 16-minute video), and courtesies such as returning left-behind rider items. Uber also maintained a rating system through which riders could express their satisfaction with a driver's service or lack thereof.

acceptance rate lower than 80-90% could be a basis for terminating a driver's relationship with Uber.

[28] *See NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008) (drivers prohibited from giving riders their own business cards and phone numbers).

[29] However, Uber regularly reimbursed drivers for the costs of cleaning messes and repairing damage to cars caused by riders.

[30] *See SuperShuttle*, 367 NLRB No. 75, slip op. at 12 (citing *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998)).

[31] If a rider complained to Uber about the route taken and Uber determined, based on GPS data, that the route was inefficient, Uber would adjust the fare downward. Uber also used smartphone technology to monitor and offer drivers feedback about their driving style, but Uber's assessments of driving style had no direct impact on a driver's relationship with Uber.

None of these facts indicate significant employer control nor interfere with the drivers' economic opportunities. The Employer's dispatch procedures and nominal training carry minimal weight.[32] Virtually all of the remaining standards went unenforced unless a rider specifically complained about an issue or a driver consistently failed to maintain region-specific minimum average ratings, in contrast to work rules embodying employer control over details of work.[33] Indeed, Uber would not even learn of issues implicating those standards absent customer complaints. Moreover, those standards were too general, and did not sufficiently impact drivers' entrepreneurial opportunity, to establish Uber's control over the manner and means by which the drivers worked.[34]

The Board's recent decision in *SuperShuttle* squarely supports the conclusion that the extent of company control—by minimally impacting economic and entrepreneurial opportunity—weighs in favor of independent-contractor status for the UberX drivers. Indeed, UberX drivers had more entrepreneurial opportunity than the drivers in *SuperShuttle,* who could control their earnings by selecting specific trips based on profitability,[35] because UberX drivers could base decisions about where and when to log in on time-limited earnings opportunities like "surge" fares and their total freedom to work for competitors.[36] UberX drivers also had far more entrepreneurial opportunity than other taxicab or shared-ride drivers whom the Board found to be

[32] *See AAA Cab Services*, 341 NLRB at 465 (rule related primarily to orderly dispatch of taxicabs was not significant incident of control); *SuperShuttle*, 367 NLRB No. 75, slip op. at 13 (although employer required more training than government contract, drivers were still independent contractors).

[33] *See AAA Cab Services*, 341 NLRB at 465 (employer's ability to counsel drivers and terminate leases based on customer complaints did not establish control sufficient to show employee status); *cf. Metro Cab*, 341 NLRB at 723-24 (employer hired road manager to enforce employer rules by monitoring drivers' activities on the job); *Elite Limousine*, 324 NLRB at 1003 (drivers on quality assurance committee reported rules violations to employer).

[34] *See Elite Limousine*, 324 NLRB at 1003 (distinguishing "common sense" rules on condition of vehicle and driver's behavior, which do not necessarily evidence employer control over drivers, from detailed rules amounting to micromanagement of drivers); *City Cab Co. of Orlando*, 285 NLRB 1191, 1194 (1987) (requiring cabs to be neat and clean or drivers to be reasonable and courteous shows only minor control with little impact on details of work).

[35] *See SuperShuttle*, 367 NLRB No. 75, slip op. at 12.

[36] *Cf. id.*, slip op. at 13 n.29.

employees in cases prior to *SuperShuttle*.[37] For example, in contrast to the black-car drivers in *Elite Limousine*, UberX drivers were not subject to restrictions on their work locations, extensive and detailed rules and regulations enforced through extensive and detailed sanctions, or use of a quality assurance committee to monitor compliance on the road.[38] In sum, Uber's lack of control over the manner and means of the UberX drivers' work, and the drivers' freedom to make their own entrepreneurial decisions, strongly favor independent-contractor status.

B. Method of Payment

The second factor to which the Board gives significant weight in the taxicab and shared-ride industries is "the relationship between the company's compensation and the amounts of fares collected."[39] Pure flat-fee arrangements, whereby drivers retain all fares and pay the company flat fees to operate during a fixed time period, generally support independent-contractor status.[40] Conversely, commission-based arrangements, where the company receives portions of drivers' fares, generally support the inference of employee status.[41] These conclusions are based on the inferences that, in flat-fee arrangements, the company lacks motivation to control the manner and means of drivers' work, giving drivers significant entrepreneurial opportunity because they retain all fares; whereas in commission-based compensation, in which the company's earnings depend upon driver production, the company has a greater incentive to control drivers' activities, thus giving them less entrepreneurial opportunity.[42] The actual impact of these various fee arrangements

[37] *See, e.g.*, *Metro Cab*, 341 NLRB at 724 (employer prohibited drivers who leased taxicabs from employer from using cabs for outside business, required drivers to come into garage for inspections or placement of advertising on cabs, and hired road manager to monitor compliance with employer policies); *Stamford Taxi*, 332 NLRB at 1373, 1381-82 (lessee-drivers prohibited from operating employer's cabs independently or for another company and employer controlled work hours, though drivers could sublease cabs); *Yellow Cab*, 312 NLRB at 144 (employer assigned shifts to lessee-drivers and discouraged using sources of business other than employer's dispatch service due to 50-cent per mile rental fee).

[38] *Cf. Elite Limousine*, 324 NLRB at 1002-03.

[39] *SuperShuttle*, 367 NLRB No. 75, slip op. at 14 (quoting *AAA Cab Services*, 341 NLRB at 465).

[40] *See id.*, slip op. at 13.

[41] *See Yellow Cab*, 312 NLRB at 144-45.

[42] *See id.*; *SuperShuttle*, 367 NLRB No. 75, slip op. at 13.

on a company's motivation to control drivers' activities and, thus, these inferences, are questionable. Accordingly, the method of payment, whether flat-fee or commission-based, should not be considered as an indicium of control. Rather, the *actual* control exerted by the company on drivers' entrepreneurial opportunity should be determinative of employee or independent-contractor status.

In any event, even under current Board law, the inferences behind the method-of-payment analysis may be overcome by the facts of particular cases.[43] This is such a case. Uber retained a percentage of fares paid by riders rather than charging drivers a flat fee for the opportunity to use the App. But the fundamental features of the Uber system overcome any inference of employer control and diminished entrepreneurial opportunity for drivers. Thus, notwithstanding any incentive there may have been to control drivers, Uber did not in fact control them (as discussed above), but, rather, relied on customers to maintain quality and insure repeat business without the need for control by Uber. In addition, the absence of a flat fee here actually *increased* drivers' entrepreneurial opportunity, since this made it easier to take advantage of the unlimited freedom they had to work for competitors or pursue other ventures and drive for Uber only when it suited them.[44] In light of drivers' independence from Uber's control and their significant entrepreneurial opportunity, we conclude that the method-of-payment factor is neutral in the particular circumstances here.[45]

C. Other Factors

Three of the remaining factors support independent-contractor status. Drivers provided the "principal instrumentality" of their work, the car, the control of which afforded them significant entrepreneurial opportunity.[46] Drivers were also responsible for chief operating expenses such as gas, cleaning, and maintenance for their cars. Uber provided only the App, commercial liability insurance, and minor

[43] *See Metro Cab*, 341 NLRB at 724 (inference of minimal control based on flat-fee arrangement overcome by evidence of "extensive" employer control).

[44] *Cf. Elite Limousine*, 324 NLRB at 1002 (employer received weekly service fees from drivers in addition to percentage of nearly all fares).

[45] It should be noted that under the traditional common-law test of employee or independent-contractor status, the method-of-payment factor concerns whether the individual is paid "by the time or by the job." Restatement (Second) of Agency § 220. The commission-based payment system used by Uber is clearly a "by the job," rather than a "by the time" system. This further supports the conclusion that the commission-based method-of-payment factor does not weigh in favor of employee status and thus is a neutral factor in the analysis.

[46] *SuperShuttle*, 367 NLRB No. 75, slip op. at 14.

assistance such as reimbursement for the costs of cleaning spills and repairing damage caused by riders. Drivers shouldered significant risk of loss, since they invested significant capital and time to use the App, and fare earnings could fluctuate depending on where and when drivers logged in. Given that the drivers provided the cars and incurred most of the expenses associated therewith, the instrumentalities factor strongly favors independent-contractor status.[47]

With regard to the "supervision" factor, drivers operated without supervision by Uber. They did not report to supervisors and generally interacted with Uber agents only when a problem arose. Uber did not "assign" trips through the App as drivers maintained the right to reject any particular trip.[48] Although, as discussed above, Uber maintained minimum service standards to the extent necessary to address specific customer complaints, which could affect drivers' relationship with Uber and earnings opportunities, those customer-driven standards do not amount to the kind of supervision normally indicative of employee status.[49] Overall, drivers had "near-absolute autonomy in performing their daily work without supervision," supporting independent-contractor status.[50]

With regard to the parties' self-assessment of their relationship, both parties understood their relationship to be one of independent contractors. Drivers' contracts explicitly characterized the relationship this way. Uber withheld neither taxes nor

[47] *See id.*, slip op. at 13 & n.29 (instrumentalities factor supported independent-contractor status where the primary instrumentalities of drivers' work were vans and dispatching system; drivers purchased or leased the vans; drivers paid for dispatch system devices through weekly fees; drivers paid for operation costs such as gas, tolls, and vehicle repairs; and drivers possessed the vehicles full-time).

[48] *See id.*, slip op. at 13. As discussed in the control analysis, UberX drivers were incentivized to accept most trip requests, and more generally had less freedom to select trips based on expected profitability than *SuperShuttle* drivers. But UberX drivers were nonetheless free to reject specific trips in the course of their work.

[49] *See AAA Cab Services*, 341 NLRB at 465 (fact that employer counseled drivers and terminated leases based on customer complaints did not establish employee status); *cf. Metro Cab*, 341 NLRB at 723-24 (employer hired road manager to enforce rules by monitoring drivers' activities on the job); *Elite Limousine*, 324 NLRB at 1002 (drivers on quality assurance committee reported rules violations to employer).

[50] *SuperShuttle*, 367 NLRB No. 75, slip op. at 14.

social security and provided drivers with IRS 1099 forms. Uber provided no benefits, paid leave, or holiday pay. These facts support independent-contractor status.[51]

Although there are several factors that point toward employee status, the strength of the evidence supporting independent-contractor status overwhelms those factors. One factor that supports employee status is that no special skills or experience were required to begin driving for Uber.[52] In addition, although Uber disagrees, we assume *arguendo* that drivers did not work in a distinct occupation or business, but worked as part of the Employer's regular business of transporting passengers.[53] But the Board has not deemed this to be a strong or dispositive factor.[54] Indeed, there are a number of decisions in which individuals were held to be independent contractors, even though their services were integral to the business of the company that engaged them, given the extent of entrepreneurial opportunity afforded them.[55] Whereas, in situations of greater company control, this factor has been cited in favor of employee status.[56]

[51] *See id.* The length of employment is a neutral factor because drivers had a relationship of indefinite duration with Uber but could go up to thirty days without fulfilling a single ride request. *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4 (Sept. 25, 2015) (factor inconclusive where workers had potential long-term relationship with employer but commonly had gaps in working relationship as they pursued other opportunities).

[52] *See SuperShuttle*, 367 NLRB No. 75, slip op. at 14.

[53] *See id.*

[54] *See id.*, slip op. at 14-15.

[55] *See, e.g.*, *Argix Direct, Inc.,* 343 NLRB 1017, 1017, 1020-22 (2004) (finding drivers working for a company providing distribution and transportation services to retailers to be independent contractors); *Arizona Republic,* 349 NLRB 1040, 1040, 1043-46 (2007) (finding newspaper carriers engaged by a company that distributes eight newspaper publications to be independent contractors).

[56] *See, e.g.*, *Slay Transportation Co.*, 331 NLRB 1292, 1293-95 (2000) (finding freight drivers to be employees); *Corporate Express Delivery Systems,* 332 NLRB 1522, 1522 (2000) (same), *enforced*, 292 F.3d 777 (D.C. Cir. 2002).

D. Conclusion

Considering all the common-law factors through "the prism of entrepreneurial opportunity" set forth in *SuperShuttle*,[57] we conclude that UberX drivers were independent contractors. Drivers' virtually complete control of their cars, work schedules, and log-in locations, together with their freedom to work for competitors of Uber, provided them with significant entrepreneurial opportunity. On any given day, at any free moment, UberX drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether. The surge pricing and other financial incentives Uber utilized to meet rider demand not only reflect Uber's "hands off" approach, they also constituted a further entrepreneurial opportunity for drivers. Although Uber limited drivers' selection of trips, established fares, and exercised less significant forms of control, overall UberX drivers operated with a level of entrepreneurial freedom consistent with independent-contractor status. In addition, drivers' lack of supervision, significant capital investments in their work, and their understanding that they were independent contractors also weigh heavily in favor of that status. Although Uber retained portions of drivers' fares under a commission-based system that may usually support employee status, that factor is neutral here because Uber's business model avoids the control of drivers traditionally associated with such systems and affords drivers significant entrepreneurial opportunity. The other factors supporting employee status—the skill required and our assumption that drivers operated as part of Uber's regular business, and not in a distinct business or occupation—are also of lesser importance in this factual context.[58] Accordingly, we conclude that UberX drivers were independent contractors.

II. UberBLACK

As noted above, UberBLACK drivers either contracted directly with Uber or worked on behalf of other businesses that did so. We conclude that drivers of both types were independent contractors of Uber.

Drivers of the first type ("UberBLACK partner-drivers") operated almost exactly like the UberX drivers discussed above. The few relevant distinctions weigh even more in favor of independent-contractor status: UberBLACK partner-drivers (1) generally invested more capital in their work than UberX drivers because they had to provide higher-end vehicles and maintain commercial liability insurance; (2) were free to hire other drivers to work on their behalf;[59] (3) could choose to receive UberX ride

[57] 367 NLRB No. 75, slip op. at 9.

[58] *See id.*, slip op. at 14-15.

[59] *See AAA Cab Services*, 341 NLRB at 465 (drivers could sublease their vehicles).

requests in addition to UberBLACK requests; and (4) contracted with Uber as business entities, and not as individuals.[60] Based on this evidence, and that discussed above regarding the UberX drivers, we conclude that the UberBLACK partner-drivers were clearly independent contractors.

UberBLACK drivers who worked on behalf of other businesses may have differed significantly in terms of facts like vehicle ownership. However, there were no more indicia of an employment relationship between *Uber* and such drivers than there were between Uber and other drivers.[61]

Therefore, all of the drivers at issue in the subject charges were independent contractors not covered by the Act. Accordingly, the Regions should dismiss the charges, absent withdrawal.

s/
J.L.S.

ADV.13-CA-163062.Response.Uber (b) (6), (b) (7)(C)

[60] *See SuperShuttle*, 367 NLRB No. 75, slip op. at 14 (entering into franchise agreement as corporation is associated with independent-contractor status).

[61] We express no opinion on whether such drivers were employees of the other businesses on whose behalf they worked, a question irrelevant to resolving the instant charges.

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Velox Express, Inc. *and* Jeannie Edge. Case 15–CA–184006

August 29, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issues in this case arise from Respondent Velox Express, Inc.'s allegedly unlawful misclassification of certain of its drivers as independent contractors and its discharge of Charging Party Jeannie Edge allegedly for raising group complaints about that classification.

Velox provides medical courier services under a contract with Associated Pathologists, LLC d/b/a PathGroup, which performs laboratory testing of medical specimens for facilities such as doctors' offices, clinics, and hospitals. Velox's drivers collect medical specimens from PathGroup's customers in Arkansas and western Tennessee. Velox consolidates the specimens collected in Arkansas at its storage unit in Little Rock, Arkansas, and then transports them to its Memphis, Tennessee office, where the Arkansas specimens are further consolidated with the specimens collected in western Tennessee for delivery to PathGroup's laboratory in Nashville, Tennessee.

As a threshold matter, the judge found, applying *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017), that Charging Party Edge and Velox's other drivers who service its contract with PathGroup in western Tennessee and Arkansas—hereafter referred to collectively as "the drivers"—are employees under Section 2(3) of the National Labor Relations Act and, contrary to Velox's claim, are therefore not excluded from the coverage of the Act as independent contractors. The judge further found that Velox violated Section 8(a)(1) by discharging Edge, misclassifying Edge and the other drivers as independent contractors, and maintaining a "Non-Disparagement" provision in its contracts with the drivers.[1]

On February 15, 2018, the National Labor Relations Board issued a Notice and Invitation to File Briefs in this matter, asking the parties and interested amici to address the following question:

> Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?[2]

The Board has considered the decision and the record in light of the exceptions and briefs[3] and has decided to affirm the judge's rulings, findings,[4] and conclusions

[1] On September 25, 2017, Administrative Law Judge Arthur J. Amchan issued the attached decision. Velox filed exceptions and a supporting brief, the General Counsel filed an answering brief, and Velox filed a reply brief.

[2] The General Counsel, Velox, and Charging Party Edge filed initial briefs. Velox filed a brief in response to the General Counsel's initial brief, and Edge filed a brief in response to the amici's briefs. Amicus/amici briefs were filed by American Federation of Labor and Congress of Industrial Organizations; American Trucking Associations, Inc.; Chamber of Commerce of the United States of America and Coalition for a Democratic Workplace, jointly; Customized Logistics and Delivery Association, National Home Delivery Association, and Truck Renting and Leasing Association, jointly; HR Policy Association; International Brotherhood of Teamsters; Massachusetts, Pennsylvania, and 10 other States, jointly; Mechanical Contractors Association of America and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, jointly; National Employment Law Project, Inc.; Signatory Wall and Ceiling Contractors Alliance; United Brotherhood of Carpenters and Joiners of America; Washington Legal Foundation; and World Floor Covering Association, Inc.

[3] No party excepts to the judge's dismissal of the allegations that Velox violated Sec. 8(a)(1) by requiring drivers to sign the "Route Driver Agreement" that it issued on August 15, 2016, and by promulgating an overbroad work rule prohibiting the discussion of wages and other working conditions in a July 24, 2016 email.

Velox has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties and amici.

Additionally, Velox excepts to the omission from the transcript of certain excerpts from an audio recording of Edge's June 2, 2017 deposition, which Velox played on the record during the hearing. In its brief in support of exceptions, Velox has transcribed the excerpts from Edge's deposition that it argues should be in the transcript. We find it unnecessary to pass on Velox's exception because even if we were to consider Velox's suggested addendum to the transcript, it would not affect the outcome of this case.

Finally, Velox moved to strike the "History of the Case" section of the General Counsel's brief in response to the Notice and Invitation to File Briefs, arguing that this section is not responsive to the question presented but instead improperly bolsters the General Counsel's answering brief. We deny Velox's motion to strike because the "History of the Case" section is relevant to the General Counsel's proposed rationale for why Velox's misclassification of its drivers as independent contractors violated Sec. 8(a)(1).

[4] Velox has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In finding Velox's maintenance of the "Non-Disparagement" provision unlawful, the judge applied the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer's maintenance of a facially neutral work rule would be unlawful "if employees would reasonably construe the language to prohibit [Sec.] 7 activity." Id. at 647. Recently, the Board overruled the *Lutheran Heritage* "reasonably construe" test and an-

only to the extent consistent with this Decision and Order.[5]

Subsequent to the judge's decision in this case, the Board issued its decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), in which it overruled *FedEx*, supra, to the extent that the Board in *FedEx* "revised or altered the Board's independent-contractor test" by finding that "entrepreneurial opportunity represents merely 'one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business.*'" *SuperShuttle*, supra, slip op. at 1 (quoting *FedEx*, supra at 620 (emphasis in *FedEx*)).

For the reasons discussed by the judge and the reasons discussed below in Section I, we find that under *SuperShuttle*, Velox has failed to establish that Edge and its other drivers are independent contractors. We find that they are therefore employees under Section 2(3) of the Act. Further, for the reasons discussed by the judge, we affirm his finding that Velox violated Section 8(a)(1) by discharging Edge for raising group complaints to Velox about its treatment of the drivers as employees[6] and her subsequent conduct, such as contacting an attorney to review the "Route Driver Agreement" issued by Velox, that was a logical outgrowth of her earlier protected activity.[7]

However, as discussed in more detail below in Section II, after considering the briefs of the parties and amici, we hold that an employer's misclassification of its employees as independent contractors does not violate the Act. We therefore reverse the judge and dismiss the allegation that Velox's misclassification of Edge and the other drivers as independent contractors violated Section 8(a)(1).

I. VELOX'S DRIVERS ARE EMPLOYEES UNDER SECTION 2(3)

As the judge correctly stated, Section 2(3) of the Act excludes independent contractors from the definition of "employee" and thus from the Act's coverage. The party asserting independent-contractor status has the burden of proving such status. See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001). To determine whether a worker is an employee or an independent contractor, the Board applies the common-law agency test. See *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968).[8]

The judge first applied the common-law factors to the factual circumstances of this case. However, he then applied the "independent business" factor established in *FedEx*, a decision that, as discussed above, the Board subsequently overruled. See *SuperShuttle*, supra, slip op. at 1, 7–9 (explaining that the *FedEx* majority impermis-

nounced a new standard that applies retroactively to all pending cases. *Boeing Co.*, 365 NLRB No. 154, slip op. at 14–17 (2017). Accordingly, we shall sever and retain for further consideration the allegation that the "Non-Disparagement" provision is unlawful and issue a notice to show cause why that allegation should not be remanded to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening of the record, and issuance of a supplemental decision.

In his decision, the judge inadvertently stated that PathGroup executive Mike Fuller is PathGroup manager Kent Tidwell's subordinate. Fuller is actually Tidwell's superior. (Tr. 276.)

[5] We have amended the judge's conclusions of law and remedy and modified the judge's recommended Order consistent with our findings and legal conclusions herein and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[6] Although Velox classified its drivers as independent contractors, Edge perceived, correctly, that it was treating its drivers as employees. Edge and others wanted to be independent contractors, and Edge raised group complaints to Velox that the drivers were not being treated as such.

[7] See, e.g., *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (finding that an individual employee's telephone call to the Department of Labor about the employer's lunch hour policy was protected activity because it was a logical outgrowth of employees' earlier complaints about the policy); *Every Woman's Place*, 282 NLRB 413, 413 (1986) (finding that an individual employee's telephone call to the Department of Labor about an overtime compensation issue was protected activity because it was a logical outgrowth of earlier complaints that employees made to the employer), enfd. mem. 833 F.2d 1012 (6th Cir. 1987); see also *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991) (observing that "[the Board] will find that an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group").

[8] The Board considers the following list of nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency § 220 (1958):

> (a) The extent of control which, by agreement, the master may exercise over the details of the work.
>
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
>
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
>
> (d) The skill required in the particular occupation.
>
> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place for the person doing the work.
>
> (f) The length of time for which the person is employed.
>
> (g) The method of payment, whether by the time or by the job.
>
> (h) Whether or not the work is part of the regular business of the employer.
>
> (i) Whether or not the parties believe they are creating the relation of master and servant.
>
> (j) Whether the principal is or is not in business.

See *SuperShuttle*, supra, slip op. at 1–2.

sibly altered the common-law agency test by diminishing the significance of entrepreneurial opportunity in the Board's independent-contractor analysis and reviving an "economic dependency" standard that Congress explicitly rejected with the Taft-Hartley amendments of 1947). Entrepreneurial opportunity is not a separate factor in the independent-contractor analysis or a mere aspect of a separate factor; instead, it "is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." Id., slip op. at 9.[9] And "[w]here a qualitative evaluation of common-law factors shows significant opportunity for economic gain (and, concomitantly, significant risk of loss), the Board is likely to find an independent contractor." Id., slip op. at 11. As required by the Supreme Court's decision in *United Insurance*, the Board continues to consider all the common-law factors in the total factual circumstances of the particular case and treats no one factor or the principle of entrepreneurial opportunity as decisive. *SuperShuttle*, supra, slip op. at 11.

Evaluating the common-law factors through the prism of entrepreneurial opportunity, we find that on the facts of this case, Velox's drivers have little opportunity for economic gain or, conversely, risk of loss. Unlike in *SuperShuttle*, Velox's drivers do not have discretion to determine when and how long they work or to set their routes and the customers they service. Cf. id., slip op. at 9, 14 (finding that the franchisee-drivers' discretion to choose when to work and which bids to accept provided them with significant entrepreneurial opportunity and weighed in favor of independent-contractor status). Instead, Velox assigns routes containing specific stops that the drivers must service on designated days. Moreover, Velox requires those specific stops to be serviced during specific time periods, as drivers cannot retrieve specimens prior to the designated pick-up time at each stop, and they must deliver all of the retrieved specimens to either Velox's Little Rock storage unit or its Memphis office in time for consolidation. Further, the drivers do not have a proprietary interest in their routes, and thus they cannot sell or transfer them, nor can they hire employees to service their routes.[10] Cf. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 502 (D.C. Cir. 2009) ("[T]his case is relatively straightforward because not only do these contractors have the ability to hire others without [the employer's] participation, only here do they own their routes—as in they can sell them, trade them, or just plain give them away."). Velox's drivers can increase their income by choosing to service a weekday route and a weekend route, but the drivers who request a weekend route are more like employees who volunteer for overtime than independent contractors seizing an entrepreneurial opportunity. See *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1766 (2011), enfd. 822 F.3d 563 (D.C. Cir. 2016).

In addition, Velox's method for compensating the drivers does not afford them significant entrepreneurial opportunity. Velox pays drivers a flat rate, which it unilaterally sets, for servicing their routes each day. If PathGroup adds stops to a route, Velox unilaterally increases the rate; conversely, if PathGroup removes stops from a route, Velox unilaterally decreases the rate.[11] Because the drivers are guaranteed the same rate of compensation each day, over which they have no control, they do not have any real opportunity for economic gain (or, conversely, risk of loss) through their own efforts and initiative, especially where, as discussed above, they effectively must service their routes during certain specific time periods each day. See *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002); *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000); *Roadway Package System, Inc.*, 326 NLRB 842, 852–853 (1998). Given those constraints, the drivers cannot work harder, let alone smarter, to increase their economic gain. The drivers receive the same amount of compensation no matter what they do.

The drivers' ownership of the principal instrumentality of their work—their vehicles—provides them with some

[9] The Board is not required to mechanically apply the principle of entrepreneurial opportunity to each individual common-law factor in every case, especially where the factual circumstances of a case would make such an evaluation inappropriate or irrelevant. See id., slip op. at 9 & fn. 17.

[10] The drivers cannot hire their own substitutes. Instead, they must ask Velox for permission to take time off, and Velox provides a substitute with whom it has a contract to cover the route. Drivers may recommend a suitable substitute, but Velox will still pay the substitute directly.

Velox argues that the drivers can subcontract their routes because driver Bret Woods testified that he had his wife, who was also a Velox driver, cover his route on two or three occasions without informing Velox. However, no evidence suggests that Velox was aware of, let alone approved, Woods' conduct.

[11] Velox argues that drivers can negotiate their compensation, citing a March 2017 email exchange in which driver David Chastain asked Velox to "look at [his] cost and mileage again" because he only received an additional $11 for new stops added to his route. In response, Velox increased the rate for Chastain's route by $9. We do not find that Chastain negotiated with Velox. Rather, he simply requested that Velox consider making a technical correction to his pay. Moreover, Velox's claim that drivers can generally negotiate their compensation is contradicted by evidence that it unilaterally determined the flat rates for the routes serviced by drivers Edge and Woods *after* they signed their contracts. Thus, Edge and Woods had no opportunity to negotiate their compensation before contractually binding themselves to service those routes.

entrepreneurial opportunity for economic gain because they can use their vehicles to perform other paid work when they are not servicing their routes for Velox. Thus, this factor does weigh in favor of independent-contractor status. And in fact, driver Edge also worked as a contract phlebotomist and used her vehicle to drive to phlebotomy appointments.[12] However, the drivers' ability to use their vehicles to work for other employers does not so much reflect significant entrepreneurial opportunity as it does the part-time nature of their work for Velox. The drivers are not free to choose a more lucrative opportunity in lieu of servicing their routes for Velox on any given day because, as discussed above, they must service their routes each day or ask Velox for permission to take time off.

Overall, the record establishes that Velox's drivers must personally service preestablished routes, in which they have no proprietary interest, during certain specific time periods on designated days, and, for performing those services, they receive flat rates of compensation over which they have no control. Given those factual circumstances, we find that the drivers do not have any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative. Instead, Velox has "simply shifted certain capital costs [(i.e., the cost of the vehicles)] to the drivers without providing them with the independence to engage in entrepreneurial opportunities." *Roadway*, supra at 851.

Moreover, as discussed by the judge in greater detail, many of the other common-law factors, which do not relate to entrepreneurial opportunity given the specific facts here, also support a finding of employee status. The drivers have very little control over their day-to-day work for Velox.[13] Although the drivers are not subject to in-person supervision while driving their routes—which would be highly impractical given the nature of their work—Velox still directs the drivers' work through its detailed procedures and its requirement that the drivers must respond to all of its communications, and Velox can discipline the drivers with fines. See *Slay Transportation*, supra at 1293–1294.[14] The drivers are not required to possess any special skills or education, as Velox provides the necessary training in a single 1 to 1-1/2 hour session. The parties have an open-ended relationship that resembles at-will employment, as the drivers sign 1-year contracts that automatically renew and that either party may terminate at any time with 1 day's notice. See *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984). Finally, Velox is in the business of providing courier services, and the drivers are fully integrated into Velox's normal operations and perform a function that is not merely a regular part of Velox's business but is at "the very core of its business." *Slay Transportation*, supra at 1294.[15]

In conclusion, after evaluating all of the common-law factors in the particular factual context of this case, we find that the many factors supporting employee status significantly outweigh the two factors supporting independent-contractor status, and the drivers have little entrepreneurial opportunity for economic gain. Therefore, we affirm the judge's finding that Velox failed to establish that its drivers are independent contractors. The drivers are thus employees under Section 2(3) of the Act.

II. MISCLASSIFICATION DOES NOT VIOLATE THE ACT

The judge found that Velox violated Section 8(a)(1) by misclassifying its drivers as independent contractors. In the absence of any Board precedent to support such a violation, the judge reasoned that,

[12] We note that the judge mischaracterized the "Non-solicitation" provision in the parties' contracts as a non-compete agreement. The "Non-solicitation" provision limits the drivers' entrepreneurial opportunity to some extent by prohibiting them from doing business with Velox's clients and customers or hiring Velox's workers for 2 years after the termination of their contracts, but it does not prevent the drivers from doing business with Velox's competitors either during or after the term of their contracts.

[13] Velox argues that any control mandated by its customer, PathGroup, is not evidence of employee status. Even if we were to ignore all evidence of control mandated by PathGroup, we would still find that Velox maintains extensive control over the drivers' day-to-day work. In addition to forms of control cited by the judge that PathGroup has not mandated, we note that Velox (1) prohibits drivers from having other people in their vehicles while driving their routes; (2) prohibits drivers from starting their routes early even if, for example, they just want to avoid rush hour traffic; (3) requires drivers to "gas up" their vehicles and eat before starting their routes; (4) requires drivers to answer all Velox emails, text messages, and telephone calls; (5) requires drivers to check and recheck their specimen totals on their route sheets; and (6) instructs drivers on how to conduct themselves in its Little Rock storage unit and its Memphis office. Thus, the record shows that Velox has sought to manage the minute details of the drivers' day-to-day work. Such extensive control is strong evidence of employee status.

[14] Velox argues that the drivers' work is normally done by independent contractors in the locality because its predecessor on the PathGroup contract classified its drivers as independent contractors. However, Velox's predecessor lost its contract with PathGroup because of what Velox accurately describes in its brief in support of exceptions as "severe service issues"; thus, Velox has understandably sought to exercise much greater control over its drivers to avoid a similar fate.

[15] However, we find, contrary to the judge, that the "parties' belief" factor supports a finding of independent-contractor status because the parties' contracts state that the drivers are independent contractors; Velox does not withhold taxes, make any other payroll deductions, or provide benefits to the drivers; and Edge repeatedly told Velox that she was an independent contractor and took issue with any of its actions that were incompatible with that status. This finding does not, however, change our overall agreement with the judge that the drivers are statutory employees.

> [b]y misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection.

For the following reasons, we reverse the judge's decision in this regard and hold that an employer's misclassification of its employees as independent contractors does not violate the Act.

A. Positions of the Parties and Amici

Charging Party Edge and certain amici[16] have taken the position that an employer's misclassification of its employees as independent contractors, standing alone, violates Section 8(a)(1) in all circumstances.[17] They argue that by misclassifying employees as independent contractors, an employer, regardless of its motive or intent, inherently interferes with, restrains, and coerces those employees in the exercise of their Section 7 rights because the employer effectively conveys that the misclassified employees do not have any rights or protections under the Act when, in fact, they do. See *American Freightways Co.*, 124 NLRB 146, 147 (1959) ("[I]nterference, restraint, and coercion under Sec[.] 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."). Relatedly, Edge and these amici argue that a misclassification effectively conveys to employees that engaging in union or other protected activities is futile. See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6 (2015). Further, they assert that a misclassification preemptively prevents the misclassified employees from engaging in Section 7 activity. See *Parexel International, LLC*, 356 NLRB 516, 518–519 (2011).

The General Counsel, the Respondent, and certain amici[18] take the position that an employer's misclassification of its employees as independent contractors, standing alone, does not violate the Act. They argue that an employer merely expresses a legal opinion when it informs its workers that they are independent contractors, and that an employer's statement of a legal opinion, even if that opinion is ultimately mistaken, is protected by Section 8(c). In addition, they contend that when Congress excluded independent contractors from the Act's coverage, it did not intend to unduly restrict business formation by penalizing employers for making mistakes when initially classifying their workers, especially given that classification decisions are rendered complicated not only by the multifactor common-law standard for purposes of the Act, but also because employers must consider a variety of independent-contractor standards under different Federal, State, and local laws and regulations. They further argue that by finding a stand-alone misclassification violation, the Board would impermissibly shift the burden to the employer to prove that its classification did not violate the Act.[19] Finally, they assert that finding a stand-alone misclassification violation could severely complicate the Board's administration and enforcement of the Act, as the rationale for finding such a violation would apply equally to the misclassification of other types of workers, such as supervisors and managers.

Certain parties and amici have proposed alternative legal theories for finding that an employer's misclassification violates the Act in more limited circumstances. The General Counsel has proposed that "an employer violates Section 8(a)(1) only when the employer actively uses the misclassification of its employees as independent contractors to interfere with activity that is protected by Section 7." Relatedly, Edge and the AFL–CIO have proposed that an employer's continued misclassification of its employees as independent contractors violates Section 8(a)(1) in the context of other related violations of the Act. The 12 States that jointly filed an amici brief (the States) have proposed that an employer violates Section 8(a)(1) when it purposefully misclassifies its employees. Finally, Edge and the International Brotherhood of Teamsters have proposed that, even if a misclassification itself is not a violation of the Act, the remedy for violations that involve misclassified employees should include reclassification of the misclassified employees.

B. Discussion

The Board has never previously found that an employer's misclassification of its employees as independent

[16] Those amici are International Brotherhood of Teamsters; Mechanical Contractors Association of America and United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States of America and Canada, AFL–CIO, jointly; National Employment Law Project, Inc.; Signatory Wall and Ceiling Contractors Alliance; and United Brotherhood of Carpenters and Joiners of America.

[17] For brevity, we will at times refer to this broad theory that a misclassification, standing alone, violates the Act in all circumstances as a "stand-alone misclassification violation." The judge's rationale for finding a misclassification violation falls under this broad theory.

[18] Those amici are American Trucking Associations, Inc.; Chamber of Commerce and Coalition for a Democratic Workplace, jointly; Customized Logistics and Delivery Association, National Home Delivery Association, and Truck Renting and Leasing Association, jointly; HR Policy Association; and Washington Legal Foundation.

[19] We describe this argument fully in the Discussion section, below.

contractors (or as any other classification excluded from the Act's coverage, such as supervisors or managers), standing alone, is a per se violation of the Act. After reviewing the briefs of the parties and amici, we agree with the General Counsel, the Respondent, and like-minded amici that an employer does not violate the Act by misclassifying its employees as independent contractors.[20]

We begin with the relevant provision of the Act. Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. Charging Party Edge and the amici in support of a stand-alone misclassification violation argue that an employer's misclassification of its employees as independent contractors inherently coerces employees in the exercise of their Section 7 rights and does so regardless of the employer's intent. They note the well-settled principle that a Section 8(a)(1) violation may be found even without unlawful motive. See *American Freightways*, supra at 147. But this argument assumes that a misclassification of employees as independent contractors is, in fact, coercive. We are unpersuaded that it is. An employer's mere communication to its workers that they are classified as independent contractors does not expressly invoke the Act. It does not prohibit the workers from engaging in Section 7 activity. It does not threaten them with adverse consequences for doing so, or promise them benefits if they refrain from doing so. Employees may well disagree with their employer, take the position that they are employees, and engage in union or other protected concerted activities. If the employer responds with threats, promises, interrogations, and so forth, *then* it will have violated Section 8(a)(1), but not before.

When an employer decides to classify its workers as independent contractors, it forms a legal opinion regarding the status of those workers, and its communication of that legal opinion to its workers is privileged by Section 8(c) of the Act, which states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit." Moreover, the communication of that legal opinion is no less protected by Section 8(c) if it proves to be erroneous. See *North Star Steel Co.*, 347 NLRB 1364, 1367 fn. 13 (2006) ("Sec. 8(c) does not require fairness or accuracy.") (internal quotations omitted); *Children's Center for Behavioral Development*, 347 NLRB 35, 36 (2006) ("[T]here is nothing unlawful in stating a legal position, even if it is later rejected.").[21]

Erroneously communicating to workers that they are independent contractors does not, in and of itself, contain any "threat of reprisal or force or promise of benefit." In this regard, it is important to distinguish the type of per se violation urged by Edge and the supporting amici from cases in which the Board has found violations

[20] Our dissenting colleague claims that we are unnecessarily "reaching out" to decide the stand-alone misclassification issue. She is incorrect. The complaint alleges a stand-alone misclassification violation, i.e., that "[s]ince about May 1, 2016, [Velox] has misclassified its employee-drivers as independent contractors thereby inhibiting them from engaging in Sec[.] 7 activity and depriving them of the protections of the Act." The judge found a stand-alone misclassification violation, concluding that Velox violated Sec. 8(a)(1) by "[c]lassifying Jeannie Edge and other driver/couriers servicing PathGroup as independent contractors, rather than as employees." And the Respondent excepts to the judge's stand-alone misclassification violation finding. Thus, this case squarely presents the Board with the question of whether Velox's misclassification of its drivers as independent contractors, standing alone, violated the Act. Moreover, as discussed above, the Board, including our dissenting colleague, invited the parties and interested amici to brief the following question: "Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Sec[.] 8(a)(1) of the Act?" Nevertheless, the dissent now contends that we should avoid answering this question either by finding a misclassification violation on narrower grounds than those on which the judge relied or by ordering a remedy that would make it unnecessary to decide the issue. For the reasons discussed below, we reject the dissent's alternative proposals for disposing of the misclassification allegation. Therefore, we must and do answer the stand-alone misclassification question squarely presented—and briefed at length—in this case.

[21] Contrary to the dissent's contention, our finding that an employer's communication of its legal opinion that its workers are independent contractors, standing alone, is privileged by Sec. 8(c) even if that opinion turns out to be incorrect is not inconsistent with *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). In *Dal-Tex*, the Board held that an employer's implied threats during pre-election campaign speeches that it will refuse to bargain if its employees select a union as their representative—even when stated as a legal position—are not protected by Sec. 8(c) but instead interfere with employees' exercise of their Sec. 7 rights in violation of Sec. 8(a)(1) and "with the exercise of a free and untrammeled choice in an election." Id. at 1785–1787. Our decision today does not in any way "sanction implied threats couched in the guise of statements of legal position." Id. at 1787. Instead, we merely find that, unlike the implied threats in *Dal-Tex*, an employer's communication to its workers of its legal opinion regarding their status is privileged by Sec. 8(c) because, for the reasons discussed at length in this decision, communication of that legal opinion does not, on its own, reasonably tend to interfere with their Sec. 7 rights.

Edge and some like-minded amici argue that a misclassification is not protected by Sec. 8(c) because it involves more than just an employer expressing a legal opinion that its workers are independent contractors, as the employer must also treat its workers in a way that is inconsistent with that classification. However, an employer's communication to its workers of its legal opinion that they are independent contractors *is* the conduct that is alleged to be coercive under the stand-alone misclassification theory. An employer's treatment of its workers as statutory employees is not alleged to be (and would not be) unlawful under the Act.

stemming from misclassification. Those cases involved statements that referred to Section 7 activity, either expressly or by clear implication, or classification decisions that were in retaliation for protected activity. For example, the Board has found that an employer violated the Act by invoking a misclassification to expressly prohibit employees from engaging in Section 7 activity or to indicate that engaging in union or other protected activities would be futile. See, e.g., *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6 (finding that, in response to a union organizing campaign, the employer, which had misclassified its employees as independent contractors, violated Sec[.] 8(a)(1) by "informing employees that it would never accept a 'boss/employee relationship,'" which "indicated that union organizing would be futile");[22] see also *Wal-Mart Stores*, 340 NLRB 220, 225 (2003) (finding that the employer's instruction to four employees whom it misclassified as "department managers" that they could not participate in union activities constituted an unfair labor practice where the employer failed to demonstrate that they were, in fact, Sec. 2(11) supervisors). The Board has also found that employers unlawfully reclassified their employees as independent contractors in order to interfere with their union activities. See, e.g., *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1049–1051 (1979) (finding that the employer violated the Act when, in response to its delivery drivers' union organizing activities, it attempted to reclassify those drivers as independent contractors and discharged drivers who refused to change status), enfd. in relevant part 633 F.2d 1054 (3d Cir. 1980); *Houston Chronicle Publishing Co.*, 101 NLRB 1208, 1211–1215 (1952) (finding that the employer's reclassification of its employees as independent contractors was unlawfully motivated by and intended to defeat their union organizing activities), enf. denied 211 F.2d 848 (5th Cir. 1954).[23]

However, it is a bridge too far for us to conclude that an employer coerces its workers in violation of Section 8(a)(1) whenever it informs them of its position that they are independent contractors if the Board ultimately determines that the employer is mistaken. We do not agree with our dissenting colleague, Charging Party Edge, and like-minded amici that by doing so, an employer inherently threatens that those employees are subject to termination or other adverse action if they exercise their Section 7 rights or that it would be futile for them to engage in union or other protected activities. In and of itself, an employer's communication of its position that its workers are independent contractors simply does not carry either implication.[24]

[22] Our dissenting colleague argues that *Sisters' Camelot* is closely on point to the situation here. She fails to acknowledge, however, the significance of the fact that in *Sisters' Camelot*, the employer stated that "it would never accept a 'boss/employee relationship'" in the midst of its misclassified employees' union organizing effort and in response to their demand that it recognize and bargain with their newly formed union. Id., slip op. at 6, 13–14. We do not dispute that in those specific circumstances, the employer's statement "indicated that union organizing would be futile." Id., slip op. at 6. To be clear, we do not, as our dissenting colleague seems to think, suggest that an employer's statements to its workers regarding their classification can only be coercive when made directly in response to their union activity. Instead, where, as here, an employer merely tells its workers that they are independent contractors without more—i.e., outside the context of union organizing or other protected activities and without expressly invoking the Act or mentioning union or other protected activities—we do not believe that the workers would be interfered with, restrained, or coerced in the exercise of their Sec. 7 rights simply because it turns out that the employer was wrong. As our dissenting colleague acknowledges, an employer's misclassification of its employees is coercive only if, "as reasonably understood by employees, it implies '[a] threat of reprisal' if employees engage in Sec[.] 7 activity." No such threat is implied here.

[23] Several amici cite *Parexel*, supra, in support of finding a stand-alone misclassification violation. In that case, the Board found that an employer violated Sec. 8(a)(1) by discharging an employee who had not yet engaged in Sec. 7 activity as "a pre-emptive strike to prevent her from engaging in activity protected by the Act," and specified that "[w]hat is critical . . . is not what the employee did, but rather the employer's *intent* to suppress protected concerted activity." Id. at 518–519 (internal quotation omitted; emphasis added). As discussed above, if an employer's decision to classify its employees as independent contractors was intended to suppress union or other protected activity, the Board may find that the employer violated the Act. However, Edge and the amici in support of a stand-alone misclassification violation argue that an employer's misclassification of its employees as independent contractors violates Sec. 8(a)(1) regardless of the employer's motive or intent. Thus, *Parexel* does not support their theory.

The States rely on *Parexel* to propose that an employer violates Sec. 8(a)(1) when it purposefully misclassifies its employees. The States do not clearly explain what constitutes a purposeful misclassification, but they argue that in the present case, Velox's purposeful intent to misclassify its drivers as independent contractors is "evident from the lack of circumstances upon which it could reasonably have concluded that its drivers were anything other than statutory employees." While the Board may find that an employer violated the Act by classifying its workers as independent contractors to interfere with or suppress their union or other protected activities, we will not infer an employer's motive solely from the strength or weakness of the case that the employer presented to establish independent-contractor status.

We express no view as to the soundness of the *Parexel* "pre-emptive strike" theory.

[24] We agree with our colleague that the determination of whether a misclassification would reasonably tend to interfere with employees' exercise of their Sec. 7 rights should be made from the perspective of employees, but we disagree with her opinion regarding what employees would reasonably perceive. When viewed from employees' perspective, an employer's communication of its legal opinion that its workers are independent contractors, in the absence of any ongoing union or other protected activities and without expressly invoking the Act or mentioning union or other protected activities, simply would not reasonably tend to interfere with employees' exercise of their Sec. 7 rights.

Further, we reject the dissent's inflammatory contention that an employer-imposed contract—like the "Independent Contractor Agreement" that Velox required Edge and the other drivers to sign—stating

We additionally find that important legal and policy concerns weigh against finding a stand-alone misclassification violation.[25] First, to form a legal opinion as to its workers' status under the Act, an employer has the unenviable task of applying the common-law agency test. The conclusion to be drawn from the application of that test may be far from self-evident. As the Supreme Court has stated, "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." *United Insurance*, 390 U.S. at 258. An employer must consider all 10 of the common-law factors found in the Restatement (Second) of Agency § 220, with no one factor being decisive. Further complicating matters, the Board's independent-contractor analysis is dependent on the particular factual circumstances presented, and employers cannot necessarily rely on Board precedent that may appear to present similar circumstances on the surface, as "the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors." *Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982). Moreover, reasonable minds can, and often do, disagree about independent-contractor status when presented with the same factual circumstances. For example, Board members regularly reach different conclusions when faced with questions concerning independent-contractor status,[26] and reviewing courts often disagree with the Board's application of the common-law agency test and deny enforcement of Board decisions finding employee status.[27]

Independent-contractor determinations are difficult and complicated enough when only considering the Act, but the Act is not the only relevant law. An employer must consider numerous Federal, State, and local laws and regulations that apply a number of different standards for determining independent-contractor status. Unsurprisingly, employers struggle to navigate this legal maze. Further, in classifying its workers as independent contractors, an employer may be correct under certain other laws but wrong under the Act—which is all the more reason why it would be unfair to hold that merely communicating that classification is unlawful.

Moreover, once a classification determination is made by the employer, it *must* be communicated to its workers. An employer must first inform its workers of their classification status before it can intelligently discuss other facets of their business relationship. Further, as discussed above, the common-law test includes consideration of whether the parties believed that they were entering into an independent-contractor relationship. An employer must communicate its belief that its workers are independent contractors to satisfy that factor. If the Board were to establish a stand-alone misclassification violation, it would penalize employers for taking this step whenever the employer's belief turns out to be mistaken.

In light of these considerations, the Board would significantly chill the creation of independent-contractor

that the signatory worker is an independent contractor is "functionally equivalent to a 'yellow-dog' contract," i.e., a contract obligating a statutory employee to refrain from union membership or engaging in union or other protected activities. The "Independent Contractor Agreement" does not even mention the Act or union or other protected activities, let alone require the signatory worker to expressly agree to refrain from engaging in those activities. Moreover, one of the factors relevant to determining independent-contractor status is "[w]hether or not the parties believe they are creating the relation of master and servant," Restatement (Second) of Agency § 220(i), and an independent-contractor agreement bears on that factor as evidence that the parties did *not* so believe. Thus, whenever an employer uses an independent-contractor agreement and turns out to be mistaken—and independent-contractor determinations are among the most difficult and disagreement-prone that the Board is called upon to make—our colleague would brand it with the most shameful label in the lexicon of traditional labor law. Such overreaching refutes itself.

[25] Our dissenting colleague accuses us of "protecting the power of *employers* to structure working relationships to their benefit" (emphasis in original) at the expense of employees' Sec. 7 rights. To the contrary, we have already explained why an employer's misclassification, standing alone, neither coerces nor interferes with employees' exercise of their Sec. 7 rights. We discuss the legal and policy concerns below to demonstrate that it would not only be contrary to the Act to find a stand-alone misclassification violation, but that the negative consequences that would result further caution against finding such a violation. Moreover, the dissent's assumption that only employers benefit from independent-contractor arrangements ignores the reality that there are good reasons why an individual might *prefer* to be an independent contractor, and it disregards that Charging Party Edge *herself* preferred to be an independent contractor and protested against being treated as an employee.

[26] See, e.g., *SuperShuttle*, 367 NLRB No. 75, slip op. at 12–15, 23–29 (majority found that employer's franchisee-drivers were independent contractors; Member McFerran dissented); *FedEx*, 361 NLRB at 621–625, 642 (majority found that employer's drivers were statutory employees; Member Johnson dissented); *Lancaster Symphony Orchestra*, 357 NLRB at 1763–1766, 1767–1769 (majority found that employer's musicians were statutory employees; Member Hayes dissented); *Arizona Republic*, 349 NLRB 1040, 1043–1046, 1046–1047 (2007) (majority found that employer's newspaper carriers were independent contractors; Member Liebman dissented); *St. Joseph News-Press*, 345 NLRB 474, 478–483, 485–486 (2005) (majority found that employer's newspaper carriers were independent contractors; Member Liebman dissented); *Slay Transportation*, 331 NLRB at 1293–1294, 1296–1297 (majority found that employer's drivers were statutory employees; Member Brame dissented).

[27] See, e.g., *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127–1128 (D.C. Cir. 2017); *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305, 1311–1314 (11th Cir. 2016); *FedEx Home Delivery*, 563 F.3d at 498–504; *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858–861 (D.C. Cir. 1995); *North American Van Lines v. NLRB*, 869 F.2d 596, 600–604 (D.C. Cir. 1989); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 920–925 (11th Cir. 1983); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 357–360 (9th Cir. 1975).

relationships by holding that an employer's misclassification of its employees as independent contractors, standing alone, is a per se violation of the Act. Any decision by an employer to classify its workers as independent contractors would subject the employer to a potential unfair labor practice charge, and with it the possibility of protracted litigation—even if it is ultimately determined that the employer was correct. To avoid this risk, employers may decide to forgo entering into or continuing independent-contractor relationships. Perhaps that is the goal of some proponents of a stand-alone misclassification violation. We do not share it. More importantly, we do not believe Congress intended to chill such relationships. In the Taft-Hartley amendments, Congress excluded independent contractors from the definition of "employee" in Section 2(3) of the Act. It did so in response to the Board's and the Supreme Court's more expansive interpretation of the definition of "employee" in the early years of the Act. See *SuperShuttle*, supra, slip op. at 9. Thus, Congress sought to preserve independent-contractor relationships. The Act, as stated in Section 1, was intended to "eliminate the causes of certain substantial obstructions to the free flow of commerce," not to create new obstructions to the formation of legitimate business relationships.

Moreover, the Supreme Court has stated that an employer "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981). Creating a stand-alone misclassification violation would fly in the face of the Court's edict. Given the uncertainties that beset independent-contractor determinations, if the Board were to establish a stand-alone misclassification violation, an employer that classifies its workers as independent contractors would most assuredly *not* have a sufficient degree of certainty that the Board would not later label its communication of that legal opinion to its workers an unfair labor practice. Therefore, we will continue to treat an employer's independent-contractor determination and communication of it to its workers as a legal opinion protected by Section 8(c).[28]

We also agree with the General Counsel, the Respondent, and like-minded amici that establishing a stand-alone misclassification violation would improperly shift the burden of proof in unfair labor practice cases. Section 10(c) of the Act places the burden on the General Counsel to establish by a preponderance of the evidence that the respondent engaged in an unfair labor practice. See also *Spectrum Health–Kent Community Campus v. NLRB*, 647 F.3d 341, 347 fn. 5 (D.C. Cir. 2011) ("The Board's General Counsel bears the burden of proving a violation of the NLRA by a preponderance of the evidence."). Determining whether an employer has violated Section 8(a)(1) of the Act involves a two-step inquiry. First, if employee status is in dispute, the Board must determine if the workers at issue are employees covered by the Act. If they are, the Board then determines if the employer interfered with, restrained, or coerced them in the exercise of their Section 7 rights. By establishing a stand-alone misclassification violation, the Board would condense this two-step inquiry into the threshold issue of employee status, as the employer would be strictly liable if the Board finds that it misclassified its workers. What is more troubling is that this would also shift the burden from the General Counsel to prove that the employer violated Section 8(a)(1) to the employer to prove that it did not. As the party asserting independent-contractor status, the employer has the burden to establish that status. See *BKN*, 333 NLRB at 144. Thus, if the General Counsel alleged that an employer misclassified its workers as independent contractors and therefore violated the Act under the proposed stand-alone misclassification theory, he would not have the burden of proving that the workers were employees. Rather, the General Counsel could simply *allege* employee status, and the employer would have the burden of proving that the workers were independent contractors, which would effectively place on the employer the burden of proving that it did not violate the Act. This would be contrary to Section 10(c) of the Act.[29]

[28] We readily acknowledge that some employers' misclassification of individuals as independent contractors may be intentional rather than mistaken. The General Counsel in this case has presented no evidence to suggest that Velox's misclassification of its drivers was intentional. As previously stated, if the General Counsel can prove the misclassification was intended to interfere with Sec. 7 rights, most notably the right to organize, an 8(a)(1) violation can be found. But in many, if not most cases, intentional misclassification is designed to interfere with rights under other Federal and State statutes involving an employer's tax, social security, and overtime obligations to employees. While we do not condone such employer misconduct, it does not, without more, warrant finding a stand-alone 8(a)(1) violation.

[29] Our dissenting colleague proposes that where the complaint alleges only a stand-alone misclassification violation, the Board could require the General Counsel to establish that the allegedly misclassified workers are in fact employees and not independent contractors. We reject her proposal, as it would arbitrarily shift the burden of proving independent-contractor status depending on the circumstances and, in any event, would not fully address our concerns articulated above. First, her proposal would require placing the burden to establish independent-contractor status on different parties in different types of cases. When the complaint alleges only a stand-alone misclassification violation, the dissent would shift the burden to the General Counsel to prove that workers are not independent contractors. But apparently, the dissent would continue to place the burden of proving independent-

Finally, we agree with the General Counsel, the Respondent, and like-minded amici that establishing a stand-alone misclassification violation would have far-reaching implications for the Board's treatment of other statutory exclusions. Neither Charging Party Edge nor the amici supporting a stand-alone misclassification violation have explained how the rationale for finding such a violation would not apply equally to an employer's misclassification of its employees as supervisors or any other category of workers excluded from the Act's coverage. We do not believe that the rationale for finding a stand-alone misclassification violation could be limited, in any principled manner, to independent-contractor misclassifications alone, and the implications of extending it to other statutory exclusions are significant.[30] The Charging Party and supporting amici have no real answer for this, other than to say that those exclusions are not currently before us. That answer will not do.

Even if misclassification, standing alone, does not violate the Act, the General Counsel, Charging Party Edge, and the AFL–CIO argue that Velox's misclassification of its drivers as independent contractors still violated Section 8(a)(1) here. Although they frame their theories slightly differently,[31] they all essentially argue that Velox's misclassification of its drivers as independent contractors became coercive when Velox discharged Edge for raising group complaints regarding this issue. They contend that unless Velox is ordered to reclassify its drivers, the drivers will be chilled from raising similar complaints or engaging in other protected activity regarding their misclassification out of fear that they will suffer the same fate as Edge. We agree with the judge that Velox violated Section 8(a)(1) by discharging Edge, and we do not dispute that Velox's unlawful discharge of Edge may chill its other drivers from engaging in protected activity, particularly regarding their misclassification. However, absent extraordinary circumstances warranting special remedies, the Board has long regarded its notice-posting remedy as sufficient to dispel the chilling effect of employers' unfair labor practices. See, e.g., *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940) (explaining that the notice's declaration "that the company would cease and desist from hampering, interfering with and coercing them in selection of a bargaining agent, which the Board found the company had done successfully in the past, was essential if the employees were to feel free to exercise their rights without incurring the company's disfavor"); *J. Picini Flooring*, 356 NLRB 11, 12 (2010) ("[Notices] help to counteract the effect of unfair labor practices on employees by informing them of their rights under the Act and the Board's role in protecting the free exercise of those rights. They inform employees of steps to be taken by the respondent to remedy its violations of the Act and provide assurances that future violations will not occur."); *Chet Monez Ford*, 241 NLRB 349, 351 (1979) ("[T]he Board long ago determined that the posting of a remedial notice for a 60-day period—subsequent to its Decision containing the unfair labor practice findings—is necessary as a means of dispelling and dissipating the unwholesome effects of a respondent's unfair labor practices."), enfd. mem. 624 F.2d 193 (9th Cir. 1980). We do not find it necessary to create a new misclassification violation to remedy the chilling effect of Velox's unlawful discharge of Edge.[32] Instead, as the Board has done for the entirety of its existence, we will order—in addition to the standard remedies due Edge for her unlawful discharge, including reinstatement and backpay—a notice-posting remedy to combat the chilling effect of the unlawful discharge.[33]

contractor status on the employer when the complaint alleges that the employer has unlawfully misclassified its employees *and* "taken any other action that would be unlawful if the workers had employee status." In the latter circumstance, the employer would still have the burden of proving that it did not violate the Act by classifying its employees as independent contractors, contrary to Sec. 10(c) as explained above.

[30] For example, in representation cases, disputes over particular workers' supervisory status under Sec. 2(11) are typically resolved through ballot challenges; such disputes do not typically result in a rerun election. If misclassification of employees as supervisors violated Sec. 8(a)(1), however, then the Board would potentially have to set aside representation elections in any consolidated C- and R-case proceeding where, in the context of an organizing drive, an employer asserts incorrectly (and post-petition) that particular workers are supervisors, unless the violation is de minimis. See *Airstream, Inc.*, 304 NLRB 151, 152 (1991) ("A violation of Sec[.] 8(a)(1) found to have occurred during the critical election period is, a fortiori, conduct which interferes with the results of the election unless it is so de minimis that it is 'virtually impossible to conclude that [the violation] could have affected the results of the election.'") (quoting *Enola Super Thrift*, 233 NLRB 409, 409 (1977)), enfd. mem. 963 F.2d 373 (6th Cir. 1992).

[31] As stated above, the General Counsel has proposed that an employer's misclassification is unlawful when the employer actively uses it to interfere with Sec. 7 activity, while Edge and the AFL–CIO have proposed that a misclassification becomes unlawful in the context of other related violations of the Act. Edge expressed support for the General Counsel's "active use" theory in her brief in response to the amici's briefs.

[32] The General Counsel also argues that Velox's reaffirmance of the drivers' putative independent-contractor status in response to Edge's protected complaints constituted active use of the misclassification to interfere with Sec. 7 rights. However, it would not be appropriate for us to find a misclassification violation to eliminate the chilling effect of conduct that the General Counsel did not specifically allege to be unlawful.

[33] We do not accept that in any circumstances, an employer's misclassification itself will become unlawful because of other related conduct by the employer. If the General Counsel determines that the related conduct is unlawful, then he should allege it as a violation of the Act; if the Board agrees, it will provide the appropriate remedy as it

In sum, we decline to hold that an employer's misclassification of its employees as independent contractors, standing alone, violates the Act. Further, we do not find that Velox's misclassification here violated the Act on the basis that it occurred in the context of a related violation of the Act or that Velox actively used it to interfere with the drivers' Section 7 rights. Accordingly, we reverse the judge's finding that Velox violated Section 8(a)(1) of the Act by misclassifying its drivers as independent contractors, and we will dismiss that allegation of the complaint.

always has done. The creation of a new misclassification violation is not necessary to remedy the chilling effect of other unlawful conduct.

Our dissenting colleague argues that the situation here is analogous to cases where the Board has found that the application of an otherwise lawful work rule to restrict Sec. 7 activity renders the rule itself—and not just its application—unlawful. See, e.g., *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 7–8 & fn. 18 (2016). Although our colleague has correctly described extant precedent, we have previously expressed willingness to reconsider that precedent in a future appropriate case. See *Desert Cab, Inc. d/b/a ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 fn. 1 (2019) (Chairman Ring and Member Kaplan, concurring); *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 1 fn. 4 (2018) (Member Emanuel, concurring). In any event, we find that precedent inapplicable here. As stated above, we agree with the judge that Velox's decision to discharge Edge was unlawfully motivated by Edge's protected concerted complaints that Velox was treating its drivers as employees. However, because the evidence does not show that Velox cited or referred to Edge's classification as an independent contractor or its "Independent Contractor Agreement" with Edge as the basis for discharging her, we cannot find that Velox applied the misclassification to restrict her Sec. 7 activity. Accordingly, the dissent fails in her attempt to draw an analogy between this case and those where the Board has found work rules unlawful because employers applied them to restrict Sec. 7 activity. Cf. *North West Rural Electric*, supra, slip op. at 1 (finding unlawful two policies where the employer's manager testified that the discharge of an employee for a protected Facebook post was pursuant to those policies, and its supervisor told the employee at the time of the discharge that the employer "had 'policies in effect' prohibiting his Facebook post"); *Cayuga Medical Center at Ithaca, Inc.*, 365 NLRB No. 170, slip op. at 2 (2017) (finding unlawful an employer's customer service rules where the employer cited them as the basis for issuing an unlawful verbal warning to an employee and subsequently referenced its customer service requirements during a meeting in which it unlawfully demoted that employee), enfd. mem. per curiam 748 Fed. Appx. 341 (D.C. Cir. 2018); *Medco Health*, supra, slip op. at 7–8 (finding unlawful a dress code provision prohibiting apparel containing "confrontational," "insulting," or "provocative" statements where the employer characterized the message on a union shirt as "insulting" and "confrontational" in instructing an employee to remove the shirt). Thus, Velox's unlawful discharge of Edge does not compel a separate finding that Velox's misclassification of its drivers as independent contractors is also unlawful. Simply finding that the discharge violated the Act and ordering the traditional remedies for such a violation (including reinstatement, backpay, and a notice posting) will suffice to remedy the Respondent's unlawful conduct.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Velox Express, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by discharging employee Jeannie Edge on August 21, 2016.

3. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that Velox engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Velox violated Section 8(a)(1) by discharging employee Jeannie Edge, we shall order Velox to offer her full reinstatement to her former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order Velox to compensate Jeannie Edge for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, Velox shall be required to compensate Jeannie Edge for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, we shall order Velox to remove from its files any reference to the unlawful discharge of Jeannie Edge, and to notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.[34]

[34] Charging Party Edge and the International Brotherhood of Teamsters have proposed, and our dissenting colleague apparently agrees, that, even if a misclassification is not itself a violation of the Act, the remedy for a violation that involves misclassified employees should

ORDER

The National Labor Relations Board orders that the Respondent, Velox Express, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any of its employees for engaging in and/or planning to engage in protected concerted activities, such as challenging the Respondent's assertion that they are independent contractors.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Jeannie Edge whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Jeannie Edge for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Memphis, Tennessee and Little Rock, Arkansas facilities copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 21, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

include reclassification of the misclassified employees. We decline to adopt this proposal. We have held that it is not an unfair labor practice to misclassify an employee as an independent contractor. Thus, misclassification does not violate the Act, and no remedy is warranted for lawful conduct. Put somewhat differently, in the absence of a misclassification violation, an order to reclassify a misclassified worker would represent an extraordinary remedy, and extraordinary remedies are warranted only "when the [r]espondent's unfair labor practices are so numerous, pervasive, and outrageous that such remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found." *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) (internal quotations omitted), enfd. 400 F.3d 920 (D.C. Cir. 2005). Accordingly, it is not the case that whenever an employer commits a violation against a misclassified employee, a reclassification remedy is necessary to fully dissipate the coercive effects of the violation. Our dissenting colleague argues that a reclassification remedy would not represent a "special" remedial measure in these circumstances. However, as discussed above, the Board has traditionally used its notice-posting remedy to dissipate any lingering chilling effect of an employer's violations, including when the employer has committed violations against misclassified employees. See, e.g., *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 7–10 (ordering the Board's traditional remedial measures—including reinstatement, backpay, and a notice posting—to remedy the employer's unlawful discharge of an employee who was misclassified as an independent contractor). We find that the Board's notice-posting remedy—which will assure the drivers that in the future Velox will not discharge them for raising protected complaints about their classification or interfere with their exercise of Sec. 7 rights in any like or related manner—will dissipate fully the coercive effects of Velox's unlawful discharge of Edge. A reclassification remedy is therefore neither necessary nor appropriate.

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint allegation involving the Respondent's maintenance of the allegedly unlawful "Non-Disparagement" provision is severed and retained for further consideration, and that the complaint is dismissed insofar as it alleges any other violations of the Act not specifically found.

In addition, NOTICE IS GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before September 12, 2019 (with affidavit of service on the parties to this proceeding), why the complaint allegation involving the Respondent's maintenance of the allegedly unlawful "Non-Disparagement" provision should not be remanded to the administrative law judge for further proceedings consistent with the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017), including reopening the record if necessary. Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C. August 29, 2019

_____
John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, concurring in part and dissenting in part.

Independent contractors, as opposed to employees, have no rights under the National Labor Relations Act. The employer here imposed a contract on its drivers insisting that they were independent contractors. But, in fact, the drivers *were* employees, and they *did* have labor-law rights. When the employer fired one of the drivers, Jeannie Edge, for complaining about her misclassification, it violated the Act. The majority correctly finds that the drivers were statutory employees, even under the too-strict test the Board now uses.[1] And the majority is correct in finding that the discharge of Jeannie Edge was unlawful.[2] But the majority gets two important issues wrong. First, reaching out to decide an issue unnecessarily—whether misclassifying employees as independent contractors, standing alone, violates the Act—the majority fails to recognize that misclassification itself chills the exercise of statutory rights. Second, the majority fails to fully remedy the violation it does find. By not requiring the employer to treat all of its drivers as statutory employees and to notify them of that fact, the drivers are left in the dark about their protected status and chilled from exercising their rights.

The Respondent, in firing Edge, unlawfully applied its misclassification of the drivers to her in a manner that violates the Act: it dismissed her for protected concerted activity, which would have been lawful if she had been a contractor, but was unlawful because she was an employee. Thus, because the misclassification in this case was enforced in a manner that violated the Act, the Board does not need to reach the question whether misclassification, standing alone and in the absence of any such enforcement, would also violate the law.[3]

But, even if this question were properly presented, the majority's finding that misclassification alone does not violate the Act is wrong. As I will explain, the issue turns on whether the misclassification reasonably tends to chill employees from acting on their statutory rights—such a chilling effect occurs whenever employees reasonably would believe that exercising their rights would be futile or would lead to adverse employer action. That standard is satisfied where (as here) an employer tells its employees that it has classified them as independent contractors, sending a clear message that (in the employer's view) they have no rights under the Act. And it is certainly satisfied where (as here again) an employer makes its employees sign an independent-contractor agreement

[1] See *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), overruling *FedEx Home Delivery*, 361 NLRB 610 (2014). Although I adhere to my dissent in *SuperShuttle* (slip op. at 15), I agree with the majority that the Respondent has not established that its drivers are independent contractors under the standard adopted in that decision.

[2] On this point, there is no need to rely on the judge's finding that the General Counsel, as part of his initial *Wright Line* burden, established a "nexus" between Edge's protected activity and the Respondent's decision to discharge her. It is well settled that there is no separate "nexus" element in the General Counsel's initial burden; to establish that protected activity was a motivating factor in a discharge decision, the General Counsel needs only to establish protected activity by the employee, employer knowledge of that activity, and employer animus toward protected activity. See *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015); *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011).

[3] Today's decision continues an unfortunate pattern of reaching out to decide an issue not necessary to resolve a case before the Board, whether to set precedent (as here) or to overrule it, as in *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110, slip op. at 12, 15 (2019) (Member McFerran, dissenting); and *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156, slip op. at 36, 37–38 (2017) (Members Pearce and McFerran, dissenting), vacated 366 NLRB No. 26 (2018).

accepting the employer's classification decision. In that situation, employees reasonably would believe that they risk being fired if they act inconsistently with the agreement—such as by asserting statutory rights that belong only to protected employees (and not to independent contractors).

Even if the majority were right about the misclassification issue, they concede that there is a violation here with respect to the discharge of Edge, and they are wrong about how to remedy it. Edge was not unique: all of the Respondent's drivers, not just Edge, were statutory employees (and not independent contractors). It follows that the Respondent must be ordered to classify *all* the drivers as statutory employees for purposes of the National Labor Relations Act and to notify them that the Act protects them. Without those remedies, Edge's fellow drivers are just as vulnerable as she was, if they engage in activity protected by the Act. "You really should just drop the employee crap," Edge was told, and now other drivers might feel compelled to obey.

I.

The National Labor Relations Act protects employees—but only employees. Section 2(3) of the Act expressly excludes from coverage "any individual having the status of an independent contractor."[4] Therefore, independent contractors—like other individuals expressly excluded under Section 2(3), such as agricultural laborers—have no right under Section 7 of the Act, 29 U.S.C. § 157, to form, join, or assist unions for purposes of collective bargaining, or to engage in concerted activity for mutual aid or protection.[5] Consequently, employers are free to discipline or dismiss independent contractors for engaging in those activities. It is tempting, then, for employers not only to create legitimate independent-contractor relationships, but also to deliberately misclassify employees as independent contractors. As the U.S. Commission on the Future of Worker-Management Relations (the blue-ribbon Dunlop Commission) observed nearly 25 years ago:

> [C]urrent tax, labor and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations. For example, an employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, workers' compensation, and health insurance, will save the administrative expense of withholding, and will be relieved of responsibility to the worker under labor and employment law. . . . Many low-wage workers have no practical choice in the matter.

U.S. Commission on the Future of Worker-Management Relations, *Final Report* 62 (1994) (available at www.digitalcommons.ilr.cornell.edu). Board precedent reveals that employers have deliberately imposed purported independent-contractor status on employees and discharged them to frustrate protected activities.[6] But even an employer's mistaken classification of employees as independent contractors can lead to serious violations of the Act, including unlawful discharges.[7] The majority does not and cannot deny these workplace realities.

Not surprisingly, the Board, has never had occasion to address the "pure" misclassification issue taken up today. It is hard to imagine how a case limited to that issue would arise, unless an employee sought the equivalent of a declaratory judgment from the Board—the Board's determination of employee status—*before* engaging in Section 7 activity. Far more likely are unfair labor practice cases triggered by an employer's *application* or *enforcement* of misclassification against employees—its denial to them of rights under the Act that are properly available to employees. That fact is demonstrated by the examples cited above. And this case, too, illustrates the point, as it does not involve misclassification without more, but rather misclassification *with* more: an employ-

[4] 29 U.S.C. § 152(3).

[5] See, e.g., *Porter Drywall*, 362 NLRB 7 (2015) (affirming Regional Director's exclusion of certain employees from a petitioned-for unit upon finding that they were independent contractors); *Stark Brothers Nurseries & Orchards Company*, 40 NLRB 1243 (1942) (dismissing complaint alleging that the employer unlawfully refused to bargain with its production and maintenance employees' designated union upon finding that those employees were agricultural laborers within the meaning of Sec. 2(3) of the Act).

[6] See, e.g., *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1051 (1979) (finding that the employer unlawfully converted its delivery drivers from employees to independent contractors and discharged those drivers who refused to accept the change in order to stymie the drivers' union organizing effort), enfd. 633 F.2d 1054 (3d Cir. 1980); *Houston Chronicle Publishing Co.*, 101 NLRB 1208, 1211–1215 (1952) (finding that the employer's reclassification of its employees as independent contractors was unlawfully motivated by and intended to defeat their union organizing activities), enf. denied 211 F.2d 848 (5th Cir. 1954).

[7] See, e.g., *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 560 & fn. 9 (7th Cir. 1993) (employer acts at its peril in taking action against individuals the employer believes to be supervisors, but who are later found to be employees); *NLRB v. Save-On Drugs, Inc.*, 728 F.2d 1254, 1256 (9th Cir. 1984) (no defense to unlawful discharges that employer believed—and Regional Director had accepted its belief—that alleged discriminatees were supervisors where Board later found that they were statutory employees).

er's reprisal against an employee for concertedly challenging the Respondent's misclassification of its drivers.

II.

The facts here are straightforward. The Respondent provided medical courier services for a client that performed laboratory testing of medical specimens for facilities such as doctors' offices, clinics, and hospitals. The Respondent's drivers collected those specimens and transported them.

Jeannie Edge was one of the Respondent's drivers. When she began driving for the Respondent in June 2016, she was made to sign an "Independent Contractor Agreement," declaring her status as a "Contractor" and providing: "Contractor acknowledges that she is an independent contractor and is not an employee of Company."

In July and August, however, Edge began discussing with other drivers a number of work-related issues, including some of the Respondent's policies and mandates that seemed to be inconsistent with the drivers' classification as independent contractors. Edge testified that she was "kind of chosen as the spokesperson for the group because [she] was bold enough to speak up," and other drivers were not willing to risk losing their jobs. In a July 25 email to Manager Carol Christ, Edge asserted that the Respondent's treatment of the drivers was inconsistent with their designation as independent contractors. Christ clearly was not happy with Edge's ongoing challenges to the Respondent's treatment of its drivers. A few weeks later, Christ told Edge, via text message, "You really should just drop the employee crap."

In August, the Respondent issued a "Route Driver Agreement" to the drivers that imposed further restrictions on the manner in which they carried out their assignments. Edge discussed with at least one other driver whether they should sign the "Route Driver Agreement," and told that driver that she would not sign the agreement until she discussed it with an attorney, because she did not want to mistakenly make herself an employee. Manager Christ then told Edge that she needed to sign and return the "Route Driver Agreement," but Edge refused to do so. Instead, Edge told Christ, too, that she would not sign the agreement until consulting with an attorney.

Two days after Edge refused to sign the "Route Driver Agreement," the Respondent fired her. The Respondent claimed that it had to terminate Edge because its client company would not allow Edge to continue servicing its contract, accusing her of dropping a specimen in a parking lot. But the judge discredited this claim, finding instead that it was a pretext to cover the Respondent's real reason for discharging Edge: her statutorily-protected complaints.

III.

Even if the Respondent's misclassification of its drivers as independent contractors was a good-faith mistake, it was plainly unlawful insofar as the Respondent actually effectuated its misclassification by discharging Edge for her protected activity. The best analogy here is with an employer's application of an otherwise lawful work rule to restrict Section 7 activity.[8] It is clear under longstanding Board law that the application of an otherwise lawful rule to restrict protected activity is unlawful, and renders the rule unlawful. The situation here is no different. Both the violation and the remedy should be clear: the Respondent must be ordered to rescind its misclassification of the drivers and inform them of their rights under Section 7 of the Act.[9] All the Board needs to decide in this case, then, is that the Respondent unlawfully applied the independent-contractor classification and that this violation—which touched all the misclassified (and so vulnerable) drivers—must be redressed. That should be the end of this case.[10]

IV.

Instead, the majority goes on to address the pure misclassification issue—as if Edge had never been discharged—broadly holding "that an employer does not violate the Act by misclassifying its employees as independent contractors." This holding rests primarily on the majority's view that misclassification does *not* have a reasonable tendency to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. There can be no such infringement, the majority says, because an employer's mere communication to its employees that it has deemed them independent contractors "does not expressly invoke the Act," "does not prohibit the workers from engaging in Section 7 activity," and "does not threaten them with adverse consequences for

[8] See, e.g., *Medco Health Solutions, Inc.*, 364 NLRB No. 115, slip op. at 9–10 (2016) (finding that employer unlawfully applied dress code policy to restrict Sec. 7 activity).

[9] See id., slip op. at 9–10 & fn. 18.

[10] The majority concedes that a facially neutral employer work rule is unlawful if it is applied to interfere with protected activity. But the majority mistakenly refuses to apply that principle here. Even if the Independent Contractor Agreement did not explicitly threaten retribution against employees for exercising rights under the Act, once the Respondent discharged Charging Party Edge for challenging the misclassification, the threat was clear. Thus, the discharge is comparable to an unlawful application of a neutral work rule. When a neutral work rule is applied unlawfully, the Board finds the rule itself unlawful, because employees' reasonable interpretation of the rule will necessarily be informed by the employer's unlawful application of the rule. Likewise, here, after Edge was discharged, the employees would understand that the Independent Contractor Agreement embodied a restriction on the exercise of Sec. 7 rights.

doing so, or promise them benefits if they refrain from doing so." In the majority's view, a violation of the Act arises only if "the employer responds with threats, promises, interrogations, and so forth . . . but not before." At bottom, the majority sees misclassification as just the employer's communication of its "legal opinion" that its workers are independent contractors, an "opinion" the majority says is protected by Section 8(c) of the Act. This view is demonstrably incorrect as a legal matter, and it certainly finds no support in the flawed policy arguments the majority asserts.

A.

The fundamental flaw in the majority's position is clear. It fails to recognize the chilling effect of "pure" misclassification on employees' exercise of statutory rights. Instead, the majority focuses on protecting the power of *employers* to structure working relationships to their benefit, including by avoiding legal obligations to their workers. Protecting employer power is certainly not a primary concern of the National Labor Relations Act—which was enacted because employers had too *much* power.[11] Section 1 of the Act declares that the policy of the United States is to protect "the exercise by *workers* of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[12] Taking the proper statutory perspective—by focusing on the rights Congress gave *employees*—reveals the defects in the majority's position.

Start with an easy example: If an employer *expressly* told statutory employees that they were not covered by the Act and therefore could not engage in protected activities, then that statement indisputably would be unlawful.[13] Likewise, if an employer made statutory employees sign individual contracts expressly providing that they would not engage in union or other protected activities, then that contract, too, would be unlawful on its face.[14] An employer-imposed independent-contractor agreement like the one here is no different as a practical or legal matter from such unlawful statements and contracts because its likely consequences for employees are the same.[15]

The Respondent's "Independent Contractor Agreement"—which declared each driver to be a "Contractor" and required her agreement "that she is an independent contractor and is not an employee of Company"—did not *expressly* state that drivers were excluded from the Act's coverage or recite that drivers were agreeing not to engage in Section 7 activities. But the agreement clearly *implied* that drivers had no rights under the Act, and that is unlawful as well. In considering that implicit message, we must remember the Supreme Court's admonition about applying the Act:

> Any assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting" and must "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

The Board has consistently done what the Court demands in analyzing the lawfulness of employer communications in analogous circumstances. Thus, the Board has recognized that the potential chilling effect of employer-imposed work rules must be considered *from the perspective of employees* to properly determine whether the rules would reasonably tend to deter employees from engaging in protected activity.[16] And, perhaps even

[11] Congress expressly found that the "*inequality of bargaining power* between employees . . . and employers . . . tends to aggravate recurrent business depressions," pointing to the "denial by some employers of the right of employees to organize and the refusal by some employers to accept . . . collective bargaining . . . as burdening or obstructing commerce. . . ." Act, Sec. 1, 29 U.S.C. § 151 (emphasis added).

[12] Id. (emphasis added).

[13] See, e.g., *Wal-Mart Stores, Inc.*, 340 NLRB 220, 223, 225 (2003) (employer unlawfully told statutory employees—whom the employer had deemed supervisors—that they could not participate in union activities and that it would be unlawful for them to do so).

[14] See generally *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (holding that employer violated Sec. 8(a)(1) of the Act by entering into individual employment contracts with its employees under which the employees relinquished their statutory rights); *J.I. Case v. NLRB*, 321 U.S. 332, 337 (1944) (holding that contract, "may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act," regardless of whether contract was imposed in response to protected activity).

[15] The Respondent's "Independent Contractor Agreement" was functionally equivalent to a "yellow-dog" contract, which all must agree is unlawful. A "yellow-dog" contract is any agreement by which statutory employees obligate themselves to refrain from union membership or union activity. See *M & M Affordable Plumbing, Inc.*, 362 NLRB 1303, 1308 fn. 10 (2015); *The Developing Labor Law*, p. 1–21 (7th ed. 2017). The Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 et seq., rendered "yellow-dog" contracts unenforceable, and the Board has consistently found all variations of such contracts unlawful to maintain. See *Barrow Utilities & Electric*, 308 NLRB 4, 11 fn. 5 (1992). The Respondent's "Independent Contractor Agreement" forced the drivers to forego their Sec. 7 rights because it required them to disavow employee status.

[16] In *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), the Board explained that to determine whether the maintenance of certain work rules violates Sec. 8(a)(1) of the Act, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Sec[.] 7 rights." As the Board further explained in *Lutheran Heritage Village-Livonia*, 343

more closely on point, the Board has found that an employer, which had misclassified its employees as independent contractors, violated Section 8(a)(1) of the Act by informing its employees that "it would never accept a 'boss/employee relationship,'" because that statement would reasonably be understood by employees to "indicate[] that union organizing would be futile."[17] So here, the "Independent Contractor Agreement" must be viewed from the perspective of the drivers, who were subjected to it by the Respondent, on whom they depended for work.

That compels a finding that the Respondent's employees would reasonably have understood that agreement—with its requirement that each driver acknowledge "that she is an independent contractor and is not an employee of Company"—as excluding them from the protected status of "employees" under the Act. The agreement certainly did not contain any qualifying language suggesting the employees retained their statutory rights.[18] Rather, the "Independent Contractor Agreement" unambiguously defined the Respondent's relationship with its drivers as a contractual one. That left the drivers no hope of asserting their rights under the Act. In this respect, the Respondent effectively told the drivers that "it would never accept a 'boss/employee relationship,'" and as a result they would have reasonably understood "that union organizing would be futile."[19] But that is not all. The drivers here would also have understood that if they acted inconsistently with the agreement, by engaging in protected activity open only to employees, the Respondent would act accordingly against them.[20] And, of course, that is exactly what the Respondent did in discharging Edge. That discharge surely confirmed the clear implication of the agreement and further chilled employees from attempting to exercise their statutory rights.[21] Contrary to the majority, it is immaterial that the Respondent did not "expressly invoke the Act" or expressly "prohibit" Section 7 activity. The Respondent's unqualified statement to its drivers that they were independent contractors was enough.[22] The Act explicitly excludes "independent contractors" from coverage. For purposes of administering the Act, then, the Board should assume that a reasonable employee who is aware of her rights under the Act is *also* aware of the independent-contractor exclusion. Thus, even without expressly referring to the Act, the Respondent's classification of its drivers as independent contractors effectively communicated to them that attempting to exercise their statutory rights would not only be futile, but also inconsistent with

NLRB 646, 647 (2004), that determination is to be made from the perspective of employees reading the rules. Although the Board recently overruled *Lutheran Heritage Village-Livonia* in part in *Boeing Company*, 365 NLRB No. 154 (2017), the Board nevertheless at least still declared its adherence to that basic principle: "[W]hen interpreting any rule's impact on employees, the focus should rightfully be on the employees' perspective. This is consistent with established Board and court case law, and it is especially important when evaluating questions regarding alleged interference with protected rights in violation of Sec[.] 8(a)(1). As the Board stated in *Cooper Thermometer Co*., 154 NLRB 502, 503 fn. 2 (1965), Sec[.] 8(a)(1) legality turns on 'whether the employer engaged in conduct, which, it may reasonably be said, *tends to interfere with the free exercise of employee rights under the Act.*'" (emphasis added in original).

[17] See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6 (2015).

[18] Cf. *Prime Healthcare Paradise Valley*, *Inc.*, 368 NLRB No. 10, slip op. at 6 (2019) (holding that unqualified requirement that employees arbitrate "all claims or controversies for which a federal or state court would be authorized to grant relief" would reasonably lead employees to conclude that they could not file and pursue charges with the Board).

[19] See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6 (2015). Consistent with *Sisters' Camelot*, longstanding precedent demonstrates that the Board will find a violation of Sec. 8(a)(1) where employers make statements conveying that protected activity is futile or inconsistent with employment or continued employment. See, e.g., *Shamrock Foods, Inc.*, 366 NLRB No. 117, slip op. at 1 (2018) (statement that employer would not have to agree to anything in collective bargaining was unlawful threat of futility); *Equipment Trucking Co.*, 336 NLRB 277, 277 (2001) (employer statement to employee that the employer's president would run the company "any way she wanted, and if [the employee] didn't like it, find another job," threatened discharge because it conveyed that the employer considered union and other protected activity incompatible with continued employment).

The majority contends that *Sisters' Camelot* and similar cases are different because the threats in those cases were made in response to union activity. But whether statutory employees are told upon hire, or upon engaging in union activity, that their employer has classified them as independent contractors, the implicit threat—and resulting chilling effect—is apparent. Even if an employer's threat made in direct response to union activity is *more* coercive than an employer's standing communication to its employees that they are independent contractors, the latter communication remains coercive enough to violate the Act. Further, the majority's view ignores that Sec. 7 protects not just union activity, but protected concerted activity generally. Statutory employees may forego engaging in that protected activity as well, having been told by their employer that they are *not* employees.

[20] Indeed, the contract itself spelled out exactly what employees should expect if they violated its terms. Section 12 explained that if the employee violated or threatened to violate the agreement, the Respondent could seek damages, a restraining order, and any and all other rights and remedies that may be available, all of which would be cumulative and not mutually exclusive.

[21] See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 314 (2014), enfd. 629 Fed. Appx. 33 (2d Cir. 2015) (by unlawfully discharging employees for participating in an online discussion about the employer and its owners, the employer provided the employees with an authoritative indication of the scope of its prohibition against inappropriate discussions and confirmed they should construe its rule against inappropriate discussions to include such protected activity).

[22] Cf. *Prime Healthcare Paradise Valley*, above, 368 NLRB No. 10, slip op. at 6 (even absent mention of the Act or the Board, employer's unqualified requirement that employees arbitrate "all claims or controversies for which a federal or state court would be authorized to grant relief" would reasonably lead employees to conclude that they could not file unfair labor practice charges).

keeping their jobs.[23] Discharging Edge reinforced that message, but the chilling tendency would have been present in any case.[24]

B.

Contrary to the majority, there are no countervailing statutory considerations that weigh against finding the Respondent's misclassification of its drivers unlawful. The majority argues that when an employer classifies its employees as independent contractors, "it forms a legal opinion regarding the status of those workers, and its communication of that legal opinion to its workers is privileged by Section 8(c) of the Act." But this argument rests on a misapplication of Section 8(c) and on a mistaken view that misclassification does not adversely affect employees.

Under Section 8(c), the "expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . *if such expression contains no threat of reprisal or force or promise of benefit*."[25] This provision is clearly inapplicable when an employer misclassifies its employees and communicates that misclassification in an independent-contractor agreement imposed on employees. The imposition of such an agreement is not the "expressing of any views, argument, or opinion," in the Act's words. Rather, it is employer conduct that directly affects statutory employees, the terms and conditions of their employment, and their exercise of statutory rights. Such conduct is not protected speech.[26]

Nor was the Respondent's misclassification of its drivers—even if a good-faith mistake—an innocuous assertion of a "legal opinion." Although offered in a different context, the Board's discussion of asserted "legal positions" in *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962), is apt here. In *Dal-Tex*, the question was whether an employer's preelection statements that it would not bargain with the union were objectionable. In prior *representation* cases, the Board had excused such statements as "merely an expression of the Employer's 'legal position.'" But in prior *unfair labor practice* cases the Board had found that similar statements fell outside the "free speech" protection of Section 8(c) and, instead, constituted unlawful interference, restraint, and coercion of employees' Section 7 rights. The *Dal-Tex* Board abandoned this difference in treatment, opting to apply the stricter, unfair labor practice approach to all cases, explaining:

> To adhere to those [representation] decisions would be to sanction *implied threats couched in the guise of statements of legal position*. Such an approach is too mechanical, fails to consider all the surrounding circumstances, and is inconsistent with the duty of the Board to enforce and advance the statutory policy of encouraging the practice and procedure of collective bargaining by protecting the full freedom of employees to select representatives of their own choosing.

Id. at 1787 (emphasis added). The same criticisms apply to the majority's view that the Respondent was merely asserting a "legal position." Here, again, we follow the Supreme Court's admonition to put ourselves in the position of the drivers subject to the Respondent's power. For reasons explained, an employer's communicated misclassification of its employees *is* coercive; as reasonably understood by employees, it implies "[a] threat of reprisal" if employees engage in Section 7 activity, and thus it enjoys no protection under Section 8(c).[27]

C.

The majority's policy arguments similarly lack merit. The majority argues that determining whether workers are statutory employees or independent contractors is hard for employers and that finding an unfair labor practice when employers are mistaken would discourage them from establishing bona fide independent-contractor relationships. This argument turns the Act on its head. As shown, the Act is intended to protect employees' ex-

[23] Although the "Independent Contractor Agreement" did not reference the "Act," "Sec[.] 7," "unions," or "concerted activity," the requirement that each driver expressly acknowledge that she was "not an employee of the Company" effectively told the driver she could not both retain her position and engage in statutorily-protected activity, as noted above.

[24] Cf. *Lafayette Park*, above, 326 NLRB at 825 (where employer-imposed work rules are likely to have a chilling effect on Sec. 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement).

[25] 29 U.S.C. § 158(c) (emphasis added).

[26] The notion that the establishment of terms and conditions of employment might be shielded as protected "speech" has been rejected by the Board and the courts, including the Supreme Court. In *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 63 (2006), the Court rejected a similar free-speech argument as follows:

> Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. See *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct").

Likewise, the Respondent's "Independent Contractor Agreement" mandating independent-contractor status only was not mere "speech."

[27] The majority suggests that *Dal-Tex* is distinguishable because the employer there asserted its "legal opinion" in the context of an organizing campaign. But, as explained above, that is a distinction without a difference from the perspective of employees, such as the Respondent's drivers.

ercise of certain rights, not to preserve employers' power to structure the workplace as they wish, even if it infringes on employees' rights. The burden of any additional care employers may need to take in classifying employees is outweighed by the need to prevent the chilling of Section 7 rights where a purported independent-contractor relationship is actually an employment relationship.[28]

That does not mean, of course, that the Act is hostile to the establishment of bona fide independent-contractor relationships.[29] The Act is not intended to encourage or discourage any particular type of working relationship. But the Act expressly covers employees, and it expressly excludes independent contractors. Where misclassification has occurred, deliberately or not, the Act is being evaded and its purposes, frustrated. For the majority to ignore that reality is "inconsistent with the duty of the Board to enforce and advance the statutory policy."[30]

Even accepting that a pure misclassification violation could, as a practical matter, risk discouraging the formation of some bona fide independent-contractor relationships, this potential must be accepted if the Board is to fulfill its statutory mandate. This case certainly does not stand alone in that respect. It is well established that exclusions from statutory coverage are to be construed narrowly. Section 2(3) commands that "[t]he term 'employee' shall include *any* employee."[31] As noted by the Supreme Court, the "breadth of §2(3)'s definition is striking: the Act squarely applies to 'any employee.'"[32] That section is circumscribed only by the narrowly defined categories of workers expressly exempted from the Act's coverage.[33] And, the Board, with Supreme Court approval, has consistently construed those exemptions narrowly, to fulfill Congress' expressed intent that statutory employees not be denied the protections of the Act.[34] The need to achieve that objective simply far outweighs the risk that some employers might think twice before seeking to establish excluded relationships.[35]

D.

Finally, the majority contends that recognizing a stand-alone misclassification violation would improperly relieve the General Counsel of his burden of proving an unfair labor practice because, once it is determined that an employer *has* misclassified employees, the employer would be "strictly liable." And, according to the majority, the General Counsel "could simply *allege* employee status, and the employer would have the burden of proving that the workers were independent contractors, which would effectively place on the employer the burden of proving that it did not violate the Act." These concerns, however, are either vastly overstated or easily addressed.

First, the majority's strict liability argument fails to recognize that many cases may present additional circumstances that might dispel the otherwise coercive message of a communicated misclassification. For example, an employer may have misclassified employees as independent contractors, but nevertheless informed employees in some manner that they retain their rights under the Act. Similarly, an employer may have advised

[28] From a remedial perspective, moreover, it should be noted that the "harm" suffered by mistaken employers would consist of a cease-and-desist order and a notice posting fully informing employees of their Sec. 7 rights, hardly draconian measures.

[29] The majority contends that I am ignoring the benefits to workers of independent contractor status, and notes that Edge herself preferred an independent contractor relationship. The relative advantages and disadvantages of *bona fide* independent contractor arrangements is not the issue presented here, however. That Edge as an individual preferred independent-contractor status, and may have even willingly signed the Respondent's "Independent Contractor Agreement," in no way frees the Respondent to violate the law by telling workers properly classified as employees that they have no rights under the Act. See generally *J.I. Case*, above, 321 U.S. at 337 (even individual employment contracts voluntarily entered into by employees "may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act").

[30] *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 (1962).

[31] 29 U.S.C. § 152(3) (emphasis added).

[32] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); see also *NLRB v. Town & Country*, 516 U.S. 85, 91–92 (1995); *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189–190 (1981); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–186 (1941).

[33] See *Sure-Tan*, above, 467 U.S. at 891–892.

[34] See, e.g., *FedEx Home Delivery*, 361 NLRB 610, 618 (2014) (exclusion of "independent contractors" should be construed narrowly), enf. denied on other grounds 849 F.3d 1123 (D.C. Cir. 2017), and overruled on other grounds by *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (endorsing narrow interpretation of exclusion of "agricultural workers").

[35] Relatedly, the majority expresses concern that establishing a stand-alone misclassification violation would have far-reaching implications for the Board's treatment of other statutory exclusions. In particular, the majority criticizes Charging Party Edge and supporting amici for failing to explain how "the rationale for finding such a violation would not apply equally to an employer's misclassification of its employees as supervisors or any other category of workers excluded from the Act's coverage." As Edge and her supporting amici have pointed out, those other categories of workers are not at issue in the present case. But, more importantly, if the Board were to find that the rationale for finding a stand-alone misclassification as to independent contractors does extend to other excluded categories of workers, then that would be primarily a function of the statute as written by Congress. The Board's duty to enforce the Act accordingly would remain unless and until Congress were to address the supposed negative consequences feared by the majority. See generally *Carpenters (Klassen & Hodgson, Inc.)*, 81 NLRB 802, 806 (1949) ("Manifestly, the Board, as the administrative agency entrusted with the enforcement of the Act, cannot assess the wisdom of, or rewrite or engraft exceptions upon, legislation which represents the considered judgment of Congress on a matter of serious and controversial public policy."), enfd. 184 F.2d 60 (10th Cir. 1950), cert. denied 347 U.S. 947 (1951).

employees that its classification determination is limited to specific Federal or State statutes, not including the Act. In those circumstances, and potentially others, there may be a genuine question whether employees would reasonably have been coerced by the misclassification, and the burden of persuading the Board on that point would fall upon the General Counsel.

The majority's second concern—that the General Counsel could merely allege employee status and the employer would have to prove independent contractor status—is both overstated and easily addressed. First, as a practical matter, it seems highly unlikely that the General Counsel would issue a complaint where his investigation failed to reveal substantial evidence that the relationship was *not* an independent-contractor relationship. Although any person is free to file an unfair labor practice charge, no case can proceed without an investigation by the General Counsel and his determination that the charge has merit. This statutory constraint significantly reduces the risk that employers with bona fide independent-contractor relationships will be called upon to defend those relationships.

In any event, even where the General Counsel proceeds on an allegation that an employer misclassified statutory employees as independent contractors, the Board could require the General Counsel to establish—not merely allege—the necessary predicate to finding the violation; namely, that the workers were in fact employees. This would be consistent with the basic rationale underlying the misclassification violation: the chilling effect conveyed when an employer *tells* employees that they are independent contractors. Indeed, whether the employer can establish that they actually are independent contractors is beside the point.[36]

In sum, there are good, precedent-based reasons to find that an employer's communicated misclassification of its employees violates Section 8(a)(1) of the Act, and no good statutory or policy arguments to find otherwise.

V.

It is obvious that the majority's erroneous view on the stand-alone misclassification issue has led it to a fundamental error in remedying Edge's discharge. The majority appropriately orders the Respondent to offer Edge reinstatement, to make her whole, and to post a notice stating, among other things, that it will not discharge its drivers for engaging in concerted activity, "such as challenging our assertion that you are independent contractors." The majority, however, refuses to order the Respondent to reclassify its drivers as "employees," and to notify them that they, in fact, *are employees*, for purposes of the National Labor Relations Act. Incredibly, the majority simultaneously concedes that the Respondent's "unlawful discharge of Edge may chill its other drivers from engaging in protected activity, particularly regarding their misclassification." The majority is mistaken in thinking that the usual notice posting will suffice to dispel that chilling effect. It will not.

It is clear that the Respondent's unlawful discharge of Edge likely will have a chilling effect on all of the Respondent's drivers who, like Edge, were required to sign the "Independent Contractor Agreement," but have been found to be statutory employees. To fully dispel that chilling effect, the Respondent must notify the drivers that they actually are employees covered by the Act and treat them as such going forward.[37] It is not enough to inform the drivers that the Respondent will not discharge them for engaging in concerted activities or for "challenging its assertion" that they are independent contractors. These limited assurances will leave the drivers in the dark about their actual status as "employees" with the full panoply of rights under the Act. That is particularly so given that (under the majority's approach) the "Independent Contractor Agreements" declaring each driver to be a contractor and "not an employee of the Company" will remain in place. Only by ordering the Respondent to formally reclassify the drivers as employees for purposes of the Act and to notify them of this change will the chilling effect of Edge's unlawful discharge be fully undone. These additional remedial measures are not "special," as the majority calls them. They are what is minimally necessary to undo the effects of the Respondent's unlawful conduct as found by the Board.

In this respect, the majority should draw guidance from *Lily Transport Corp.*,[38] in which the Board found it necessary to modify its usual remedial order and notice to appropriately remedy the employer's unfair labor practices. In that case, the Board found that the employer had maintained, in its employee handbook, several rules that reasonably would have chilled employees from exercising their Section 7 rights. Shortly before the unfair labor practice hearing, however, the employer had re-

[36] To be sure, as the majority recognizes, the Board has consistently and properly held that the party seeking to exclude individuals from statutory coverage bears the burden of proof. See *Porter Drywall*, 362 NLRB 7, 9 (2015) (employer seeking to exclude workers as "independent contractors" bears the burden of establishing that status); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (same). But in stand-alone misclassification cases—where representation is not at issue and the employer has not taken any other action that would be unlawful if the workers had employee status—the Board could rationally conclude that the employer is not seeking to "exclude" workers from coverage.

[37] This "reclassification" would have no necessary bearing on the Respondent's classification or treatment of the drivers for *other* purposes.

[38] 362 NLRB 406 (2015).

vised its handbook to delete those rules and had distributed the revised handbook—although without any notice or explanation to employees of the deletions. The judge ordered the usual remedies requiring the employer to rescind the offending rules and to provide inserts for the handbook informing employees that the unlawful rules had been rescinded. But the rescission and insertions were not needed because the employer already had rescinded the rules and revised its handbook. What remained necessary, however, was adequate notice *to the employees* that the employer *had* rescinded the rules and that the employees were no longer subject to them. Accordingly, the Board ordered the employer to post a notice that, in addition to the standard provisions, explained that the Board had found the challenged rules unlawful and that the employer had issued a revised handbook deleting the rules. These remedial measures were necessary to ensure that going forward no employee would be chilled from engaging in Section 7 activity on the mistaken belief that the rules remained in effect. Similarly, here, the Respondent must reclassify the drivers as "employees" and tell them it has done so, lest any one of them continue to believe that she is an independent contract without rights under the Act.

VI.

This should be a straightforward case, but the majority has made it unnecessarily complicated—and has made bad law as a result. We all agree that the Respondent's drivers were statutory employees, that the Respondent had misclassified them as independent contractors, and that the Respondent then unlawfully discharged a driver for engaging in protected concerted activity. It would have been enough here to find the discharge unlawful and to remedy it fully, by undoing the effects of that violation not just on Edge, but on all of the drivers whom the Respondent had also misclassified as independent contractors. Instead, the majority reaches out to decide the pure misclassification issue—and gets it wrong, which in turn leads the majority to provide a remedy that falls short. When an employer misclassifies its employees as independent contractors and informs them of that status, not least by making them sign a binding agreement, the chilling effect on labor-law rights is undeniable. We should recognize that effect and redress it, not ignore it in the misguided view that the National Labor Relations Act cares more about empowering employers than about protecting employees. Accordingly, I dissent.

Dated, Washington, D.C. August 29, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you for engaging in and/or planning to engage in protected concerted activities, such as challenging our assertion that you are independent contractors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeannie Edge whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Jeannie Edge for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jeannie Edge, and WE WILL, within 3

days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

VELOX EXPRESS, INC.

The Board's decision can be found at www.nlrb.gov/case/15-CA-184006 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Linda Mohns, and *Kyle McKenna, Esqs.,* for the General Counsel.

Benjamin C. Fultz and *E. Rachael Dahlman Warf, Esqs. (Fultz Maddox Dickens PLC),* of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Little Rock, Arkansas on July 24 and 25, 2017. Jeannie Edge filed the initial charge in this matter on September 12, 2016. The General Counsel issued the complaint on March 31, 2017, and an amended complaint on April 13, 2017.

The General Counsel alleges that the Respondent, Velox Express, violated the Act in discharging the Charging Party, Jeannie Edge, and in misclassifying its drivers as independent contractors, as opposed to employees. He also alleges that Respondent has promulgated unlawful rules and a discriminatory route driver agreement.

As explained below, I conclude that Jeannie Edge was an employee of Respondent and that Respondent violated the Act in discharging her. I also find that Respondent violated the Act in misclassifying some other drivers as independent contractors.

With regard to the allegedly violative rules, I conclude that Respondent's non-disparagement policy violates the Act, but that it did not, by Carol Christ, violate the Act in sending an email to employees stating that all pay issues, complaints, concerns etc. should go through her and no one else. Finally, I find that Respondent did not violate the Act by issuing the route drivers agreement.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates a courier service.[2] It has headquarters in Indiana and maintains a facility in Memphis, Tennessee, where it annually performs services valued in excess of $50,000 in states other than Tennessee and purchases and receives goods in Memphis valued in excess of $50,000 from outside of Tennessee. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

This case largely involves Respondent's operations in Arkansas and to some extent western Tennessee. Velox has a contract with Associated Pathologists, LLC (PathGroup), which is a diagnostic medical laboratory company, to collect medical samples from facilities such as doctor's offices, clinics and hospitals. Respondent delivers these specimens to PathGroup's laboratory in Nashville, Tennessee for analysis. Several drivers pick up samples in Arkansas, which are consolidated in Little Rock for transport by Velox's "long haul" drivers to Velox's Memphis facility. Then the samples are further consolidated for shipment by Velox to the PathGroup laboratory in Nashville.

Jeannie Edge worked for Velox picking up samples in Arkansas. Prior to working for Velox, Edge worked for Lab Express, which was replaced by Velox as the contractor collecting PathGroup specimens.

In 2016 Velox entered into independent contractor agreements with Edge and other drivers who collected the samples. These contracts, drafted by or for Velox, are "take or leave it" documents. There was no true negotiation or opportunity to negotiate on the part of the driver/courier.

Essentially, the drivers (also called medical couriers) were offered specific routes to service and compensation was based on the size of the route. So far as this record shows, drivers could not have more than one route that operated at the same time. Thus, they were unable to make a profit by hiring drivers

[1] Tr. 155, line 7: should read, "the relevance of "rather than "letters."

[2] Respondent describes itself as a logistics company. It states it is not just a courier service because it designs routes for its customers. However, there is no credible evidence that Respondent is anything other than a courier service insofar as its contract with PathGroup is concerned. Indeed, the contract between PathGroup and Velox specifies that Velox will provide "courier services;" it does not mention any other type of service Velox is to render to PathGroup, R. Exh. 9.

PathGroup provided Velox with routes it had already designed; Velox then hired drivers to run those routes, Tr. 32, 185–187, 336. Larry Lee testified that Velox made many suggestions and changes to those routes. However, there is no evidence for this other than his self-serving testimony, which I decline to credit. So far as PathGroup is concerned, Velox is a courier company and advertises itself as such, GC Exh. 41.

[3] While Respondent contends that it is not the employer of its drivers, it concedes that it has other employees, such as its dispatchers, Tr. 339–340.

to operate a route that they were not driving personally. If they could not drive their route on a given day, they had to ask permission from Velox's management for a day off. Velox then selected a substitute driver.

A driver's compensation could change if stops were added or subtracted to their route. Drivers had no responsibility or ability to develop business for Velox. They were not precluded from working for other businesses at the same time they worked for Velox. Jeannie Edge, for example, worked as an independent contract phlebotomist when not driving her assigned route for Velox. However, it is unclear whether drivers could work for someone other than Velox instead of covering their Velox routes. So far as this record is concerned, Velox drivers' ability to work for other businesses was no different than the opportunity for any employee to moonlight.

A threshold issue in this case is whether the drivers were independent contractors or employees, since the Act accords rights to the latter but not the former. Edge worked for Respondent from June 22, to August 21, 2016, at which time Respondent either terminated her contract or discharged her, depending on how you view her status. Prior to working for Velox, Edge worked for Lab Express, which Velox replaced as the contractor collecting medical samples for PathGroup's Nashville, Tennessee laboratory. During the period Edge drove for Velox, other drivers who worked for Respondent in Arkansas were Brett Woods, Jill Cross and Marilyn, whose last name does not appear in this record.

In June 2016, Edge executed an independent contractor agreement with Velox. Edge performed this job in her privately owned vehicle, purchased her own insurance and maintained her car at her own expense. Velox did not withhold income tax and did not provide health insurance to drivers. Velox couriers were not covered by Velox's workers compensation insurance policy either.

Velox promulgated many rules specifying how the drivers/couriers were to perform their jobs (GC Exhs.3, 5 and 11). When Edge needed a day off, she contacted Velox for permission. Respondent obtained a substitute driver. Drivers were generally not allowed to choose a substitute. In some cases it appears they could do so with the approval of Velox. This was a change from Lab Express' practice in which the driver was responsible for obtaining a substitute.

On July 24, Carol Christ, Velox's manager in Memphis emailed Velox's PathGroup drivers. She advised them that they must answer phone calls from Velox's dispatcher and respond to her emails. Christ also told drivers they must not leave lids off the Styrofoam containers and keep the Memphis storage areas neat.

In response to what she considered micromanaging by Christ, Edge began to complain that Velox treated the drivers as employees, rather than as independent contractors. Christ was aware that this was an issue with other drivers as well, Tr. 53-54, 235–236. In an email dated July 25, Edge told Christ that another driver had already said he was going to report the situation to the Internal Revenue Service. Christ forwarded Edge's email to Larry Lee, a Velox vice-president, who was Respondent's only witness in this case (GC Exh. 4 (reverse side)) and is the person who terminated Edge.

On August 1, Christ sent an email to the drivers/couriers announcing a number of Velox policies, including the following:

> Line hauls MUST run on time every time therefore DRIVERS must be in the office on time.
>
> If you go early you risk missing stops. If you arrive at a pick up location and there are no specimens in the box, you should always KNOCK ON THE DOOR! It is your responsibility to make 100% sure that no one is inside finishing up specimens or running late.

(GC Exh. 5.)

On August 12, 2016, Edge collected specimens from the Compassionate Women's Clinic in Nashville, Arkansas (located in southwest Arkansas). A PathGroup representative called Velox on August 15 and said a specimen had been found in the parking lot at that facility. Respondent's manager in the Memphis, Carol Christ, sent Edge back to retrieve this specimen.

On about August 15, Velox issued a "Route Driver Agreement" to its drivers,[4] (GC Exh. 11), which it required each driver to sign.[5] That document states as follows:

> **Route Driver Agreement**
> **1. Scheduled pickup times**
> **a. Do not start your route early**
> **b. Do not pickup from scheduled stops early**
> **c. Always check both the lockbox and inside**
> **d. Do not leave a stop that always has specimens, call your dispatcher so they can contact PathGroup.**
> **e. Always take a picture of your LB ticket in the empty lockbox and log the ticket number on your route sheet.**
> **2. Frozen Specimens**
> **a. Frozen specimens MUST be completely covered in dry Ice Inside your frozen cooler**
> **b, Do not take the green pouch unless in a sealed pink sheet bag**
> **3. Will Calls**
> **a. You are to verbally call in your pick up on ALL will call orders.**

[4] The complaint alleges that Respondent violated the Act by requiring drivers to sign the route driver agreement, complaint paragraphs 8(d), (f) and 9. I see no evidence that supports this allegation. The timing between Edge's July 25 email and promulgation of route driver agreement is insufficient to establish discriminatory motive. An equally plausible explanation is that the drivers route agreement was promulgated in light of recent service failures on the part of the Velox drivers.

[5] R. Exh. 24 is the same document. Larry Lee testified that he drafted this document and then sent it to Kent Tidwell at PathGroup for review. According to Lee, Tidwell told him his draft was perfect. Regardless, many of the specific requirements in this document emanate from Velox; not PathGroup.

b. You are to NEVER leave a will call until the dispatcher releases you.
c. Will Call users will always have something to pickup
4. Shoulder Bag
a. You are required to use a shoulder bag on ALL pickups, no exception.
b. Specimens go straight from the lockbox to your shoulder bag.
c. Always double check the area around the lockbox before returning to your vehicle.
5. Route Sheet
a. Your route sheet should be neat and complete.
b. Double check your route sheet before entering the consolidation area.
6. Consolidation
a. You are not to enter the consolidation area until asked to.
b. You are to double check that your totes, shoulder bag, coolers, and vehicle are empty before departing the consolidation office. You will then sign the Clear Tote log and have another Velox employee or IC sign as your verifier.
7. Line Hall,
a. Line haul drivers are to get food, gas, etc. before departing with the line haul.
b. Line haul drivers are to immediately contact their dispatcher if they are delayed for any reason.
c. Line haul drivers are expected to drive straight to GRM with no stops unless absolutely necessary.
d. You are to have someone at GRM acknowledge that your totes are empty prior to departing
8. Penalty
a. Drivers agree that they are subject to a $150.00 fine and or removal from the route If it is determined that through your negligence or failure to follow the standard operating procedure results in a service failure.

Acknowledgement
I have read and understand the above policy

Also on August 15, Respondent required Edge and other route drivers to participate telephonically in a meeting/conference call with Velox's Memphis Manager, Carol Christ.[6] A few days later, Christ demanded that Edge send her a copy of her driver's license and social security card so that Respondent could perform a background check. During that exchange, Christ texted Edge that, "You should really drop the employee crap. Had you simply done as asked yesterday [send Christ a picture of her SSN card and driver's license] it should have been done" (GC 13, pg. 00121).

On Friday, August 19, Christ demanded that Edge sign Velox's driver route agreement that night (GC Exh. 13, p. 00132). In a telephone call later that evening, Edge told Christ that she had consulted with an attorney and would sign the agreement on Monday if her attorney advised her to do so (Tr. 70–71, GC Exh. 14). Edge drove her route on Saturday August 20, and Sunday, August 21. On Sunday night, Christ texted Edge to inform her that her contract with Velox had been terminated.[7]

Larry Lee, Respondent's vice-president, testified that Kent Tidwell, a PathGroup manager, called him on August 15, about the specimen found in the Compassionate Care parking lot. According to Lee, Tidwell was very angry and told him that he did not want the driver who was responsible to handle PathGroup specimens any more. PathGroup was Velox's only customer in the Little Rock area. Lee testified that he had a telephone conversation with Edge on August 15, in which she denied leaving the specimen in the Compassionate Care parking lot.[8] She told him that the paperwork in the bag containing the specimen was not wet, which it should have been had it been left outside over the weekend.

Lee testified further that he found Edge's explanation not to be credible and that on August 15, after the call, he directed Memphis manager Christ to terminate Edge's contract.[9] Lee did not explain why he found Edge's explanation incredible. He did not investigate the circumstances surrounding the specimen found on August 15 despite the fact some of these lent some support to Edge's claim (Tr. 363). Lee also did not explain why Christ waited 6 days to terminate Edge's contract after he had told her to do so, or why Christ allowed Edge to continue to handle PathGroup samples for another 6 days.

Normally, if there was a discrepancy between the number of specimens left by the Clinic and the number picked up the courier, it would be noticed immediately. Nobody reported any such discrepancy with regard to the August 12 collection at the Compassionate Care Clinic (GC Exh. 17, pp. 2–3). Blood specimens were drawn at Compassionate Care on Saturday and

[6] Respondent notes that not all drivers attended this meeting. However, GC Exh. 9 makes it clear that attendance was mandatory. Respondent apparently did not enforce this requirement.

[7] Christ, a manger still employed by Velox, did not testify, thus Edge's account of this phone call is uncontradicted and credited.

[8] Obviously, this conversation occurred after Edge retrieved the specimen.

[9] Other errors admitted to by Edge are irrelevant to this case. Respondent's position is clearly that it was forced to terminate her contract due demands by PathGroup's Kent Tidwell arising out of the August 12 incident. There is no evidence that Tidwell was aware of Edge's prior mistakes when he allegedly demanded she be barred from handling PathGroup samples. Lee testified that when he talked to Tidwell and decided to bar the driver from handling PathGroup samples, he didn't even know that Edge was the driver responsible for the August 12 pick-up at Compassionate Care, Tr. 327.

Sunday, August 13 and 14; thus, it is quite possible that the specimen found on August 15, was not in Compassionate Care's lock-box when Edge collected their samples on August 12 (Tr. 357–360).

Credibility Determinations

I do not find Lee's testimony regarding the reasons he terminated Edge's contract to be credible. Thus, I conclude that Velox did not terminate Edge's contract at the behest of PathGroup. I find this explanation to be a pretextual reason for the termination of her contract/discharge.

Curiously, Lee testified that he would have terminated Edge's contract even if he found her explanation of what happened on August 12 credible (Tr. 327). This, in of itself, is compelling evidence that Respondent's stated reason for terminating her is pretextual.

Moreover, there is no documentation supporting his claim that Tidwell demanded that the driver who serviced Compassionate Care on August 12 not handle PathGroup samples again. Tidwell advised his subordinates on August 15 that "this driver has been terminated" (R. Exh. 28). However, there is nothing to suggest that this was done at his behest. Neither Tidwell, nor any other representative of PathGroup testified in this proceeding.[10] Nothing in this record explains the circumstances surrounding Tidwell's August 15 email, which is clearly inaccurate, since Edge was not terminated until August 21, and there are many indications in this record that Respondent had no intention of terminating her on August 15.

For one thing, Edge continued to handle PathGroup samples for almost a week after Tidwell communicated with Lee. Secondly, the communication between Carol Christ, Velox's manager in Memphis, and Edge does not indicate any intention of terminating her contract prior to August 20. On August 17–18, Christ demanded that Edge send her photos of her license and social security card, a demand that makes no sense if Velox had already decided to terminate Edge's contract, (GC Exh. 13). What is also significant in this exchange is the animus demonstrated by Christ towards Edge's assertions that Velox is treating her like an employee rather than as an independent contractor.

On August 20, Christ demanded Edge sign a route driver agreement and return it immediately. This is also a demand that makes no sense if Velox had already decided to terminate Edge's contract. Christ, who is still Velox's manager in Memphis, did not testify in this proceeding.

Edge consulted a private attorney about the route driver agreement and inadvertently informed Christ of this fact on or about August 19. Shortly thereafter Larry Lee had a conversation with Christ. On the evening of Sunday, August 21, Christ informed Edge that he independent contract agreement was being terminated.

The record is also devoid of any explanation as to why Tidwell would demand that the driver in the August 12 incident be barred from handling PathGroup samples and not make a similar demand in many other incidents in which Velox employees failed to pick up or mishandled PathGroup samples.

Lee testified that he often received complaints from Tidwell and Tidwell's subordinate, Mike Fuller, PathGroup's Director of Market Operations, about service failures in the West Tennessee/Little Rock Market (Tr. 292–293, 305–306, 308). Respondent did not terminate the contract of any driver servicing PathGroup in that market other than Jeannie Edge, Tr. 11.

An example of misconduct by another driver is as follows: a Velox driver ruined 3 samples on or about June 28, 2016, requiring that the specimens be redrawn. PathGroup demanded a $450 credit from Velox but made no demands about the driver. Velox did nothing with respect to this driver other than counseling (R. Exh. 25, Tr. 318). By way of contrast, the specimen left at the Compassionate Women's Care Clinic on August 12, was not ruined.

Another example of misconduct by another driver(s) occurred just prior to a mandatory meeting for Velox drivers on August 15. One or more Velox drivers in Tennessee failed to collect specimens left in a lockbox (Tr. 54-55, 354). Velox took no action against that driver(s).[11]

A third example is that in early August, 3 Velox drivers mishandled PathGroup specimens (GC Exh. 7). They were fined $150 for their errors, but there is no evidence that PathGroup requested that they be barred from handling PathGroup specimens in the future (Tr. 377–378).

Due to Lee's lack of credibility on the reasons for Edge's termination, I decline to credit any of his testimony unless corroborated by documentary evidence or other reliable evidence of record.[12] In this regard, I note that much of his testimony on significant matters was elicited by leading questions from Respondent's counsel.

Analysis

The Independent Contractor Issue

Sections 7 and 8 of the National Labor Relations Act accord rights and protections to employees. Section 2(3) specifically excludes individuals having the status of independent contractor from the definition of "employee." A party seeking to exclude individuals performing services for another from the protection of the Act, has the burden of proving independent contractor status, *BKN* 333 NLRB 143, 144 (2001). The Board applies a multi-factor analysis in determining whether particular individuals are employees or independent contractors. No single factor is controlling.

Very often the line between "employee" and "independent contractor" is a fine one. However, in determining whether individuals fall on one side or another, one must keep in mind the admonition of the United States Supreme Court that, "ad-

[10] Lee also testified that Tidwell ordered him to look into how the sample was left on August 12, Tr. 322; this he did not do—other than talking to Edge and deciding that he did not believe her. Lee's lack of curiosity supports my inference of discriminatory motive in terminating Edge's employment, *K & M Electronics,* 283 NLRB 279, 291 (1987).

[11] Respondent states at p. 12 of its brief that the meeting on August 15 was "a direct result of Edge's mishandling a patient's medical specimen." This has not been established. In fact the record strongly suggests that meeting was called due a number of service failures by several Velox employees.

[12] I also do not take Edge's testimony at face value—unless corroborated by other reliable evidence-or uncontradicted by Respondent.

ministrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach and that the NLRA and similar statutes are "to be narrowly construed against employers seeking to assert them," *Holly Farms Corp. v. NLRB,* 517 US 392, 399 (1996). Thus, where it is a "close call," agencies and courts should err on the side on finding employee status.

The Board has addressed the "independent contractor" vs. "employee" in a number of cases, such as the recent decision in *Pennsylvania Interscholastic Athletic Association, Inc.,* 365 NLRB No. 107 (July 11, 2017). In that case, the Board discussed its leading cases on this issue, including *Fed Ex Home Delivery,* 361 NLRB 610 (2014) enf. denied 849 F. 3d 113 (D.C. Cir. 2017); *Big East Conference,* 282 NLRB 335 (1986) enfd. 836 F. 3d 143 (3d Cir. 1987); *Sisters Camelot,* 363 NLRB No. 13 (2015) and *Pennsylvania Academy of the Fine Arts,* 343 NLRB 846, 847 (2004). Since each case is very fact intensive, it is best to analyze each factor with regard to the record in this case:

(1) Extent of control by the employer

Several provisions of the drivers' independent contractor agreement are more consistent with employee status than independent contractor status. These include the drivers agreeing to submit to routine and random drug tests and the non-solicitation (in fact non-compete) provisions of the agreement (GC 2, paragraph 11, pp. 5–6). This contrasts with the situation in *Saleem v Corporate Transportation Group,* 854 F. 3d 131 (2d Cir. 2017) in which drivers could and did compete with the business they claimed was their employer.

Velox mandates the places at which the drivers collect specimens and the times at which the specimens must be collected. Drivers must not pick up samples earlier than the pick-up time required by Velox. They are also under a less precise requirement that specimens not be picked up too late because the drivers must return the specimens on time to Little Rock for consolidation and transport to Memphis. From Memphis, Velox drivers then take the samples to PathGroup's laboratory in Nashville.

Edge was not free to work when she wanted. Whenever she wanted a day off from work, she had to ask permission from Carol Christ. As mentioned previously, this was a change from the practices of Edge's previous employer, Lab Express.

Respondent's route driver agreement, set forth in detail above, shows that Velox sought to exercise a great deal of control of its drivers/couriers. The record also establishes that Carol Christ ordered Edge to return to Nashville, Arkansas to retrieve a specimen not picked up on August 12.

The drivers' contracts with Velox provided that drivers would be liable for any expense that Velox would have to bear due to their errors. PathGroup, at least on some occasions, required Velox to credit it for the damage to specimens by Velox drivers (Exh. R-25).

Drivers were required to wear a Velox shirt, khaki pants and closed-toed shoes (GC Exh. 12, Tr. 229–230). They were also required to have an Android phone.

Respondent argues that the extent of its control cannot be considered in a finding that the drivers were employees, because Velox was merely passing along PathGroup's or HIPPA's requirements. This may be true for some of the rules it imposed on drivers, but not for many others. The uniform requirement and many of the items in the route driver agreement emanate from Velox; not PathGroup or HIPPA (GC Exh. 12).

There is no evidence that PathGroup required couriers to wear Velox uniforms for example. PathGroup only required that couriers dress professionally (R. Exh. 9, pg. 4, par. g). There is no evidence that PathGroup required Velox to subject its couriers to random drug tests. Many of the mandates in the route driver agreement were initiated by Velox VP Larry Lee, not PathGroup. This can be ascertained by comparing the route driver agreement (GC Exh. 11), with the Service Agreement between PathGroup and Velox (Exh. R. 9) and PathGroup's SOP for new and sensitive clients (Exh. R. 12).

Nowhere did PathGroup mandate a $150 fine for service failures. Its contract with Velox provides that Velox will indemnify PathGroup for actual losses. However, Velox's fine could be levied in a situation in which there was no loss to PathGroup, such as a missed specimen pick-up that does not result in the specimen having to be redrawn.

I conclude this factor, establishing that Velox exercised a great deal of control over the way its driver/couriers performed their jobs, weighs heavily in favor of employee status.

(2) Whether the individual is engaged in a distinct occupation or business

Collecting medical samples is Respondent's business. Although Edge is free to work for other entities, she was not free do to so during the times she was supposed to cover her route. Edge's freedom to work for others is indistinguishable from the ability of any employee to work a second job.

Edge and other drivers are not in the courier business except insofar as they work for Velox. They are generally required to wear a shirt with a Velox logo and present themselves to the public as representatives of Velox rather than their alleged independent contractor business.

This factor favors employee status.

(3) Whether the work is usually done under the direction of the employer or by a specialist without supervision

Velox drivers work independently in completing their routes without one-on-one supervision. However, the drivers are not free to perform the job in any way they see fit. Velox cared very much how the drivers did their job as opposed to simply requiring that it be completed in a satisfactory manner. It required the job to be performed with a shoulder bag, mandated how the specimens were handled and when they were to be picked up.

Given the control exercised by Velox as to how the drivers' job was performed, this factor weighs in favor of employee status.

(4) Skill required in the occupation

Velox drivers are not highly skilled. I credit the testimony of

Jill Cross that the job requires minimal training.[13] Other evidence in the record also supports this conclusion. For example, Brett Woods testified that when Velox took over the contract in Arkansas and West Tennessee, Velox provided only an hour and a half training for him and another driver, who unlike Woods, had no prior experience as a medical courier.

A driver must know which specimens must be frozen, which must be refrigerated, and which can be kept at room temperature. A driver must also be familiar with a few uncomplicated procedures, such as using a shoulder bag when gathering samples, so that none are dropped. A driver must also be somewhat familiar with the requirements of HIPPA[14] regarding patient confidentiality and the security of medical information.

This factor favors employee status. Every person working for another person, whether an employee or independent contractor, needs to have some knowledge as to how the job is to be performed. Virtually no new employee is turned loose to perform a job for which they were just hired without some training. The level of knowledge required to be a Velox driver/courier does not rise to the level of a skill.

(5) Whether the employer or individual supplies the instrumentalities, tools, and place of work.

Velox drivers use their own vehicles to perform their tasks. They are free to use their vehicles for purposes other than Velox's business. The drivers pay for their fuel, insurance and upkeep of their vehicles. Velox provides Velox shirts, shoulder bags, Rubbermaid tubs, ticket books and a route; little else. Drivers are not required to use the equipment provided by Velox except the shirt (assuming they have been provided one).

This factor, in isolation, favors independent contractor status.

(6) Length of time for which the individual is employed

While the term of a driver's independent contractor agreement is for one year, either party may terminate the contract for any reason with one day's notice (GC Exh. 2). This is much more akin to an employment-at-will relationship than a contractual relationship in which one is hired to do a discrete task. In some more typical independent contractor situations, the relationship between the contractor and client ends when the discrete task is performed.

Nevertheless, long-term independent contractor relationships have become more common in today's "gig economy." Some of these would not pass scrutiny if the Supreme Court's admonition in *Holly Farms Corp. v. NLRB* were adhered to.

This factor favors employee status.

(7) Method of payment

The fact that the drivers are paid by the job, rather than by time usually favors independent contractor status. However, on close examination, Velox drivers' situation is more similar to an employee paid by the hour than an individual contractor paid to do a discrete job regardless of the time it takes. Drivers do not invoice Velox for time and materials; instead they are paid a fixed rate determined by Velox for their route. That rate is calculated according to the mileage and number of stops on the route.

The drivers must do their route every day, unless they call off to Respondent.[15] The time frame in which their job is to be performed is set by the pickup times at each stop on their route (they may not pick up early) and the need to have their collection samples ready for transport to Memphis in a timely fashion. In reality, the drivers' compensation is for the time spent picking up the samples, as well as completing a job.

Moreover, Respondent maintains total control over the drivers' compensation. It offers drivers a route with a set figure for payment. The driver has no ability to alter his or her compensation; they cannot collect samples from other routes and as a practical matter they cannot work for anyone else during the hours they perform their tasks for Velox.

Velox contends that drivers are able to negotiate their compensation, citing the example of David Chastain (R. Exh. 11), who asked for an increase in compensation when stops were added to his route. However, as a matter of policy, Respondent increased drivers' compensation when stops were added and decreased their compensation when stops were subtracted from a route (GC Exh. 3). Thus, it appears that Respondent merely increased Chastain's compensation in conformance with its general compensation policy.

Despite the fact that Velox drivers are nominally paid for by the job, the reality of their situation favors employee status.

(8) Whether the work is part of the regular business of the employer

This factor morphs into the same analysis as factor # 2. Collecting medical specimens is Respondent's business. The drivers do not perform any tasks for Velox that are not part of Velox's core mission.

This factor weighs heavily in favoring employee status.

(9) Whether the parties believe they are creating an independent contractor relationship

Both Velox and Jeannie Edge believed they were creating an independent contractor relationship when Edge began her tenure with Velox. However, Driver Jill Cross believed that in fact she was an employee of Velox, Tr. 219.

Velox provided Edge with a 1099, rather than a W-2 form. Respondent did not withhold her income tax or have a workers compensation policy that covered her or other drivers. Couriers were not insured in any respect by Velox.

While Respondent believed it had an independent contractor relationship with its drivers, Edge came to believe this was no

[13] At p. 24 of its brief, Respondent discusses Edge's experience prior to her employment with Velox; Cross and other drivers had no such experience.

[14] Health Insurance Portability and Accountability Act of 1996. Every employee in health care related industries is subject to HIPPA. Given the consequences of a violation of that statute, it would be surprising if any such employee did not receive some training in its requirements.

[15] At p. 29 of its brief, Respondent states that drivers are free to take off for work whenever they wish. I credit Edge's testimony at Tr. 44 that drivers had to ask Christ for permission to take a day off. Moreover, Christ's email of July 24, GC Exh. 3 (also R. Exh. 29) states that "requesting days off or calling out of work should go through me."

longer the case as Respondent increased its control over her. Moreover, Edge' subjective belief as to whether she was an employee or independent contractor is far less important than the economic realities of her relationship to Velox. A non-attorney is not in a particularly good position to understand the difference between being an employee and an independent contractor.

In light of the above, I find this factor weighs in neither direction.

(10) Whether the principal is or is not in the business

Velox is in the business of collecting medical specimens. That is the business of the drivers. This factor favors employee status.

(11) Whether the evidence shows the individual is rendering services as part of an independent business

I interpret this to be the same inquiry as to whether the individual has a significant entrepreneurial opportunity for gain or loss, *Corporate Express Delivery Systems v. NLRB,* 292 F. 3d 777, 780 (D.C. Cir. 2002). The record herein establishes that the drivers had no real opportunity to increase their "profit." Respondent offered Edge one route at a compensation rate Velox determined on the basis of mileage. Velox told her that was the only courier route available. Thus, she did not have any ability to increase the amount she received for driving for Velox. Furthermore, pursuant to the contract between Velox and PathGroup, Edge could not collect samples for PathGroup outside of her relationship with Velox (R. Exh. 9).[16]

Velox argues that drivers could increase their profit by shopping for example, for cheaper gas. That opportunity is indistinguishable from an employee's opportunity to make their wages go further by searching for the best price on gas and other commodities.[17] In *Standard Oil Co.,* 230 NLRB 967, 971 (1977), the Board noted that such costs are more or less standardized and provide no significant opportunity for drivers to influence their net compensation.

Considering all the above factors, I conclude that Jeannie Edge was an employee of Velox.

Complaint paragraph 5 (misclassification as a separate 8(a)(1) violation)

The General Counsel alleges that Respondent violated the Act in misclassifying its drivers/couriers, apart from whether or not it violated the Act in discharging Jeannie Edge. This record establishes that all Respondent's courier/drivers who pick up specimens for PathGroup out of the Memphis office, have working conditions virtually identical to those of Edge—as evidenced by Velox's requirement that they sign the route driver agreement. I find that other Velox drivers collecting PathGroup specimens out of Velox's Memphis office are employees.

By misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection.

The Independent 8(a)(1) allegations

The General Counsel alleges that Respondent violated and is violating Section 8(a)(1) by maintaining the following Non-Disparagement Provision in its Independent Contractor Agreements (GC Exh. 2, pg. 6).

During the Term and following the termination of this Agreement, regardless of the reason for such termination, Independent Contractors shall not do or say anything that a reasonable person would construe as detrimental or disparaging to the goodwill and good reputation of the Company, including making negative statements about the Company's method of doing business, the effectiveness of its business policies and practices or the quality of any of the Company's services or personnel.

The General also alleges that Respondent promulgated a violative rule when Carol Christ sent an email to the driver/couriers on July 24, 2016, (GC Exh. 3).

> The email in pertinent part states:
>
> Some of you were hired by John Willis, some were hired by me.
>
> If you work at the Memphis office, Little Rock AR, Jackson TN or Jackson MS, you are part of the Memphis branch and should report directly to me.
> Not John Willis and not Jim Gibson.
>
> Any pay issues, complaints, concerns, requesting days off or calling out of work should go through me.
> No one else.

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). As stated above, a rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; and/or (2) that the rule was promulgated in response to protected activity and/or (3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).

In *Lutheran Heritage* the Board retreated somewhat from its prior decisions in light of the decision of United States Court of Appeals for District of Columbia in *University Medical Center v. NLRB,* 335 F. 3d 1079 (D.C. Cir. 2003). In that case the Court declined to enforce the Board's decision at 335 NLRB

[16] Analysis of a courier service would be much different if a driver was allowed to own multiple routes and lease them out for a profit. They may have been the arrangement between Lab Express and its drivers. The maintenance of control by Velox over who drove its routes, which limited the ability of its drivers to "profit" from the work of other drivers is important to my finding that Velox drivers are employees.

[17] In *Standard Oil Co.,* 230 NLRB 967, 968 (1977), the Board expressed the relevant factors somewhat differently than in some recent cases. Regarding factors mentioned in that case, I would note that the drivers perform their tasks in the name of Velox; not their allegedly independent businesses and that the drivers' working arrangement with Velox appears to be permanent, so long as performance is satisfactory.

1318 (2001), regarding a rule prohibiting "disrespectful conduct." In *Lutheran Heritage,* the Board stated that it would not conclude that a reasonable employee would read a rule to apply to Section 7 activity simply because the rule *could* be so interpreted.

As to Christ's email, I find that it would not reasonably be read to prohibit employees from discussing wages, hours and working conditions with each other and seeking help on these issues from third parties (such as a union). On the contrary I find the email is more fairly read as requiring drivers to cease contacting other managers such as Willis and Gibson (Respondent's President) about pay and other issues pertaining to the drivers' working conditions and to contact Christ instead. I infer that Christ sent the email because employees were going to Willis and Gibson with their concerns, instead of her. Therefore, I dismiss complaint paragraph 7(a).

On the other hand, I find that the Non-Disparagement provision in the independent contractor agreement violates Section 8(a)(1). First of all, that provision applies to employees protected by Section 7 of the Act. By prohibiting negative statements about the Company's method of doing business, the effectiveness of its business policies and practices or the quality of any of the Company's services or personnel this provision purports to deny employees protected rights. For example, negative statements about Velox's business policies and practices would reasonably be read to include employee statements relating to company policies concerning wages, hours and other terms and conditions of employment, *Claremont Resort & Spa,* 344 NLRB 832 (2005). Employees not only have Section 7 rights to make negative statements about such matters to other employees, they may also appeal to third parties, such as the press, the public or a labor organization, in order to get such policies changed, *Kitty Clover, Inc.,* 103 NLRB 1665, 1687–1688 (1953); *Arlington Electric,* 332 NLRB 845, 846 (2000); *Emarco, Inc.,* 284 NLRB 832, 833 (1987).

Respondent violated Section 8(a)(1) in discharging Jeannie Edge

Having found that Jeannie Edge was Respondent's employee, I turn to the question of whether her employment was terminated in violation of the Act.

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging an employee because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . (Emphasis added)"

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Jeannie Edge clearly engaged in protected activity in complaining to management that she was being treated as an employee rather than as an independent contractor. She also discussed this with other employees. The record also establishes that Carol Christ and Larry Lee knew that the classification of employees was an issue for employees other than Edge (Tr. 53–54, 235-36, GC Exh. 4 (reverse side)).[18] Thus, they were aware that her protected activity was concerted.

In order to prove a violation of Section 8(a)(3) and/or (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[19] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

The record establishes that Respondent was aware of Edge's protected activity (i.e., her agitation over the employee/independent contractor issue); that it bore animus towards that activity (E.g. GC 13, pg. 00121 in which Christ texts "You should really drop the employee crap. Had you simply done as asked yesterday [send Christ a picture of her SSN card and driver's license] it should have been done."). The timing of Edge's discharge, 3 days later, is sufficient to meet the General Counsel's initial burden of establishing a nexus between her protected activity and discharge.[20] Additionally, the timing between Respondent's knowledge that Edge was consulting an attorney over the route driver agreement and her termination is sufficient to satisfy the General Counsel's burden in establishing a relationship between her protected activity and her discharge.

Respondent's affirmative defense that it decided to terminate Edge on August 15 for her alleged misconduct in failing to pick up the Compassionate Women's Care Clinic specimen on August 12, is not credible. Moreover, I find, as stated previously, that is it a pretextual reason upon which I also rely in concluding that Velox fired Edge in retaliation for her protected concerted agitation on the employee/independent contractor issue,

[18] Lee admitted to seeing GC Exh. 4, which establishes that he knew that the employee/independent question was an important issue to drivers other than Edge.

[19] *Flowers Baking Co., Inc.,* 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB,* 70 F. 3d 863 (6th Cir. 1995).

[20] I recognize that some cases hold that this is not part of the General Counsel's initial burden, e.g., *Neises Construction Co.,* 365 NLRB No. 129 fn.6 (2017). However, assuming that it is, the General Counsel satisfied it.

Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000); *Shattuck Denn Mining Corp. v. NLRB,* 362 F. 2d 466, 470 (9th Cir. 1966); *Fast Food Merchandisers,* 291 NLRB 897, 898 (1988); *Flour Daniel, Inc.,* 304 NLRB 970, 971 (1991); *Norton Audubon Hospital,* 341 NLRB 143, 150–151 (2004). Finally, Respondent's failure to adequately investigate the circumstances of the "dropped specimen" at the Women's Care Clinic supports the inference of discriminatory motive.

CONCLUSIONS OF LAW

Respondent, Velox Express violated Section 8(a)(1) of the Act by

1. Discharging employee Jeannie Edge on August 21, 2016.

2. Maintaining a Non-Disparagement Policy that would reasonably be read to prohibit employees from disparaging Velox and its officials insofar as employees' negative statements may relate to wages, hours and other terms and conditions of employment.

3. Classifying Jeannie Edge and other driver/couriers servicing PathGroup as independent contractors, rather than as employees.

REMEDY

The Respondent, having discriminatorily discharged Jeannie Edge, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth C*o., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall compensate her for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on her Social Security earnings record.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

Respondent, Velox Express, Inc. its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, such as challenging Respondent's assertion that they are independent contractors.

(b) Maintaining a Non-Disparagement rule or policy which prohibits employees from making negative statements about the company insofar as they would be reasonably construed to include a prohibition of negative statements pertaining to wages, hours and other terms and conditions of employment.

(c) Classifying route drivers who are employees as independent contractors.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Jeannie Edge whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision. Respondent shall compensate her for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings, as set forth in the remedy section.

(c) Compensate Jeannie Edge for the adverse tax consequences due to receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Revise or Rescind its Non-Disparagement policy.

(e) Take whatever steps are necessary to reclassify the courier-drivers servicing the PathGroup account out of Velox's Memphis office as employees and to treat them as employees rather than as independent contractors.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Jeannie Edge in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its offices in Little Rock, Arkansas and Memphis, Tennessee copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 22, 2016.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 25, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, such as challenging your classification as an independent contractor.

WE WILL NOT maintain a policy that prohibits you from disparaging this company or its officials insofar as it relates to wages, hours and other terms and conditions of employment.

WE WILL NOT continue to classify drivers who are employees as independent contractors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeannie Edge whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Jeannie Edge for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

WE WILL compensate Jeannie Edge for the adverse tax consequences due to receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Jeannie Edge, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

VELOX EXPRESS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-184006 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Legal Update on Employer Rules After *Boeing*

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NEW YORK STATE BAR ASSOCIATION
LABOR AND EMPLOYMENT LAW SECTION
2019 FALL MEETING – ITHACA, NY
SEPTEMBER 21, 2019

LEGAL UPDATE ON EMPLOYER RULES AFTER *BOEING*

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In December 2017, a sharply-divided Board issued its long-awaited decision in *Boeing Company*, 365 N.L.R.B. No. 154 (Dec. 14, 2017). The case involved the legality of a facially neutral Boeing policy prohibiting the use of camera-enabled devices, *e.g.*, smartphones, on employer property, which an administrative law judge found was unlawful applying the often-criticized standard established by the Board in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004).[2] In so finding, the ALJ gave no weight to the Boeing security interests served by the rule.

On review, the Board reversed the ALJ; dismissed that portion of the complaint challenging Boeing's "no-camera rule;" overruled the *Lutheran Heritage* "reasonably construe" standard; and, announced that in the future the NLRB "will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee 'would reasonably

[1] The author gratefully acknowledges the assistance of Jacob L. Hirsch, an associate in Proskauer's Labor and Employment Law Department in New York City.

[2] There was no claim that Boeing's rule explicitly restricted activity protected by Section 7 of the Act; that it was adopted in response to NLRA-protected activity; or, that the rule had been applied by Boeing to restrict such activity.

construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future." *Boeing*, slip op. at 2.

The Board cited "multiple defects" inherent in the first prong of the *Lutheran-Heritage* standard, including:

- The single-minded consideration of NLRB-protected rights, without properly taking into account legitimate employer justifications for the rule;
- The tendency of the test to lead employers to conclude that they might be better-served by not having handbooks at all, to the detriment of their employees;
- The fact that the test had resulted in the invalidation of facially neutral rules solely because they were ambiguous in some respect;
- The test's failure to distinguish between core Section 7 activity and rights that lie at the periphery of the statute; and
- Concerns that the test had led to unpredictable results.

In place of the discredited *Lutheran-Heritage* "reasonably construe" standard, the Board adopted a new test in *Boeing* under which it now evaluates "(i) the nature and extent of the potential impact [of the rule] on NLRA rights, *and* (ii) legitimate justifications associated with the rule," adding that it "will conduct this evaluation, consistent with [its] 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees, which is consistent with Section 8(a)(1)." *Id.* at 3.

The NLRB then delineated three categories of employment policies, rules and handbook provisions for analysis in future unfair labor practice cases:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or

> (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another. *Id.* at 3-4.

Applying those standards to the no-camera rule, the Board found that the "justifications for Boeing's restrictions on the use of camera-enabled devices on Boeing property" -- *i.e.*, maintaining the security of its facilities and information housed therein, critical not only for Boeing's business interests but also for national security -- "outweigh the rule's more limited adverse effect on the exercise of Section 7 rights." *Id.* at 5.

Over the last two years, Regional Directors have submitted numerous unfair labor practice cases to the NLRB's Division of Advice for guidance on whether employer rules violated the new *Boeing* standard of legality. We summarize several of the more recent Advice Memoranda below.[3]

1. *Nuance Transcription Services, Inc.*, Case 28-CA-216065 (Nov. 14, 2018) – Rule requiring that the contents of an employee handbook be kept confidential was unlawful

[3] This is a supplement to the author's paper on this subject that was published in connection with the Labor and Employment Law Section's 2019 Annual Meeting in New York City.

under Category 3 as it effectively precluded employees from discussing any and all employer policies regarding pay, benefits, and working conditions with unions or other third parties. Advice also concluded that the employer's rule restricting disclosure of payroll information was unlawful on its face. Although the rule did not expressly prohibit discussions concerning terms and conditions of employment, the fact that it precluded disclosure of payroll information to third parties was enough to render the rule unlawful.

In addition, the employer's policy prohibiting personal use of its email system to send messages "not considered in support of [Employer] objectives," was overly broad and unlawful under Category 2. While it would rarely inhibit Section 7 activity in practice, the rule could be implicated by any protected concerted activity that would be deemed contrary to employer objectives. Advice reasoned that the purpose of the rule – preventing "counterproductive messages that tie up system resources" – could be achieved with a narrower policy that would not infringe on Section 7 rights.

2. *CVS Health*, Case 31-CA-210099 (Sept. 5, 2018) – Rule requiring employees who commented about the employer on social media to identify themselves as an employee and to clarify that they were *not* speaking on behalf of the company or as an official company representative, was a lawful Category 1 restriction on who can speak on the employer's behalf. The Division of Advice explained that "[e]mployers have a substantial interest in ensuring that employees do not, intentionally or unintentionally, make statements that can be interpreted as coming from the company."

Two other rules contained in the employer's "Colleague Handbook" were found to be unlawful under Category 2. One required that employees mentioning their work in personal

social media interactions identify themselves by name, title and/or role within the company. The other rule prohibited disclosure of "employee information" – which could reasonably be understood to include employee contact information and other non-confidential employment-related information – through social media or other online communications. Neither rule was justifiable based on the employer's interest in prohibiting disclosure of this information. However, a rule prohibiting the posting of material that is "discriminatory, harassing, bullying, threatening, defamatory, or unlawful" was a permissible exercise of employer authority under *Boeing*.

3. *Coastal Shower Doors*, Case 12-CA-194162 (Aug. 30, 2018) – The Division of Advice determined that a general prohibition against "obtaining unauthorized confidential information pertaining to . . . employees" was lawful because employees would not reasonably read such a confidentiality rule as a prohibition on disclosure of information about their wages and working conditions to co-workers or a union. Rather, "a more reasonable understanding of the rule is as a ban on unauthorized *access* of confidential information held by the *Employer*, that is, of records and files." Advice explained that "[e]mployees do not have a right under the Act to disclose employee information obtained from unauthorized access or use of confidential records, or to remove records from the employer's premises."

Advice also determined that a rule prohibiting employees from "creating discord with clients or fellow employees" was lawful under Category 1 because it constituted a disruptive behavior rule – not one that would be reasonably interpreted by employees to apply to Section 7 activity. Similarly, a rule requiring that all solicitations/distributions be in "good taste" was lawful. (The rule was compared to admonitions considered lawful in *William Beaumont Hospital*, prohibiting "inappropriate" or "socially unacceptable" behavior.)

However, a rule proscribing "disclosure of any confidential information to anyone outside the Company without the appropriate authorization" was overbroad and unlawful under *Boeing*. "Confidential information" was defined as any information that was "generated" or "retained" by the company. Because virtually all terms and conditions of employment could be considered as information *generated* and *retained* by the company, the rule impermissibly infringed on Section 7 rights.

Finally, Advice found that the employer unlawfully prohibited cell phones for personal use during "working hours." Although the Board in *Boeing* stated that cell phone bans fell under Category 1, the rule here could be construed to prohibit cell phone use even during break times, meal periods and other non-working time, all of which are encompassed by "working hours." Absent a legitimate business justification, such rules generally are unlawful under Category 2.

4. *Ally Financial, Inc.*, Case 12-CA-211123 (July 5, 2018) – The Division of Advice found that the employer's "Workplace Behavior" policy, which prohibited "insubordination, neglect of duties or other disrespectful conduct including, but not limited to, refusal to perform work," was a lawful Category 1 rule, concluding that the vast majority of activity covered by the prohibition was unprotected and that employees would not usually understand such rules to cover protected concerted activity. However, Ally's rule prohibiting conduct or activity that is "not in the best interest of the Company" was unlawful because it "sweeps in protected concerted or union activity where employees pit their own collective interests against the Employer's." Advice also found that the employer's rule prohibiting solicitation or distribution of literature, without the approval of Human Resources, constituted a flat ban on Section 7 protected activities because it did not distinguish between non-work time and work time. Lastly, Ally's rule prohibiting the use of its own equipment to engage in solicitation unlawfully restricted its

employees' right to use company email on nonworking time to engage in Section 7 related solicitation, contrary to the Board's decision in *Purple Communications*.

5. *ADT, LLC*, Case 21-CA-209339 (July 31, 2018) – In this case, the Division of Advice considered four employer rules involving dress-code, personal cell phone use, confidential information and media relations. All but the cell phone rule were found to be lawful. The dress code was challenged on the ground that it prohibited the wearing of "any items of apparel with inappropriate commercial advertising or insignia." Advice concluded that employees would not reasonably understand the rule to apply to union insignia, particularly since it was part of a policy aimed at "maintaining a professional, business-like appearance," and was limited to "inappropriate" insignia. On the other hand, the employer's rule that cell phones may only be used for "work-related or critical, quality of life activities," was deemed unlawful because "employees have a Section 7 right to communicate with each other through non-Employer monitored channels during lunch or break periods," and ADT's prohibition applied at all times, including employees' non-working time.

ADT's policy on "confidential information" was approved as it only expressly restricted discussion of such information by employees who had access to confidential employee information as part of their job. Lastly, Advice approved of ADT's media relations rule, which provided that "all information provided to media, financial analysts, investors or any other person outside the [Employer] may be provided only by [Employer] designated spokespersons or [Employer] officers," because "when viewed in context, [the rule] merely regulates who may speak on behalf of the Employer and does not restrict employee media appeals regarding workplace matters, . . . [and] would have no real impact on Section 7 rights."

6. *Colorado Professional Security Services, LLC*, Cases 27-CA-203915, -206097 and -206104 (Aug. 7, 2018) – The employer, a private security company, had a policy entitled "Harm to Business or Reputation" stating: "Employees must refrain from engaging in conduct that could adversely affect the Company's business or reputation. Such conduct includes, but is not limited to: 1. publicly criticizing the Company, its management or its employees . . ." The Division of Advice analyzed the rule under *Boeing's* Category 2 because the impact on employee rights outweighed the employer's business justification. Advice explained that "by prohibiting any public criticism of the Employer or its management, the Employer is expressly interfering with any appeals to the public in labor disputes, and it does not have a legitimate business justification for that kind of total ban." At the same time, Advice concluded that CPSS's standard language in its disciplinary letters, which prohibited employees from discussing discipline with coworkers and clients, "expressly interfer[ed] with employees' right to communicate with each other or third parties on a central term of employment, again without any legitimate business justification for doing so."

7. *Wilson Health*, Case 09-CA-210124 (June 20, 2018) – This case was submitted to the Division of Advice for consideration of various employer rules, including the Hospital's "Commitment to My Co-workers" document, in which employees were required to agree, *inter alia*, to (i) "accept responsibility for establishing and maintaining healthy interpersonal relationships with you and every member of this team;" (ii) "talk to you promptly if I am having a problem with you. . .;" (iii) "not complain about another team member and ask you not to as well. . .;" and (iv) "be committed to finding solutions to problems rather than complaining about them or blaming someone for them. . ." Advice determined that the "Commitment to my Co-workers" document was a lawful Category 1 civility policy, reasoning that the document "relates

to employees' interactions with their coworkers, and does not impinge on their ability to discuss terms and conditions of employment or criticize the Employer."

Also worth noting was Advice's treatment of the Hospital's rule prohibiting use of cellular telephones except during scheduled breaks and only in lounges or designated break areas. Unlike in the *Coastal Shower Doors* and *ADT* cases, the policy was found to be lawful because it "does not unlawfully prevent employees from possessing and using cellphones during non-work time and in non-work areas for communications, which can include Section 7 activities."

Note: All NLRB Advice Memoranda discussed here are available for review on the NLRB's official website (www.nlrb.gov).

Legal Update: Access to Employer Property Under the NLRA

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NEW YORK STATE BAR ASSOCIATION
SECTION ON LABOR AND EMPLOYMENT LAW
2019 FALL MEETING, ITHACA, NEW YORK
SEPTEMBER 21, 2019

LEGAL UPDATE:
ACCESS TO EMPLOYER PROPERTY UNDER THE NLRA

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On May 22, 2019, NLRB Chairman John Ring announced that "standards for access to an employer's private property" will be part of the Board's aggressive rulemaking agenda. See https://www.nlrb.gov/news-outreach/news-story/nlrb-rulemaking-agenda-announced. As of the writing of this paper no new rules have been proposed, so we are left to guess as to the specifics of any such rulemaking. However, in three recent decisions, the Board has remade access law through adjudication. *See UPMC Presbyterian Hospital*, 361 NLRB No. 2 (June 14, 2019), *Bexar Performing Arts Center*, 368 NLRB No. 46 (August 23, 2019), and *Kroger Limited Partnership*, 368 NLRB No. 64 (September 6, 2019). In each of these cases, the Board reversed precedent and broadened the circumstances under which employers can exclude individuals engaging in statutorily protected activity on their property. In *UMPC*, the majority found a hospital lawfully excluded union organizers from its cafeteria, which was open to the public; In *Bexar*, the majority found an arts venue lawfully prohibited musicians who performed there from handbilling on the sidewalk; and in *Kroger*, the majority found a grocery chain lawfully barred union representatives from its parking lot. Member McFerran dissented in each case.

UPMC

In *UPMC*, a majority consisting of Chairman Ring and Members Kaplan and Emmanuel held that the employer (a hospital) did not violate the Act when it excluded nonemployee union representatives from a cafeteria that was open to the public. In doing so, the Board overruled decades of precedent regarding nonemployee access to public restaurants and cafeterias within an employer's private property.

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Supreme Court set the standard governing nonemployee access to employer private property. There, the Court held that

> An employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

Id. at 112 (emphasis added). Thus, the Supreme Court created two exceptions to the general rule that an employer may exclude nonemployee union organizers from its property: inaccessibility and discrimination. The Board has interpreted the *Babcock & Wilcox* discrimination exception to mean that where an employer opens a portion of its property to the public – e.g., a cafeteria or restaurant -- it cannot lawfully bar nonemployee union organizers from that portion of the property so long as they are using it in a manner consistent with its intended use and are not disruptive. *See e.g.*, *Ameron Automotive* Centers 265 NLRGB 511, 512 (1982); *Montgomery Ward & Co.*, 356 NLRB 800, 801 (1981), enfd. 692 F.2d 1115 (7th Cir. 1982).

The majority in *UPMC* determined that an employer is not necessarily required to allow nonemployees to use public areas within its facilities any purpose.; rather, under

the Board's new standard, an employer will have violated the Act by barring access to union representatives only if it has allowed other nonemployees to engage in "similar activity in similar relevant circumstances," the employer has not violated the Act. 368 NLRB No. 2 at *4-5. In applying the new standard to the facts presented, the Board majority determined that the hospital lawfully excluded union organizers from its public cafeteria because the organizers were not "simply eating lunch," but were talking about union organizing and displaying union materials for distribution, and there was no evidence that other cafeteria patrons had engaged in "such promotional activity in the cafeteria." *Id.* at *7.

Member McFerran dissented arguing that the new standard permits employers to exclude union representatives from areas open to the public based entirely on their union affiliation. *Id.* at *9. The majority's definition of discrimination, she argued, is impermissibly narrow. *Id.* at *16. She reasoned that when an employer has opened it's a portion of its property to the public, its opposition to statutorily protected activities – such as union solicitation and distribution – should not be a legitimate basis to exclude individuals from that property. *Id.*

Bexar

In *Bexar*, 368 NLRB No. 46, the NLRB again overturned precedent and announced a new standard to determine the right of contractor-employees to access a company's property for Section 7 purposes. In so doing, the Board majority – consisting of Chairman Ring and Members Kaplan and Emmanuel -- relied heavily on the distinction that Justice Thomas drew in the Supreme Court's *Lechmere* decision[1]

[1] 502 U.S. 527.

between the Section 7 rights of employees and those of nonemployee organizers. Specifically, the Board overturned two 2011 decisions -- *New York New York*, 356 NLRB 907 (2011), and *Simon DeBartolo Group*, 357 NLRB 1887 (2011) – and held that an employer may exclude from its property off-duty contract employees seeking to engage in Section 7 unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that the contract employees have a reasonable alternative means to communicate their message. *Id.*

In *New York New York*, the NLRB held that an employer can only exclude off-duty contract employees where it can demonstrate that the activity of those contract employees "significantly interferes with" its use of the property or the exclusion is justified by "another legitimate business reason." 356 NLRB 918-19. The *New York New York* Board examined the case in light of *Lechmere*, to determine whether the rights of off-duty contractor-employers are more properly those of direct employees or those of nonemployee organizers. *Id.* at 911. While the NLRB determined that the rights of contractor-employees fall into a different category than those of either direct employees or nonemployee organizers, it ruled that contractor-employees who work regularly, but not directly, at an employer's premises may exercise their Section 7 rights on those premises, except under limited circumstances. *Id.* at *918. In *DeBartolo*, the Board extended its *New York New York* ruling to apply the same rights to contractor-employees who work on a given site regularly, but not exclusively. *Simon DeBartolo*, 357 NLRB at *4 fn 8.

The majority in *Bexar* found that the *New York New York* and *DeBartolo* Boards wrongly applied *Lechmere*. 368 NLRB at *2. The majority reasoned that *Lechmere*

requires the Board to weigh employees' Section 7 rights against the employers' property rights to "accommodate Section 7 rights and private property rights so as to cause as little destruction to one as is consistent with the maintenance of the other." *Id.* at *7. The *Bexar* majority determined that "although employees of an onsite contractor enjoy some Section 7 access rights, they are weaker than those of the property owner's own employees," and therefore weigh differently against the owner's rights. *Id.* at *6.

This ruling adds two burdensome requirements to the standard for off-duty contractor-employees seeking to exercise Section 7 rights and eliminates a significant protection against employer exclusion. First, it imposes the obligation that contractor-employees work at the site in question exclusively, in other words, that they have no other employer. Second, it adds the *Lechmere* requirement that employees must show that no other means of communication is available before they can be deemed eligible for that right—even if the only other means at their disposal are prohibitively expensive or entirely ineffective. Additionally, the ruling removes the requirement that the employer prove that allowing the employees to engage in Section 7 activity would interfere with its use of the property or that exclusion is justified by a legitimate business reason.

Member McFerran's dissenting opinion asserts that the majority's new standard damages employees' Section 7 rights far more than is necessary to protect employers' property rights. She argues that the requirement that contractor employees seeking access work both regularly *and exclusively* on the employer's premises is arbitrary and "serves no purpose except to frustrate the exercise of Section 7 rights." *Id.* at *18. Categorically denying access rights to all employees who also work somewhere else –

a significant and growing number of workers in today's economy – will leave those workers with *no* workplace where they can exercise their Section 7 rights because they are exclusively employed *nowhere*. *Id.* at 22. Similarly arbitrary, she asserts, is giving property owners the right to exclude contract employees if they have any reasonable alternative means of communicating their message – including "social media" or "billboards." *Id.* at 22-23. Because property owners will almost always be able to show that employees can purchase a highway sign (even if prohibitively expensive) or post on social media (even if utterly ineffectual), contractor employees – even those few who work *exclusively* at the premises – will never be able to engage in Section 7 activity aimed at the public. *Id.* As a result, the majority's new standard "takes away important Section 7 rights from a segement of the workforce that may need them the most." *Id.* at 24.

Kroger

In *Kroger*, 368 NLRB No. 64, the Board overruled *Sandusky Mall Co*, 329 NLRB 618 (1999), which interpreted the *Babcock & Wilcox* discrimination exception to require an employer to allow nonemployee union representatives access to its property where it has also allowed other nonemployees to engage in "civic, charitable and promotional activities." *Id.* The majority, consisting of Chairman Ring and Members Kaplan and Emmanuel, adopted a new standard pursuant to which nonemployee union representatives may be excluded from employer properly unless the employer has allowed access to other nonemployees for "activities similar in nature." 368 NLRB No. 64 at *2. Thus, an employer may now deny access to union organizers seeking to engage in "protest activities" on its property while allowing nonemployee access for "a

waide range of charitiable, civic and commercial activities" that, according to the majority, are not similar in nature to protest activities. *Id.*

In her dissent, Member McFerran argued that much like its decision in *UMPC*, the majority's decision "creates a license for an employer to permit almost any third-party activity on its property *but* union solicitation and distribution." *Id.* at *15 (emphasis in the original). She noted that while the Supreme Court did not fully explain the discrimination exception in *Babcock & Wilcox* – because discrimination was not an issue in that case – it did so in an earlier case, *Stowe Spinning*, 336 US 226 (1949). In *Stowe Spinning* the Court endorsed a broad view of discrimination and held that the employer violated the Act by prohibiting a union for using its meeting hall while permitting outside community groups to do so. *Id.* at 233. The standard the majority adopts in *Kroger*, she argued, was expressly rejected by the Supreme Court in *Stowe Spinning*, and therefore cannot stand. 368 NLRB No. 64 at *23.

According to Member McFerran, the rationale for a broad view of the discrimination standard is that

> [w]here an employer has permitted solicitation and distribution on it property by nonemployees other than union representatives . . . the employer's claim that granting access to the union would burden its property rights is necessarily weakened for purpose of the Act.

368 NLRB No. 64 at *20. That is, when employer has granted access to nonemployees other than union representatives, it is clear the employer's real objection is not to solicitation and distribution by outsiders generally, but to *the union*. *Id.* at *21.

We Don't Have A Crystal Ball But . . .
(Potential Future Changes In Access Law)

While we can't predict with any certainty what future changes the Board will make to its access standards, whether through rulemaking or adjudication, the dissenting opinions of current and former Board members, as well as statements from the General Counsel, provide some indication of the issues the Board may look to address. Those issues include the access rights of off duty employees, and access rights when picketing as opposed to handbilling or other solicitation/distribution

A. Access Rights Of Off-Duty Employees

When it comes to solicitation and distribution on employer-owned premises by employees who are *not* currently on duty, the controlling case is *Tri-County Medical Center*, 222 NLRB. 1089 (1976).

In *Tri-County*, the Board held that an employer rule barring off-duty employees from union solicitation or distribution at the workplace violates the Act unless the rule (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. *Id.* at 1089. Except where justified by business reasons, "a rule that denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid." *Id.*

Statements by current NLRB General Counsel Peter Robb, former Board Chairman Philip Miscimarra, and current Member William Emmanuel indicate that the Board may move overrule or modify the *Tri-County* standard to restrict the access rights of off-duty employees.

In 2014, a Board majority consisting of Members Miscimarra, Johnson and Schiffer applied the *Tri-County* standard to an employer rule prohibiting employees from remaining on company premises after their shift "unless previously authorized by their supervisor." *Piedmont Gardens*, 360 NLRB 813 (2014)(internal quotations omitted). The majority held that the exception to the general rule prohibiting off-duty employees from remaining on the premises – i.e., permitting access with supervisory authorization – rendered the rule unlawful under the third prong of the *Tri-County* test because it gave the employer "broad – indeed, unlimited – discretion to decide when and why employees may access the facility." *Id.* at 814 (internal citations omitted). Member Miscimarra joined the majority opinion only because he believed the rule at issue to be unlawful *as applied*. *Id.* at 814, fn. 7. In his opinion, the rule was facially lawful (notwithstanding the exception allowing access with supervisory authorization) and violated the Act only because it was in fact discriminatorily applied so as to restrict employees' Section 7 activity. *Id.*

On December 1, 2017, then-new General Counsel Robb issued a call for Mandatory Submissions to the Division of Advice (Memorandum GC 18-02) from Regional Directors on several issues. One of those was "[o]ff-duty employee access to property." GC 18-02 at 3. In particular, GC 18-02 indicated that while certain cases support issuance of a complaint under current law, the General Counsel may choose to provide the Board with an alternate analysis, including, "[f]inding that access must be permitted under *Tri-County* unless employees are excluded for all purposes, including where supervisor expressly authorized access (e.g., *Piedmont Gardens*, 360 NLRB No. 100 (2014))". *Id.*

The Board's 2018 decision in *Burger King and Michigan Workers Organizing Committee*, 366 NLRB No. 156 (August 15, 2018), is also suggestive of what future rulemaking or adjudication on access to property by off-duty employees might entail. In *Burger King*, a group of employees were disciplined for handing out flyers in the parking lot of a particular franchise. The employer claimed that its Loitering and Soliciting policy, promulgated in the Employee Handbook, prohibited employees from handbilling or the like "in and around" the Burger King property. *Id.* at *1. The Board upheld the ALJ's decision that under *Tri-County* the policy violated Section 8(a)(1) by unlawfully restricting protected Section 7 activity. *Id.* at *2. However, in a footnote, Member Emmanuel stated that he "believes that the Board should revisit *Tri-County Medical Center* to the extent that it allows off-duty employees to engage in Sec. 7 activities on an employer's parking lot and other exterior areas of the employer's property." *Id.*

B. Picketing vs. Handbilling and Other Activities

In GC 18-02, General Counsel Robb also required the submission of cases in the area of "off-duty employee access to property" that pertain to "Applying Republic Aviation to picketing by off-duty employees (e.g., *Capital Medical Center*, 364 NLRB No. 69 (2016)), equating picketing with handbilling despite greater impact on legitimate employer interest (including patient care concerns))". GC 18-02 at 3.

In *Capital Medical Center*, the Board held that an employer violated the Act by prohibiting off-duty employees from engaging in peaceful informational picketing. 364 NLRB No. 69 (August 12, 2016). The majority applied the Supreme Court's decision in *Republic Aviation*, which held that employers may not bar employees from engaging in solicitation or distribution in non-working areas of its property, unless it is necessary to

maintain discipline and production. 324 U.S. 793 (1945). Then-Member Miscimarra dissented, drawing a distinction between handbilling/other solicitation – in which he agrees off-duty employees have the right to engage on employer premises – and kinds of Section 7 activity, he would hold that picketing on an employer's premises is not entitled to the same protection as handbilling and other solicitation/distribution. *Id.* at 8-10.

Legal Update: Employer Withdrawal of Recognition Under the NLRA

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NEW YORK STATE BAR ASSOCIATION
SECTION ON LABOR AND EMPLOYMENT LAW
2019 FALL MEETING, ITHACA, NEW YORK
SEPTEMBER 21, 2019

LEGAL UPDATE:
EMPLOYER WITHDRAWAL OF RECOGNITION UNDER THE NLRA

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In *Johnson Controls*, 368 NLRB No. 20 (July 3, 2019), the Board held that where an incumbent union has lost majority support within 90 days prior to contract expiration, the employer may unilaterally withdraw recognition when the contract expires, and the union may only reestablish majority status by petitioning for and winning a Board election. In doing so, the Board overruled the "well-established, consistently-applied, and judicially-approved"[1] framework set forth in *Levitz Furniture Co.*, 333 NLRB 717 (2001), and its progeny. The majority of the Board concluded that this new scheme succeeds, where *Levitz* failed, in protecting and promoting the purposes of the Act. The decision is accompanied by a strongly-worded dissent that took issue with the majority's procedural approach, its characterization of the *Levitz* framework, and the validity of the newly-adopted scheme.

Background

Section 9(a) of the National Labor Relations Act ("NLRA" or "Act") provides that where a majority of employees in a bargaining unit select a union, the employer is

[1] 368 NLRB No. 20 at *17, Member McFerran dissenting.

required to recognize and bargain with that union. The Board has long held that once a union is established as the employees' representative, it enjoys a presumption of continuing majority status. See *Station KKHI*, 284 NLRB 1339 (1987), enfd. 891 F.2d 230 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990). That presumption is irrebuttable in certain situations -- including during the term of a collective bargaining agreement, up to three (3) years (see *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996)) – and rebuttable in others, including upon the expiration of the collective bargaining agreement.

Prior to *Levitz*, during a period where the union's majority status is rebuttable (e.g., after contract expiration), an employer could rebut the presumption by demonstrating either that the union did not in fact enjoy majority support or that the employer had a good-faith reasonable doubt of the union's continued majority support. *Celanese Corp. of America,* 95 NLRB 664, 671-75 (1951). An employer that satisfied its burden of proof in one of these ways could lawfully withdraw recognition from the union and refuse to bargain. *Id.*.

If, during the term of a collective bargaining agreement – when the union's majority status is irrebuttable – the union in fact lost majority status or the employer maintained a good faith reasonable doubt that it had done so, the employer could announce its intention to withdraw recognition upon expiration of the contract, when the presumption became rebuttable. See *Burger Pits*, 273 NLRB 1001 (1984), enfd. sub nom. *HERE v. NLRB*, 785 F.2d 796 (9th Cir. 1986). Known as "anticipatory withdrawal," this doctrine provided that while an existing contract prevents immediate withdrawal of recognition, an employer could rely on an actual or believed loss of majority status prior

to contract expiration to put the union on notice that it would withdraw recognition when the contract expired, refuse to negotiate for a successor agreement, and then lawfully withdraw recognition and unilaterally change terms and conditions of employment upon expiration.

In *Levitz* the Board abandoned the "good faith doubt" standard for withdrawal of recognition and held that an employer may rebut the presumption of a union's majority status only where it can prove that the union has actually lost majority support. 333 NLRB at 717. *Levitz*'s "actual loss of majority" standard has been applied to the anticipatory withdrawal doctrine. See *Parkwood Developmental Center*, 347 NLRB 974, 975, fn. 10 (2006). Therefore, if an employer announces its intent to withdraw recognition upon contract expiration based on evidence of the union's loss of employee support prior to expiration, and then withdrew recognition when the contract expired, it had to prove that the union did not have majority *at the time of the withdrawal* – i.e., at the time the contract expired.

The *Levitz* Board also made it clear that an employer that unilaterally withdraws recognition does so at its own peril, including in the context of an anticipatory withdrawal. That is, if the Union challenges the withdrawal in an unfair labor practice proceeding and the employer is unable to prove that the union did not have majority support, the Board would find the withdrawal, and any concomitant changes to terms and conditions of employment, to violate Section 8(a)(5) of the Act.

The *Levitz* framework did, however, give employers an alternative to the potentially risky proposition of unilaterally withdrawing recognition – they could continue to recognize the Union, maintain the status quo terms and conditions, and petition for a

Board election to determine majority status. 333 NLRB at 727-28. In making the election option available to employers, the Board provided them with a "safe harbor" from any claims that they were unlawfully recognizing a union without majority status. Indeed, this option was designed specifically to encourage employers to seek a Board election rather than take the riskier, and more destabilizing, route of unilateral withdrawal of recognition. *Johnson Controls*, 368 NLRB No. 20 at *15, Member McFerran dissenting.

Johnson Controls: The Majority Decision

In *Johnson Controls*, the Board considered and modified the *Levitz* framework in the context of the anticipatory withdrawal doctrine. Rather than continuing the *Levitz* regime which *permitted* the *employer* to seek an election to avoid the risk of committing an unfair labor practice due to an unsupported withdrawal of recognition, the Board now *requires* the *union* to petition for and win an election as the only means of reestablishing majority status after an employer withdraws recognition. *Id.* at *2

A. The Majority's Criticism of *Levitz*

In the view of the majority in *Johnson Controls*, the *Levitz* regime was "unworkable" and "[did] not advance the purposes of the Act" – specifically, promoting labor relations stability and giving effect to employee whishes concerning union representation. *Id.* at *6

The majority pointed to the so-called "last in time" principle as confirmation that the *Levitz* standard failed to properly safeguard employee free choice. *Id.* Under the majority's view of *Levitz*, where an employer announces an anticipatory withdrawal based on union's purported loss of majority status prior to contract expiration and the

union then "reacquires" majority status, the *Levitz* rule gives controlling effect to the union's later evidence of majority status over the prior evidence of union disaffection. In the majority's view, giving an employee's expressed support for the union more weight than her previously expressed disaffection for the union is an inherently unfair and inadequate way of determining that employee's actual sentiments about the union. *Id.*

The majority also took issue with *Levitz* for insufficiently promoting labor stability. The majority reasoned that *Levitz* framework fostered instability by creating a situation where employers may withdraw recognition and make unilateral changes only to later discover that it had violated Section 8(a)(5) of the Act because the Union has "re-established" majority support. *Id.* This, according to the majority, unnecessarily disrupts the bargaining relationship. *Id.*at *7.

B. The New Standard

To address the perceived shortcomings of the *Levitz* regime, the majority announced a modification to the anticipatory withdrawal doctrine: if an employer has evidence that the union has actually lost majority support within 90 days before contract expiration, it may notify the union if its intention to withdraw recognition when the contract expires, and may in fact withdraw that recognition upon expiration, notwithstanding the fact that the union may have actual majority support at the time of the withdrawal *Id.* at *2. If the Union wishes to reestablish its majority status, its only means of doing so is to file an election petition within 45 days from the date the employer announced its anticipatory withdrawal. *Id.* Even if the union files such a

petition, the employer may still withdraw recognition[2] and make unilateral changes to terms and conditions of employment[3] upon contract expiration. *Id.* at *10.

. This new standard moves away from what the majority deemed the "unsatisfactory process" of resolving employee sentiments regarding union representation through unfair labor practice proceedings, and instead provides for these issues to be resolved through a Board election. *Id.* In this regard, in the majority's view, it both fosters stability in labor relations and better protects employee free choice.

The *Johnson Controls* Dissent

Member McFerran dissented, arguing that the majority misconceived the issue, mischaracterized existing law, and devised a new scheme that is contrary to basic labor law principles.

By framing the issue as a question of how a union can "reacquire" majority status after an anticipatory withdrawal of recognition (in the majority's view, only by petitioning for and winning a Board election), Member McFerran argued that the majority obscured the fact that the anticipatory withdrawal doctrine is not about whether a union has reacquired majority support prior to contract expiration, but whether the employer can meet its burden of demonstrating that the union has actually lost majority support *at the time it withdrew recognition*, i.e., at the time the contract expires. *Id.* at *17. If the

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[2] The employer is not *required* to withdraw recognition unless a rival union has intervened or filed a petition. 368 NLRB No. 20 at *10.

[3] If the Union files an election petition, and there is a period of time between contract expiration and the election, an employer may make unilateral changes to terms and conditions of employment upon contract expiration without violating Section 8(a)(5). *Id.* The majority reasons that this is so because the post-contract presumption of continuing majority status has been rebutted by the pre-expiration showing of disaffection. *Id.*.

employer cannot meet this burden, the union need not reacquire majority status because that status was never lost.

Given the majority's misunderstanding or misrepresentation of the anticipatory withdrawal doctrine as applied through *Levitz* and its progeny, Member McFerran asserted that the majority's stated reasons for adopting a new standard – to protect employee free choice and foster stable labor relations – do not withstand scrutiny.

With respect to employee free choice, Member McFerran noted that under the *Levitz* regime, it was the employer's burden to prove that the union has actually lost majority support and such burden cannot be carried with dual signatures (e.g., employees who signed *both* a disaffection petition and union cards). *Id.* at *18-19. If, because of dual signatures, an employer was unable to meet its burden of proving actual loss of majority status, then the union remains in place; the union has not "reacquired" majority status – it never lost it. *Id.* To the extent an employer felt it was confronted with conflicting evidence of employee sentiments and wanted to test the union's support, it had the option of seeking a Board election. *Id. at *19.* According to Member McFerran, this option sufficiently safeguards employee free choice without allowing employers to unilaterally oust a union from the workplace at a time when it retains a presumption of majority status that has not been adequately rebutted.

Equally unavailing from Member McFerran's perspective is the majority's position that *Levitz* and its progeny undermine stable labor relations. She argued that any disruption in the bargaining relationship under *Levitz* was caused entirely by the employer's decision to unilaterally withdraw recognition. *Id.* Employers seeking

stability, she reminded, are free to take advantage of the *Levitz* safe-harbor by continuing to recognize the union while petitioning for Board election. *Id.* at *20.

Indeed, Member McFerran seems to suggest that, to the extent that a new standard is warranted, the Board should prohibit employer's from unilaterally withdrawal of recognition and, instead, always require a Board election before allowing an employer to cease recognition and change employment terms and conditions. *Id.* This approach, she argues, would avoid disrupting the bargaining relationship altogether and would give effect to employee sentiments regarding union representation through the best method – a Board election. *Id.*

Legal Update: Legality of Unions Placing Inflatable Rats at Neutral Employers'

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2019 FALL MEETING – ITHACA, NY

September 21, 2019

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LEGAL UPDATE ON THE LEGALITY OF UNONS PLACING INFLATABLE RATS AT NEUTRAL EMPLOYERS' PREMISES

"Scabby the Rat"[1] may be deflated if the General Counsel's views are adopted by the Board.

In 2019, General Counsel Peter Robb authorized issuance of several complaints and the filing of a 10(l) injunctive petition in federal district court. These cases were authorized by the General Counsel after consideration by the Division of Advice. Specifically, the General Counsel asserts that posting a large inflatable rat balloon outside the premises of a neutral employer, (also known as a secondary employer) when it is accompanied by union agents peacefully passing out handbills or posting a message on the rat that criticizes the secondary employer for hiring a contractor (the primary employer) that the union has a labor dispute with is conduct that is "tantamount to picketing". Further, even if the conduct is not construed as picketing, the General Counsel contends that it is nonetheless "coercive conduct" and under either theory, it is unlawful secondary activity prohibited under either Section 8(b)(4) (i) or(ii)(B) of the National Labor Relations Act. This provision is commonly known as the secondary boycott provision. It generally outlaws picketing or other types of coercive conduct by a union when it is leveled against a neutral employer in order to put pressure on

[1] The Rat is widely known as a symbol of a labor protest.

the neutral employer to cease doing business with the primary employer with whom the Union has a labor dispute.

The General Counsel acknowledges that his decision is contrary to current Board law. He is of the view, however, that the law was erroneously decided back in 2010 and 2011 when several cases were issued that found similar conduct to be lawful under both Sections 8(b)(4)(i)(or (ii)(B). General Counsel Robb is currently litigating several cases involving the same issue so that the lawfulness of this conduct can be reconsidered by the Board.

Currently, there are three active NLRB cases where the General Counsel has already litigated the lawfulness of Unions' placing inflated rats and/or large stationary banners outside a neutral employer's location. The first case was heard by Chief Administrative Law Judge Robert A. Giannasi involving a labor dispute in Region 4. The case is *International Brotherhood of Electrical Workers, Local 98 and Shree Sai Siddhi Spruce, LLC. d/b/a/ Fairfield Inn & Suites by Marriot, Case No. 04-CC-223346 and his decision issued on May 28. (JD-45-19)*

The second case is *International Union of Operating Engineers Local Union No. 150, a/w. International Union of Operating Engineers, AFL-CIO and Lippert Components, Inc. Case No. 25-CC-22834 involving a labor dispute in Region 25. A decision issued by Judge Kimberly R. Sorg-Graves on July 15, 2010.(JD-57-19.*

The third case *was* litigated before the Honorable Judge Nicholas G. Garaufis of the United States Eastern District Court of New York pursuant to an injunctive proceeding filed under Section 10(l) of the Act concerning a labor dispute in Region 29. The petition sought a preliminary injunction[2] against Local 79 of the Laborers Union to cease displaying the inflatable rat at the neutral employer's place of business. The decision issued on July 1, 2019. The case is *Kathy Drew King, Regional Director of Region 29 of the NLRB and Construction & General Building Laborers' Local 79, Laborers International Union of North America, 2019 U.S. LEXIS 11316 July 1, 2019, Case No. 29-CC-241297.*

As will be discussed below, Judge Garaufis dismissed the 10(l) petition and both Administrative Law Judges dismissed the complaint allegations involving use of the rats and/or banners. The General Counsel has not appealed the District Courts dismissal of the 10(l) injunction and the Complaint and Notice of Hearing that issued in that case was postponed indefinitely on July 22, 2019. However, the

[2] There was a TRO initially sought by Region 29 which was denied.

General Counsel has filed exceptions to the Board in the Region 4 case and will likely file an appeal in the Region 25 case.

Background

Section 8(b)(4 (i) and (ii)(B) of the Act prohibits conduct by a labor organization or its agents that (i)induces or encourages employees to withhold their services from their employer or (ii) threatens, coerces or restrains any person engaged in commerce, where an object of the conduct under (i) or (ii) is to force or require any person (also referred to as neutral or secondary) to cease doing business with any other person (also referred to as primary.)

Picketing a neutral employer or engaging in conduct "tantamount to picketing" is unlawful under 8(b)(4)(i) when it induces employees of a neutral employer to cease work. Non-picketing activity can also be unlawful inducement activity if it is targeting employees of a neutral to cease work. This is referred to as signal picketing. *See International Brotherhood of Electrical Workers, Local 98,* 327 NLRB 593 (1999).

This same conduct (picketing or conduct tantamount to picketing) is also unlawful under 8(b)(4)(ii) as it is conduct that" threatens, restrains, or coerces" a neutral employer, with the object in either situation of forcing or requiring the neutral employer "to cease doing business" with the primary employer.

Further, even if the conduct is not construed as picketing, it can still be a violation under 8(b)(4)(ii)(B) if it is found to be "coercive" when it is directed against a neutral employer. Examples of coercive conduct would be the use of loud speakers or bull horns to blast a message at a neutral employer's location, a large demonstration in front of a neutral employer, or blocking the entrances of a neutral employer.

Contrast this with truthful and peaceful handbilling engaged in by a union and its agents in front of a neutral employer that is not accompanied by picketing or other coercive conduct. The Supreme Court decided the lawfulness of such conduct in its landmark decision *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988). *Debartolo* involved peaceful and truthful handbilling at a shopping mall by a union urging customers to boycott shopping at all of of the stores in the mall in protest of one of the mall tenants who was constructing its store with a non-union contractor. Even though the tenants and the mall owner were neutrals to the labor dispute and the conduct had a cease doing business object, the Court held that peaceful and

truthful handbilling doesn't rise to the level of "picketing or coercive conduct" within the meaning of Section 8(b)(4)(ii)(B) of the Act. In construing the conduct and the statutory intent of Section 8(b)(4)(B), the Court was mindful of its Constitutional avoidance doctrine. It believed that finding handbilling unlawful would raise serious concerns under the free speech clause of the First Amendment. For this and other reasons, the Court declined to find a violation under the secondary boycott provisions of the Act.

Post DeBartolo Conduct by Union's Use of Inflatable Rats and Large Stationary Banners

The *DeBartolo* decision was heralded by unions. In reliance, they often chose to handbill rather than to engage in traditional picketing to protest a neutral employer's doing business with a non-union employer. Although this conduct had a cease doing business object, it was lawful activity. Along with handbilling, Unions began to erect large inflatable rats (anywhere from 8 to 20 feet in height) which they placed in front of the neutral employer. The inflatable rat became known by union supporters as "Scabby the Rat".

In these cases, the Unions' handbills or messages affixed to the rats notified the public about their labor dispute with the primary employer and criticized the neutral employer for doing business with the primary. In other cases, Unions erected large stationary banners with signage on the banners that described their labor dispute. The Union claimed that both types of conduct were neither picketing nor coercive conduct. Rather, they asserted that the inflated rat or banner was merely a prop that they used to gain the attention of the public that there was an ongoing labor dispute. The Employer, on the other hand, viewed this conduct as coercive and claimed its purpose was to shame the neutral employer to cease doing business with the primary employer in violation of 8(b)(4)(B). As discussed below, the Board had previously addressed the lawfulness of this conduct in several reported decisions. The General Counsel believes these cases were erroneously decided. He has authorized complaints and a 10(l) petition in order to have the earlier decisions overruled by the current Board.

Existing Board Law

Specifically, the Board cases which the the General Counsel asserts should be overruled are ***Carpenters Local 1506 (Eliason & Knuth of Arizona)***, 355 NLRB 797

(2010) (placement of large stationary banners near the secondary employer publicizing hiring of non-union contractor by neutral with wordage on banners saying "Shame on named Employer"(Board dismissed complaint alleging 8(b)(4)(ii)(B)); ***Sheet Metal Workers Local 15 (Brandon Medical Center (Brandon II)*** , 356 NLRB 1290 (2011) (placement of large inflated rat and distribution of handbills outside neutral employer's hospital criticizing it for hiring non-union contractor) (Board dismissed complaint alleging 8(b)(4)(ii)(B)); and **Carpenters Southwest *Regional Council Locals 184 and 1498 (New Star),*** 356 NLRB 613 (2011)(union erected banners at 19 different neutral employer's premises identifying neutral employer and stating "shame" on each of the neutral employers(Board dismissed complaint alleging both 8(b)(4)(i) or (ii)(B).

In all three of these cases, the Board dismissed the proceedings and concluded that the conduct in question was neither picketing nor coercive conduct within the meaning of either 8(b)(4)(i) or (ii) (B).[3] To the contrary, the conduct was found to be symbolic speech and persuasive communication directed to the public seeking to have them support the union's labor dispute.

CURRENT CASES BEING LITIGATED

In the Region 4 case noted above, the Union admitted that its conduct had a secondary object. Thus, the sole issue for Judge Giannasi to decide was whether the use of the inflatable rat accompanied by handbilling occurring on public property outside of a neutral employer's premises was conduct "tantamount to picketing" or alternatively "coercive conduct" within the meaning of (ii) of Section 8(b)(4)(B). On May 28, 2019, Judge Giannasi issued his decision dismissing the complaint allegations relating to the use of the inflatable rat.[4] He concluded that the placement of the inflatable rat in front of the Marriot Hotel to protest their hire of a non-union contractor was not unlawful under Section 8(b)(4)(ii)(B). Judge Giannasi relied on the prior Board cases *Carpenters Local 1506 (Eliason & Knuth) and Sheet Metal Workers Local 15 (Brandon Medical Center),* to support his finding that there was no unlawful picketing or coercion. He also referred to the "constitutional avoidance" doctrine discussed in the DeBartolo decision and relied on by the Board in the *Eliason* and *Brandon* decisions.

[3] In the Eliason and Brandon decisions, the General Counsel only alleged a violation under 8(b)(4)(ii)(B).
[4] Judge Giannasi found a separate violation when the Union broadcast excessively loud messages outside the restaurant. He found this conduct to be coercive in violation of Section 8(b)(4)(ii)(B).

On July 16, 2019, the General Counsel and the Charging Party filed exceptions to the decision which are now pending before the Board. They will be considering the General Counsel's argument that the prior decisions should be overruled and that a violation should be found.

In the Region 25 case, Judge Kimberly R. Sorg-Graves also dismissed the complaint which alleged that the Operating Engineers had posted a large, inflatable rat and two stationary banners near the public entrance of a trade show in violation of both 8(b)(4)(i) and (ii) (B). In her decision Judge Sorg-Graves concluded that the Union's conduct was neither signal picketing nor coercive conduct and relied on the Board precedent discussed above.

"The General Counsel provides no law showing that a displayed message causing embarrassment to a company or its executives is equivalent to coercive conduct that is reasonably expected to prevent patrons and employees from attending or working thereby coercively blocking the secondary's flow of commerce which the provision of the Act was intended to proscribe. Notably, there is no evidence that the banners and inflatable rat or the two individuals attending the rat cause any disruption (i.e. no physical barrier to impede others, no stopped traffic, no patrolling, no loud disruptive noises or actions, no approaching the patrons or employees, no refusal by patrons to attend or employees to work, etc.)" Operating Engineers at page 7.

Finally, in the Region 29 case, Laborers local 79, the General Counsel litigated the legality of placing inflatable rats at a neutral's three other separate locations. The General Counsel authorized Regional Director Kathy Drew King (Region 29) to issue a complaint and to file a petition in District Court seeking an injunction pursuant to Section 10(l) of the Act alleging a violation of Section 8(b)(4)(i) and (ii)(B) of the Act. The 10(l) petition was filed in the Eastern District of New York of the United States District Court before Honorable Judge Nicholas G. Garaufis. On July 1, 2010, Judge Garaufis issued his decision denying the injunction. In its petition, Regional Director King alleged that the placement of large inflated rats(there were several along with an inflated cockroach) accompanied by the distribution of handbills by Local 79 Laborers at a neutral owner's three Shoprite Supermarkets in Staten Island was violative of Section 8(b)(4)(i) and (ii)(B) of the Act. The handbills protested the owner's (Thomas Mannix) contracting out the construction of a new Shop Rite supermarket to a contractor GTL Construction who the Union claimed exploited construction workers by not paying them a living wage.

In a 32 page decision, Judge Garaufis dismissed the petition stating that "Based on the circumstances of this case, …the Court finds that the activities of Local 79 outside the Mannix stores-a regular display of inflatable rats and a cockroach on a public street, peaceful and limited handbilling, and a single peaceful, stationary, hourlong rally in mid-May -do not constitute picketing, lack the requisite element of coercion"… and do not otherwise rise to the level of threats, coercion, or restraints necessary to find a violation of Section 8(b)(4)((ii)(B)." *Id.* at page 29.

The Court further decided that there was no violation of Section 8(b)(4)(i)(B) of the Act relying on the same cases set forth in its analysis of Section 8(b)(4)(ii)(B) noting also that the NLRB has not ruled on whether the display of inflatable rats would be violative under this section of the Act.

Notably, the Court also went on to state that "The court also cannot find, as Petitioner apparently wishes it to do, that the union's peaceful, nonthreatening, noncoercive, expressive activity is "coercion" within the meaning of Section 8(b)(4)(ii)(B) because the target of their expressive conduct feels that the rat and the text of the handbills create "ambiguity or unfairly overstate the degree to which he believes he can influence the labor practices of the contractor building his new grocery store. The notion that a violation of Section 8(b)(4)(ii)(B) could be found – and a federal court could enjoin expressive conduct-wherever the target of a protest disagreed with the content of the message (or, indeed, the way it is written) is untenable, and would raise serious constitutional concerns."[5] *Id.* at 29.

The decision was not appealed and the Complaint and Notice of Hearing that had issued was indefinitely postponed on July 22, 2019.

Now, the issue has been teed up in the two ALJ decisions and is awaiting final ruling by the Board. If the Board reverses extant Board law and finds a violation under 8(b)(4)(i) or (ii)(B) as alleged by the General Counsel, there is a strong likelihood that these cases will be appealed to the Circuit Court. Again, the Constitutional avoidance doctrine set forth in DeBartolo will have to be considered in determining the lawfulness of this conduct.

As noted by the Supreme Court in DeBartolo,

There is even less reason to find in the language of Section 8(b)(4)(ii), standing alone, any clear indication that handbilling, without picketing, "coerces"

[5] The Court also dismissed the petition on the grounds that injunctive relief is not just and proper when the Regional Director is asking the Court to make an initial finding that departs from the current Board decisions interpreting this conduct citing to Silverman v. 40-41 Realty Associates, Inc. 668 F.2d 678, 680. (Second Cir, 1982)

secondary employers. The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do. *Id* at 580.

Query whether the addition of an inflatable rat or banner that accompanies handbilling should alter the outcome? **STAY TUNED!**

NLRB NARROWS THE IMPOSITION OF A LOVES BARBECUE REMEDY WHICH REQUIRES A SUCCESSOR EMPLOYER TO RETAIN PREDECESSOR'S PRIOR TERMS AND CONDITIONS OF EMPLOYMENT WHEN IT BECOMES A BURNS SUCCESSOR.

In a recently issued decision, **Ridgewood HealthCare Center**, 367 NLRB No. 110 (2019), the Board overturned long standing precedent (**Galloway School Lines**, 321 NLRB 1442 (1996) and subsequent cases applying that precedent), on when a **Burns** successor is obligated to retain the prior terms of the predecessor's contract before bargaining for a successor agreement.

Under the Supreme Court decision In **NLRB v. Burns Int'l Security Services**, **Inc**. 406 U.S. 272 (1972) the Supreme Court by a vote of 5 to 4 held that when a company purchases the assets of another company whose employees are represented by a union, the successor employer Is required to recognize and bargain with the union if the following conditions are met.

1) The successor employer hires as a majority of its own workforce, the former employees of the predecessor employer who were represented by the union.

2) The successor employer continues the business of the predecessor in substantially unchanged form with a substantial and representative complement of employees.

3)The Union makes a demand to recognize and bargain.

Pursuant to **Burns**, the successor employer is ordinarily free to set its own terms and conditions of employment. The Supreme Court acknowledged, however, an exception when a successor employer would be required to

commence bargaining under the predecessor's expired contract terms. This exception occurs when the successor has made it perfectly clear that it is going to retain all of the predecessor's employers. This is known as the "perfectly clear exception".

In the **Spruce Up** decision, 209 NLRB 194 (1974), the Board applied the **Burns** "perfectly clear successor" doctrine. It held that a successor Is obligated to retain the predecessor's prior contract terms before bargaining with the Union **only** in those situations when it has hired all or substantially all of the predecessor's employees; or has misled employees that it intended on hiring the former employees under the same conditions that they had enjoyed with the predecessor employer; or fails to clearly announce its intent to establish new conditions before inviting former employees to accept employment.

In **Loves Barbecue,** 245 NLRB 78 (1979) the Board established a remedial remedy when the failure to become a Burns successor is a result of its avoidance of a bargaining obligation by its unlawful refusal to hire the prior employees in violation of Section 8(a)(3) of the Act. In such a situation, the Board will find a violation of Section 8(a)(3) and (5) of the Act. As a remedy, it will require the successor employer not only to recognize and commence bargaining, but also to restore the terms and conditions of employment that had existed under the predecessor's contract, make employees whole, and commence to bargain under those terms.

Ridgewood revisited the perfectly clear successor doctrine under **Burns** and **Spruce Up** and narrowed the application of the **Loves Barbecue** remedy. It reversed **Galloway** and any case subsequently applying the remedy based on **Galloway**.

In **Ridgewood** the majority in a 2-1 decision reversed the ALJ who had applied the **Loves Barbecue** remedy based on the precedent of **Galloway School Lines** and subsequent cases. In **Galloway,** the Board had concluded that when a successor employer had refused to hire **some but not all** of its former employees in violation of Section 8(a)(3) to avoid a Burns bargaining order, it forfeited the right to set its own terms and conditions of employment, even in situations where the evidence didn't establish that the Employer had Intended on hiring all or substantially all of the predecessor's employees. In **Ridgewood,** the Board found this remedy to be punitive and not supported by **Burns** and **Spruce Up.** They overruled

Galloway and concluded that the Board had improperly extended the Loves Barbecue remedy.

The Board in **Ridgewood** distinguished **Loves Barbecue** from **Galloway** because the Employer in **Loves Barbecue** had refused to consider for hire **any** of the predecessor's employees thereby creating an uncertainty as to whether the Employer would have hired all (or substantially all) of the former employees. Based on the Employer's unlawful conduct that created this uncertainty, the Board in **Ridgewood** agreed that it was appropriate to resolve the uncertainty against the Employer and apply the perfectly clear exception and the remedy that it awarded.

Turning to the facts in **Ridgewood**, the Board noted that the evidence established that it would have hired 53 out of 101 former employees (refused to hire 4 employees in violation of 8(a)(3). The Board agreed with the ALJ that it was a **Burns** successor but found that it was privileged to set its own initial terms of employment even though it had unlawfully refused to hire some of its former employees in violation of Section 8 (a)(3). The rationale for this holding was because the evidence in **Ridgewood** established that the Employer would not have hired all or substantially all of the predecessor's employees. They held that the prior ruling in **Galloway** went too far as there must also be evidence that the Employer intended to retain **all or substantially all of the predecessor's employees.**

Accordingly, the Board in **Ridgewood** narrowly interpreted the application of the **Loves Barbecue** remedy when finding a "perfectly clear" successor. It held that it would only require the successor to maintain the prior terms and conditions of employment before commencing bargaining only if it intended to retain **all or substantially all** of the predecessors' employees citing to **NLRB v. Burns Security Services, Inc**., 406 U.S. 272 (1972 for legal support.

There was a strong dissent by Member McFerran noting that the **Loves Barbecue** remedy adopted in **Galloway** and subsequent cases had been the law for 20 years. She also asserted that neither **Burns** nor **Spruce Up** required a departure from this precedent. Further, Member McFerran noted that from an equitable viewpoint, applying the **Loves Barbecue** remedy also served as a deterrent for Employer's to commit 8(a)(3) violations in order to avoid a bargaining obligation when they knew that they would face the **Loves Barbecue** remedy and not be free to set their

own terms and conditions of employment. The majority on the other hand found this remedy to be punitive. They also stated that "the **Galloway** remedy may be a deterrent to employers contemplating unlawful hiring schemes, but it also risks job loss and consequent financial ruin for all employees in the successor's enterprise. Such a potential outcome threatens the labor relations stability that the Board is statutorily bound to protect." **Ridgewood** at 8.

Member McFarren was also critical of the Board for determining to overrule **Galloway** when it failed to invite pubic participation and the Respondent had excepted to the ALJ finding on other grounds.

This decision will severely limit when a successor employer will be required to retain the prior terms and conditions of employment that the employees had secured with the predecessor employer. As noted by Member McFarren, if an Employer can attempt to avoid a bargaining obligation by refusing to hire some but not all of its former employees, there is less of a deterrent to doing so when the remedy is only to offer reinstatement and backpay to those who it unlawfully refused to hire and to bargain under the new set of employment terms it has already implemented.

BOARD SEEKS INPUT FROM PUBLIC IN RECONSIDERING STANDARD FOR DETERMINING WHEN AN EMPLOYEES UTTERANCES AT THE WORKPLACE CAUSES THEM TO LOSE THE ACT'S PROTECTION WHILE ENGAGING IN SECTION 7 ACTIVITIES.

On September 5, 2019, the Board issued a Notice and Invitation to File Briefs in *General Motors LLC and Charles Robinson*, 368 NLRB No. 68. The issue concerns whether or not to overrule several Board decisions, *Plaza Auto Center,* 360 NLRB 972 (2014); *Pier Sixty, LLC*, 362 NLRB 505 (2015) enfd. 855 F.3d 115 (2d Cir. 2017) and *Cooper Tire,* 363 NLRB No. 194 (2016), enfd. 866 F.3d 885 (8th Cir. 2017)

In all three cases the Board considered whether or not employees lost their protection because while they were engaging in Section 7 activity

(union or protected concerted activity) they uttered profane, sexually offensive or racially offensive comments.

Each case involved very different factual situations - Plaza Auto (profane statements made directly to a supervisor) Pier Sixty (profane language posted against a supervisor on Facebook) and Cooper Tire (racially or sexually offensive language uttered by employees while on a picket line).

The Board is considering whether it should modify, or abandon the standard applied in these three cases. They are also considering what if any other factors should be considered when determining whether the statements by the employees crossed over the line.

Dissenting Member McFarren doesn't see a basis to reconsider this area of the law. Rather she believes the law has been appropriately applied by the Board. She notes that there are many cases where the Board has determined that the employees statements went too far and they lost their protection under the Act.

BIOGRAPHIES

RYAN J. BARBUR, ESQ.
BIOGRAPHY

Ryan J. Barbur joined Levy Ratner as an associate in 2007, and became a partner in 2014. At LR, Ryan primarily represents labor unions and Taft-Hartley funds, helping them to navigate the complex areas of bankruptcy, employee benefits, ERISA collections and withdrawal liability.

Ryan is an active member of the American Bar Association's Employee Benefits Committee, and is a contributing author to the EBC's Employee Benefits Law treatise.

Ryan is a graduate of the Columbia University School of Law (J.D. 2007) and the University of Minnesota – Twin Cities (B.A. 2004). Ryan is currently pursuing an LLM in Employee Benefits from the UIC John Marshall Law School.

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Stanley D. Baum is the Chairperson of the New York State Bar Association's Labor & Employment Law Section Committee on Employment Benefits and Compensation, and a member of the Section's Executive Committee.

Stanley has many years of experience in the ERISA, employee benefits, executive compensation and employment areas of the law. He has a B.S., *Accounting, summa cum laude,* from the Wharton School of the University of Pennsylvania; a J.D. from the University of Pennsylvania School of Law; and an LL.M., *Taxation,* from New York University School of Law.

ALLYSON L. BELOVIN, ESQ.
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Allyson L. Belovin (Cornell University School of Industrial and Labor Relations, B.S., 1993; Georgetown Law School, J.D., 1996) has devoted her career to protecting and advancing the rights of working people by representing labor unions and individuals in all aspects of labor and employment law. She litigates cases in state and federal courts as well as at the National Labor Relations Board, the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the New York City Human Rights Commission and other agencies. She uses skill and insight to help clients navigate discipline and contract interpretation cases in American Arbitration Association and JAMS hearings and has substantial experience negotiating collective bargaining agreements covering thousands of workers. Allyson represents unions in a wide range of industries, including health care, utilities, cultural organizations, legal services, sports, maritime, education, and postal service. She also represents unions and candidates in union officer elections and other internal matters. Allyson's representation of individual clients includes the litigation of discrimination claims under a variety of federal, state and local laws, including race and sex discrimination claims, equal pay claims, disability claims, and first amendment claims, as well as wage and hour work and freelancer representation. She also represents executives, professionals and other white collar employees in negotiating hiring and separation agreements, including covenants not to compete, confidentiality restrictions and non-solicitation clauses.

Allyson is a chapter editor of the seminal labor law publication, *The Developing Labor Law*, and has been on the Board of Editors of the well-known treatise *How To Take A Case Before The NLRB*. She is the co-chair of the NYSBA Labor & Employment Section's Labor Relations Committee, a member of the Advisory Board of the Center for Labor and Employment Law at NYU Law School, a former Board member of the AFL-CIO's Lawyers Coordinating Committee, and an active member of the ABA's Committee on the Development of the Law Under the NLRA,. Allyson has authored papers and presented on panels for the ABA, the NYSBA, the AFL-CIO LCC and the Cornell School of Industrial and Labor Relations on various subjects, including NLRA developments, labor arbitration practices, deposition techniques in labor cases, successorship and the labor law implications of corporate restructuring, and joint employer status under the NLRA. Belovin also conducts training sessions for union organizers and rank-and-file activists on a variety of issues including harassment prevention, fair pay practices, grievance handling, and arbitrations.

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Ms. Marcela Bermudez is senior counsel in Greenspoon Marder's Immigration and Naturalization practice group. Ms. Bermudez focuses her practice on business immigration. She represents multinational companies, as well as individual clients, in connection with a variety of employment-based immigration, non-immigrant matters, I-9 issues, and family-based benefits. Ms. Bermudez also represents foreign investors seeking visa status based on start-up companies and investments, as well as individuals seeking classification for extraordinary ability or national interest waiver.

Ms. Bermudez also focuses her practice on global business immigration with a concentration in Latin America. She works with multinational corporations throughout the world to strategize and facilitate the transfer of its employees and their dependents for temporary assignments abroad, including obtaining the necessary residence and work permits, visa and post-entry registration.

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Professional and Community Involvement
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Speaking Engagements
Speaker, "Expats and Secondees into the US: Clearing the Employment and Immigration Hurdles," New York State Bar Association, Labor and Employment Section, Annual Meeting, January 25, 2013
Speaker, "Managing Global Workforce Mobility," August 5, 2008

Publications
Co-Author, "Immigration Policy and Employment Law in the Era of Trump," Labor & Employment Law Section Fall Meeting, New York State Bar Association, October 2017
Author, "Immigration Basics for Expats and Secondees," New York State Bar Association, Labor and Employment Section, Annual Meeting, January 25, 2013

Co-Author, “New IRS Audit Policies May Focus on HR Departments,” *SHRM Magazine*, September 4, 2009
Co-Author, “IRS to Audit Employers Sponsoring H-1B Visa Holders,” Bloomberg News, June 15, 2009
Co-Author, “Termination of Foreign Nationals: Refresher on Due Diligence from an Immigration Perspective,” October 17, 2009

Marcela Bermudez is a senior counsel with Greenspoon Marder LLP in New York. She focuses her practice on business immigration. She also focuses her practice on global business immigration with a concentration in Latin America. She works with multinational corporations throughout the world to strategize and facilitate the transfer of its employees and their dependents for temporary assignments abroad. Ms. Bermudez also represents foreign investors seeking visa status based on start-up companies and investments, as well as individuals seeking classification for extraordinary ability or national interest
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Mr. Carello provides legal advice and counsel to the business on labor, employment and other personnel issues. He was previously a Labor & Employment Associate at Nixon Peabody LLP.

LARRY CARY, ESQ.
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Larry Cary is a Founding Partner of Cary Kane LLP. He has practiced labor, employment and employee benefits law for 30 years and been involved with the American labor movement for over 40 years. Previously he was the senior partner in the labor department of Vladeck, Waldman, Elias & Engelhard where he represented unions and benefit plans for 17 years. He also was general counsel to the Amalgamated Service and Allied Industries Joint Board, ACTWU, and its pension and welfare benefit plans. Before attending law school, Mr. Cary was an organizer for Local 3, United Storeworkers, RWDSU, a research assistant in a multiemployer welfare benefits plan, and the development specialist in charge of starting-up the Robert F. Wagner Labor Archives at New York University.

Mr. Cary taught labor law and related subject for over 20 years. He was an Adjunct in the labor liberal arts extension certificate program of Cornell University, School of Industrial and Labor Relations, where he has taught labor, employment and employee benefits law. As an Assistant Professor for Hofstra University he taught labor law, union administration, contract administration, collective bargaining, political science and public administration. Mr. Cary also taught at the Labor College, Empire State, SUNY, in the Local 3, IBEW, electrical apprentice associates degree program.

Throughout his legal career, Mr. Cary has been counsel or co-counsel to various multiemployer plans, including pension, annuity, profit sharing, welfare, vacation and legal services plans in the private sector and to union-administered welfare, legal services and education funds in the public sector in New York City.

On behalf of unions, Mr. Cary negotiates collective bargaining agreements, arbitrates disciplinary and contract interpretation disputes, deals with internal union matters and advises on anti-corporate campaigns. He has handled matters before a wide variety of administrative agencies, including the NLRB, NMB, PERB, OCB, OATH, IRS, DOL, INS, EEOC, NYS Division of Human Rights and NYS Departments of Health, Education and Labor. He has represented clients in many industries, including: trucking, warehousing, municipal and voluntary hospitals, nursing home, the postal service, defense contracting, building service, newspaper, retail, manufacturing, clothing, laundry and linen supply, maritime, airline, private and public sector education, bakery, grocery and produce, over the road freight, car wash and government. Mr. Cary was General Counsel to TWU, Local 100, the union for bus and subway workers in New York City. He is General Counsel to District council 1707, AFSCME, which represents workers in New York City Day Care, Head Start, Home Care and other non for profit agencies.

Licensed to practice law in the State of New York, Mr. Cary litigates in both New York and Federal courts and is admitted to the United States Supreme Court, the United States Court of Appeals for the Second Circuit, and the United States District Courts for the Southern and Eastern Districts of New York.

Mr. Cary is active in a number of organizations. Since 1983 he has been a member of the labor advisory board of the Robert F. Wagner Labor Archives, which is an internationally respected labor history archives. He is the Treasurer of the Workers Defense League, Inc., which provides free representation to claimants at unemployment compensation insurance hearings in New York City. Mr. Cary serves *pro bono* as counsel to the New York Committee for Occupational Safety and Health, which is the leading organization in New York City promoting safe and healthful workplaces. For ten years he was the President of the Cornell University Adjunct Faculty Federation, Local 4228, NYSUT, AFT, and a delegate to the New York City Central Labor Council. Mr. Cary served on the Executive Board of the New York Labor History Association for ten years and was its President in 1985-1986. As a result of his efforts, in 1986 Governor Mario M. Cuomo proclaimed May "Labor History Month" in New York State.

Mr. Cary is a member of the Association of the Bar of the City of New York, the American Bar Association, the New York State Bar Association, the AFL-CIO Lawyers Coordinating Committee, the Federal Bar Council, the International Foundation of Employee Benefit Plans and the Association of Benefit Administrators. He is the President and a member of the Board of Directors of the Brooklyn Tech Alumni Foundation, having graduated from Brooklyn Technical High School where he majored in chemistry. The Alumni Foundation recently completed a $21 million fund raising campaign to support educational excellence at BrooklynTech. He graduated from Brooklyn College, with a major in history and a minor in economics. He received a Masters of Public Administration from New York University where his studies concentrated on health policy, planning and administration. He earned his law degree at Brooklyn Law School and a Certificate in Employee Benefits Law from Georgetown University's Law Center.

PETER D. CONRAD, ESQ.
BIOGRAPHY

Peter Conrad began his legal career as a trial attorney and hearing officer at the National Labor Relations Board.

Peter joined Proskauer's Labor & Employment Law Department in 1980 and became a partner in 1986. He has represented employers in numerous industries (including health care, higher education, financial services, trucking, pharmaceutical, petrochemical, telecommunications, legal services, publishing, retail, broadcasting, entertainment, hotel and professional sports) in the full range of unfair labor practice and election proceedings before the NLRB. In the nearly 30 years that Peter has handled matters at the NLRB, he has confronted virtually every issue that a labor lawyer practicing in this area could expect to see, from the straightforward discharge for union activity, to the most complex secondary boycott, successorship and refusal-to-bargain situations, representing some of the firm's most prestigious clients.

The remainder of Peter's time is devoted to the related areas of union avoidance and corporate campaigns (defending employers against organizational activity in its many forms), as well as arbitration, negotiation, and litigation under collective bargaining agreements. Although primarily engaged in a more traditional labor relations practice, Peter also represents companies in employment discrimination cases (before state and federal administrative agencies and in the courts), workers' compensation and unemployment insurance proceedings, and general client counseling in all areas of labor relations and employment law.

The clients that Peter represents on a regular basis include T-Mobile USA, United Parcel Service, Consolidated Edison Company of New York, Barneys New York, Delaware North Companies, Castle Oil Corporation, and Otis Elevator Company, to name a few.

As a member of the interdepartmental Sports Law Group, Peter also has done work over the years for the National Basketball Association, the National Hockey League, Major League Baseball and the Major Indoor Soccer League, primarily in matters pending at the NLRB, including the 1995 attempted decertification of the National Basketball Players' Association and the much more recent season-long lockout by the NHL in 2004/2005.

Peter has been a member of the faculty of the Practising Law Institute since 1987, speaking on the labor and employment law aspects of "Acquiring or Selling the Privately Held Company."

HON. THÉRÈSE WILEY DANCKS
BIOGRAPHY

Thérèse Wiley Dancks is a United States Magistrate Judge for the Northern District of New York. At the time of her appointment in February of 2012, she was a founding partner in the law firm of Gale & Dancks, LLC, where her practice centered on civil litigation and trial work. She was associated with the Syracuse law firm of Mackenzie Hughes, LLP from 1991 to 1997. Judge Dancks graduated *magna cum laude* from Le Moyne College in 1985 and earned her J.D. degree *cum laude* from Syracuse University College of Law in 1991. She serves on various committees for her district court, the Second Circuit, and the Federal Magistrate Judges Association. She is a native Central New Yorker, and in her spare time assists local community and professional organizations, with an emphasis on helping providers of legal services to the indigent and poor, bar associations, and educational institutions.

KAREN P. FERNBACH, ESQ.
BIOGRAPHY

Ms. Fernbach commenced her career with the National Labor Relations Board upon graduation from St. John's Law School in 1977. In 2012, she was appointed Regional Director of the Manhattan Region of the National Labor Relations Board. She served as Regional Director until her retirement in 2017. Currently Ms. Fernbach is a Visiting Assistant Professor at Hofstra Law School. She teaches labor law, employment law, collective bargaining, advanced topics of labor law and is a faculty advisor for the Hofstra Labor & Employment Law Journal. She also teaches Labor Law as an Adjunct Professor at St. John's law school.

In 2019, Ms. Fernbach was appointed to the AAA Labor Arbitration Panel. She also mediated federal employee work place disputes when she was employed at the NLRB. Ms. Fernbach is an active member of the Labor and Employment Law Section of the NYS Bar Association and a Member of the Advisory Board of Cornell Institute of Labor Relations. She is a member of both the Long Island and NYC Sections of the Labor Employment Relations Association, (LERA). In 2019 she was appointed to the Executive Board of LI LERA.

Ms. Fernbach has been a guest speaker at numerous conferences addressing current legal issues in both the labor and employment field. Some of the organizations where she has been invited to speak at include the NYS Bar Association, American Bar Association, NYC Bar Association, Cornell Institute of Labor Relations, American Conference Institute, and both the NYC and Long Island Sections of LERA.

PATRICIA L. GANNON, ESQ.
BIOGRAPHY

Ms. Patricia L. Gannon is a shareholder in Greenspoon Marder's Immigration and Naturalization practice group. Ms. Gannon focuses her practice on business immigration. She advises multi-nationals on employment verification matters and develops various compliance strategies and programs and, employment-based immigrant petitions, investment and professional visas. Ms. Gannon, as a member of the Foreign American Counsel, concentrates her international practice on global immigration and provides outbound assistance to foreign companies. She facilitates and organizes global human resources through the implementation of visa and management of global mobility staff.

Ms. Gannon has represented fortune 500 companies, artists, Olympic athletes, banking, telecommunications, and an array of international high net individuals.

Previously, Ms. Gannon was the deputy district counsel for the former Immigration and Naturalization Service, where she spearheaded nationwide enforcement initiatives and worked with the Eastern Region Service Centers' policy and enforcement of employment eligibility verification forms. She also served as a special assistant to U.S. Attorney for the Eastern District of New York where she investigated and prosecuted many complex immigration civil cases.

Ms. Gannon has lectured nationally and internationally on immigration issues to bar associations and industry groups.

Bar Admissions
Minnesota
New Jersey

Education
J.D., William Mitchell College of Law, 1990
B.A., University of Minnesota, Twin Cities Campus, 1986
Universidad De Cadiz, 1984-1985

Other Languages
Spanish

Professional and Community Involvement
New York State Bar Association, Immigration Section, chair
International Talent Mobility Team, leadership team
United States Chamber of Commerce, Employment Labor Committee, Immigration Sub-Committee, member
American Immigration Lawyers Association (AILA), member
Employer Sanctions Legislative Committee and the Anti-Exploitation Task Force Committee, member

Speaking Engagements

Featured Judge, 2019 National Immigration Law Competition, New York University Law Moot Court Board, February 1-2, 2019

Speaker, "Investment and Citizenship Portfolios," Latin American Lawyer Forum, September 13, 2018

Speaker, "Forming and Dissolving Partnerships," AILA Annual Conference on Immigration Law, June 14, 2018

Speaker, "Labor & Employment Law Section Fall Meeting," New York State Bar Association, Bolton Landing, NY, October 20-22, 2017

"How to Prepare Your Clients for Potential Raids," Webinar Presented by American Immigration Lawyers Association, July 18, 2017

Speaker, "2017 AILA Employer Compliance and Worksite Enforcement Conference," American Immigration Lawyers Association, Scottsdale, AZ, February 10-11, 2017

"Clinton vs. Trump on Immigration – An overview of Very Different Perspectives," Webinar Presented by New York State Bar Association, October 19, 2016

Speaker, "Basic Immigration Law," Practice Law Institute, March 23, 2006, 2011

Speaker, "The Need for a U.S. Immigration Reform: The U.S. and Mexican Perspective," United States-Mexico Chamber of Commerce, March 2, 2006

Recognitions

The National Law Journal, "Immigration Trailblazer," 2018

U.S. News & World Report, "Best Lawyers," 2014 – 2018

InterContinental Finance Magazine, Legal Excellence Award, 2011-2016

Legal 500 U.S., 2013 - Present

Who's Who Legal, 2008 - Present

Attorney General Award, Outstanding Compliance with EEO Hiring Practices, nominated Department of Justice, Outstanding Performance in Investigation and Prosecution

Publications

Co-Author, "Border Patrol: Risks of the U.S. Commercial Cannabis Industry for Non–U.S. Citizens," Cannabis Business Times, October 9, 2018

Co-Author, "Immigration Policy and Employment Law in the Era of Trump," Labor & Employment Law Section Fall Meeting - New York State Bar Association, Bolton Landing, NY, October 20-22, 2017

Co-Author, "Introduction to ICE HIS I-9 Audits," American Immigration Lawyers Association, Scottsdale, AZ, February 10-11, 2017

Co-Author, "New IRS Audit Policies May Focus on HR Departments," *SHRM Magazine*, September 4, 2009

Co-Author, "Time for Supreme Court to Rein in Expansion of Civil RICO," *New York Law Journal*, April 4, 2006

GRETCHEN HARDERS, ESQ.
BIOGRAPHY

GRETCHEN HARDERS is a Member of the Firm in the Employee Benefits and Executive Compensation practice, in the firm's New York office.

Ms. Harders' practice focuses on all aspects of executive compensation and employee benefits law. Ms. Harders counsels a broad range of clients on executive compensation and employee benefit issues, tax-qualified and non-qualified plans, 401(k) plans, the Patient Protection and Affordable Care Act, deferred compensation, executive incentive compensation plans, executive employment and severance agreements, Section 409A compliance, equity-based compensation plans, multiemployer plans and health and welfare plans and trusts.

Ms. Harders has been selected by her peers for inclusion in *The Best Lawyers in America*© in the field of Employee Benefits (ERISA) Law (2014 to 2020). She was also recommended by *The Legal 500 United States* in the category of Employee Benefits, Executive Compensation, and Retirement Plans: Design (2013, 2014, 2018, 2019), and named to the *New York Metro Super Lawyers* list in the area of Employee Benefits (2013 to 2018).

Education

University of Minnesota Law School (J.D., cum laude, 1997)
University of Chicago (B.A., 1989)

Bar Admissions

New York

NOLAN J. LAFLER, ESQ.
BIOGRAPHY

Nolan is an associate attorney in Blitman & King's Rochester office. Nolan's labor practice is comprehensive, including all facets of collective bargaining, grievance and interest arbitration, proceedings before PERB and the NLRB, matters of internal union administration, and related state and federal court litigation on behalf of unions. He represents unions in various industries and sectors of the economy, including police, fire and corrections; transit; education; retail, service and production; and the building and construction trades.

Nolan is a 2014 graduate of the American University Washington College of Law in Washington, D.C., where he worked as a law clerk at AFSCME, the NLRB and the U.S. Department of Labor. He is a recipient of the Peggy Browning Fellowship for Workers' Rights. Nolan received his Bachelor of Arts in Political Science from the University at Albany, State University of New York, in 2011. As an undergraduate, he worked in CSEA's government relations division.

COLIN M. LEONARD, ESQ.
BIOGRAPHY

Colin is a management-side labor and employment law attorney who works with clients throughout Central New York, the Mohawk Valley and the Southern Tier of New York.

His practice includes traditional labor-related work, including collective bargaining, labor arbitrations and agency matters before the NLRB and PERB. Colin also represents employers in federal and state anti-discrimination litigation and counsels human resources professionals on wide-ranging legal issues, including wage and hour, employee discipline and the New York State Labor Law.

Colin has experience assisting employers manage downsizing situations, when compliance with state and federal statutes relating to employment losses is critical. In particular, he has worked closely with employers in managing WARN-related risks resulting from plant closings and mass layoffs. Colin has represented employers in claims brought by unions and employees asserting violations of the New York State WARN Act. He helps employers conduct risk assessments and adverse impact analyses relating to layoffs, so that an employer can proceed with planned downsizing consistent with applicable law.

Employers regularly engage Colin to conduct workplace training. This includes union avoidance training for management and supervisors, FMLA training for HR professionals and workplace harassment training for employees and supervisors. Colin is a regular presenter for groups including the Central New York Chapter of the Society of Human Resource Management, the Human Resource Association of the Twin Tiers and the Southern Tier Association for Human Resources.

JESSICA LUKASIEWICZ, ESQ.
BIOGRAPHY

Jessica Lukasiewicz joined Thomas & Solomon LLP in 2008 after graduating from Syracuse University College of Law. Since joining the firm, Ms. Lukasiewicz has worked extensively on representing employees in wage-and-hour matters under both state and federal law, including the Fair Labor Standards Act. She also counsels and litigates on a wide variety of employment matters including discrimination, sexual harassment, and the Family Medical Leave Act.

During law school, Ms. Lukasiewicz gained experience on a wide range of discrimination issues while working at MFY Legal Services, Inc., Legal Services of Central New York, and the U.S. Department of Education Office for Civil Rights. She was also Business Editor for The Digest.

Before attending law school, Ms. Lukasiewicz graduated cum laude from the University of Florida in 2005, where she majored in psychology.

EDUCATION

Syracuse University College of Law, Syracuse, New York
J.D., 2008

University of Florida
B.S., *cum laude*, 2005
Major: Psychology

HONORS AND AWARDS

NY Super Lawyers Rising Stars, 2015–Present

PROFESSIONAL ASSOCIATIONS AND MEMBERSHIPS

New York State Bar Association
Monroe County Bar Association
American Bar Association
National Employment Lawyers Association
Greater Rochester Association for Women Attorneys
Co-chair, Labor & Employment for Women's Bar Association of the State of New York
Professional Advisory Committee for Hearing Loss Association

ERIN MCGEE, ESQ.
BIOGRAPHY

Erin McGee practices in the areas of employee benefits law and labor and employment law. She advises unions and boards of trustees of employee benefit plans on administrative and operational issues, as well as on compliance with a variety of laws, including state and federal employment statutes, the Employee Retirement Income Security Act, and the federal tax code, as well as represents union members in arbitrations and assists in labor law matters. She also represents union members and their families in housing, consumer credit and real estate matters.

Erin received her J.D. from the Fordham University School of Law in 2005, where she was a Francis J. Mulderig and a Stein Public Interest Scholar, leader of the Labor Law Interest Group and Habitat for Humanity, and a first-place Trial Advocacy competitor and coach. Prior to law school, she studied Philosophy and Politics at New College, Oxford University, as a Rhodes Scholar, where she was a member of the rowing team that defeated Cambridge in the annual boat race. She earned her B.A.s in English and Journalism at Iona College in New Rochelle, New York.

Erin is admitted to practice in New York and the U.S. District Courts for the Southern and Eastern Districts of New York.

GEOFFREY A. MORT, ESQ.
BIOGRAPHY

Geoffrey Mort is of Counsel to Kraus & Zuchlewski LLP, where he represents individual employees and specializes in employment discrimination litigation as well as separation and employment agreements. He previously served as an Assistant Corporation Counsel in the New York City Corporation Counsel's Office and as an Assistant Circuit Executive for the United States Second Circuit. Mr. Mort has extensive litigation experience, primarily in the Federal Courts, and has tried numerous cases to verdict or bench decision. In addition, he has conducted arbitrations before the American Arbitration Association, FINRA and the New York Stock Exchange. Mr. Mort is admitted to practice in New York and Colorado, as well as in the U.S. Second Circuit and Southern, Northern and Eastern Districts of New York. He is a Fellow of the College of Labor and Employment Lawyers, and also is a regular contributor to the "Outside Counsel" column in the New York Law Journal.

Additionally, Mr. Mort is co-chair of the Workplace Rights and Responsibilities Committee and a member of the Executive Committee of the New York State Bar Association ("NYSBA") Section on Labor and Employment Law, as well as NYSBA's Committee on Cannabis Law. He has spoken at NYSBA annual meetings, Labor and Employment Law Section Fall meetings, and conferences of the National Employment Lawyers Association/New York. Mr. Mort also is a member of the New York City Bar Association and the American Bar Association, where he is a member of the Employee Rights and Responsibilities Committee. He graduated from Brooklyn Law School, where he was Commentaries Editor of the Law Review, and *magna cum laude* from the University of Denver.

HON. JOSEPH E. O'DONNELL
BIOGRAPHY

Judge O'Donnell joined PERB's Buffalo office in March 2015. Prior to accepting his appointment as an Administrative Law Judge, he served as a Senior Partner in the Buffalo law firm of Reden and O'Donnell LLP for approximately 20 years. After graduating from law school, he worked as a Management Labor Relations Representative for General Motors Corporation before moving on to serve as an Associate Counsel in CSEA's Legal Department during the late 1980's, where he had the distinct privilege of working with Jerome Lefkowitz, then CSEA's Deputy General Counsel.

Judge O'Donnell received his Juris Doctorate degree from California Western School of Law, San Diego, California, in 1984, and his Bachelor of Science degree in Industrial Administration from General Motors Institute (now Kettering University) in 1979.

Judge O'Donnell is admitted to practice in New York, California, and Washington D.C.

LAURA RODRIGUEZ, ESQ.
BIOGRAPHY

Laura Rodríguez is an associate at Pechman Law Group PLLC, where she dedicates her practice to representing both employees and management in a broad range of labor and employment matters.

Ms. Rodríguez has independently handled over seventy-five wage and hour cases including individual, collective, and class action lawsuits in the state and federal courts of New York, New Jersey, Connecticut, and Pennsylvania. She also represents employees and employers in the negotiation of severance agreements and non-compete issues, as well as the investigation and litigation of harassment, discrimination, and retaliation claims before the Equal Employment Opportunity Commission, the National Labor Relations Board, the New York State Department of Labor, and the New York City Commission on Human Rights. Of note, in 2017 Ms. Rodríguez obtained a judgment of over $1.4 million for five former workers of Indus Valley Restaurant, now closed, in the matter, Dias v. PS Bros. Gourmet, Inc. In 2018, she was lead counsel for a 3-day federal court trial representing the plaintiffs of Eren v. Gulluoglu LLC, bakery employees who had been misclassified and denied overtime wages. The judge found in plaintiffs' favor for all claims and issued a judgment awarding them payment for lost wages, interest, and other damages going back six years.

Ms. Rodríguez is an Adjunct Professor at Fordham Law School where she teaches an employment law course that explores issues of wage theft on a local, state, and national level. She is a founding member of Fordham Law's Alumni Attorneys of Color Affinity Group and co-chairs the group's New Attorneys Division. She is also a member of the New York City Bar Association and sits on the Minorities in the Courts Committee. In January 2019, she appeared on the ABC Network show, Tiempo, to discuss the rights of and issues affecting low-wage workers.

Prior to attending law school, Ms. Rodríguez served as an AmeriCorps volunteer and worked as a high school teacher and administrator in the Boston Public Schools.

BAR ADMISSIONS
New York
New Jersey
U.S. District Court of New Jersey
U.S. District Court Southern District of New York
U.S. District Court Eastern District of New York
U.S. Court of Appeals for the Second Circuit

EDUCATION
Fordham University School of Law, New York, New York Honors:
Public Service Valedictorian; Archibald R. Murray Public Service
Award, summa cum laude; Stein Scholar for the Public Interest;
Law School Class of 1967 Endowed Scholarship Recipient

Brown University, Providence, Rhode Island Honors: Trifari Fellowship Awardee; Frances D. Horowitz Millennium Scholar

LANGUAGES
Spanish
Italian

HON. MARY THOMAS SCOTT
BIOGRAPHY

Judge Scott was appointed to serve as an ALJ in PERB's Buffalo regional office in May 2018. Prior to that time, she had a 25 year career in private and public sector labor relations, most recently as Deputy Director of Labor Relations for the County of Erie and the Director of Employee Relations for the City of Buffalo. Judge Scott received her Juris Doctorate from SUNY at Buffalo, a masters' degree in Industrial Administration from Carnegie-Mellon's Tepper School of Business, and her undergraduate degree from SUNYAB in Business Management. In 2009, she was awarded a US Fulbright Scholarship to teach Collective Bargaining and Forensic Labor Contract Analysis to graduate students at the Southern Federal University in Rostov-on-Don in the Russian Federation.

PAUL J. SWEENEY, ESQ.
BIOGRAPHY

Mr. Sweeney joined Coughlin & Gerhart, LLP, following active duty as a Marine Corps judge advocate. He is a partner in the firm and concentrates in labor and employment law and commercial litigation. As chair of the firm's Labor & Employment Law Practice Group, Mr. Sweeney defends employers against liability, discrimination, disability and wage & hour claims and represents employers in contract negotiations, arbitration, discipline and administrative proceedings before the Equal Employment Opportunity Commission, the New York State Human Rights Division, the National Labor Relations Board, the Public Employment Relations Board and the Occupational Safety and Health Administration. In addition, he also represents clients in complex contract, construction and real estate disputes and serves as a mediator for the U.S. District Court for the Northern District of New York.

Mr. Sweeney, a co-chair of the Public Sector Labor Relations Committee of the New York State Bar Association's Labor and Employment Law Section, serves on the Section's Executive Committee and is the immediate past Treasurer of the Northern District of New York - Federal Court Bar Association. He edits BLR's *New York Employment Law Letter*, a monthly publication that helps employers understand new laws, regulations and court cases. Mr. Sweeney has received an "AV Preeminent" peer review rating from Martindale-Hubbell and has been named for inclusion in the *Best Lawyers in America* and the *Upstate New York Super Lawyers* publications. He is a member of the Federation of Defense & Corporate Counsel.

Mr. Sweeney retired as a colonel in the Marine Corps Reserve with more than 29 years of active duty and reserve service, including a combat deployment to Fallujah, Iraq. Prior to his retirement, he served as the senior Marine Reserve attorney in the Office of the Counsel for the Commandant of the Marine Corps and was the officer-in-charge of all Marine Reserve attorneys assigned to the Commandant, the Chairman of the Joint Chiefs of Staff and DoD Office of General Counsel. His personal awards include the Legion of Merit, the Defense Meritorious Service Medal and the Meritorious Service Medal, with gold star device.

Mr. Sweeney received his Bachelor of Arts degree, *in cursu honorum*, from Fordham University and his Juris Doctor degree from Brooklyn Law School.

ERIN S. TORCELLO, ESQ.
BIOGRAPHY

Erin S. Torcello works closely with her clients as a strategic business partner to provide practical solutions to complex legal issues in the workplace.

She represents and counsels management in the private and public sectors on a wide variety of labor and employment matters, including:

employment discrimination
and workplace harassment
wrongful discharge
layoffs
employee handbooks
unfair labor practice charges
Age Discrimination in Employment Act
National Labor Relations Act
New York State Human Rights Law
Fair Labor Standards Act (FLSA)
New York State Public Employees
Fair Employment Act (the Taylor Law)
collective bargaining and
wage and hour issues
civil rights litigation
personnel policies
labor arbitration
claims brought under Title VII
Americans with Disabilities Act
Family Medical Leave Act
Occupational Safety and Health Act (OSHA)

Honors & Affiliations
Listed in:
The Best Lawyers in America® 2020, Employment Law - Management
New York Super Lawyers 2019®, Employment and Labor
New York Super Lawyers 2018®, Upstate New York Rising Star, Employment and Labor
40 Under 40, *Buffalo Business First,* 2018
New York State Bar Association, Labor and Employment Law Section
Erie County Bar Association
Women's Bar Association of the State of New York
Buffalo Niagara 360 (BN360) Spotlight Professional, 2016-17

Education
University at Buffalo School of Law (J.D., *magna cumlaude,* 2007)
Cornell University School of Industrial and Labor Relations (B.S. 2004)

Bar/Court Admissions
New York
U.S. District Court for the
Eastern District of New York
U.S. District Court for the
Western District of New York

Practices
School Districts
Municipalities
Manufacturing
Labor and Employment

Representative Matters
Defended employers in numerous litigations and administrative actions alleging employment discrimination, harassment and/or retaliation.
Represented multiple employers in connection with wage and hour audits conducted by the New York State Department of Labor and the United States Department of Labor.
Handled multiple collective bargaining negotiations on behalf of management in various industries, including, education, health care and not-for-profit.

Representative Presentations
The Employers Guide to Dealing with Substance Abuse, Buffalo Niagara Partnership Speaker Series, March 21, 2019
Interviewed, Opioid Abuse on the Job: No Simple Solution for Employers, October 3, 2018
Interviewed, On Target with Penny Wolfgang, March 4, 2018
Pregnancy & Reasonable Accommodations - State and Federal Rights, WNY WBASNY, October 21, 2016
Once a Problem is Discovered, What are an Employer's Options?, Opiates in the Workplace Better Business Bureau of Upstate New York Seminar, September 22, 2016
State of the Union: NLRB's Expanded Impact on Your Workplace, Bond, Schoeneck & King Workplace 2016, June 1, 2016
Beating DOL to the Punch – Conducting Internal Wage & Hour Audits, Bond, Schoeneck & King Workplace 2014, June 12, 2014
Got It Covered? Often Overlooked Wage and Hour Issues for New York Employers, Bond, Schoeneck & King Workplace 2012, May 31, 2012
Employment Discrimination CLE, SUNY Buffalo Law School GOLD Group, November 2011
Proceed With Caution: What The 'New' NLRB Signals for Employers with Non- Union Employees, Bond, Schoeneck & King Workplace, 2011
Avoid Getting Burned: Hot Topics in Hiring and Recruitment, Bond, Schoeneck & King Workplace, 2011
The 'New' NLRB Signals for Employers with Non-Union Employees: Are You Ready?, Bond, Schoeneck & King Breakfast Briefing Series, 2011
Religion in the Workplace: Understanding Employee Rights and Employer Obligations, Bond, Schoeneck & King Workplace, 2010

KELLY TRINDEL, PH.D.
BIOGRAPHY

Kelly Trindel, Ph.D. is Head of Industrial Organizational Science + Diversity Analytics at pymetrics, a gamified assessment and analytics startup creating employment selection tools and performance-enhancement software for the human capital field. Kelly has built an international team of Industrial Organizational Psychologists and EEO Analysts at pymetrics who consult with clients and handle job analysis, fairness testing, and validation outcome studies for the life of our SaaS engagements. Before joining pymetrics in February 2018, Kelly worked at the Equal Employment Opportunity Commission (EEOC) most recently serving as Chief Analyst and Director of Research + Investigative Analysis. In this role, she led a group of Social Scientists located in district offices around the country in providing analytic support for systemic investigations and case development. While at EEOC Kelly served as the Commission's expert on 'big data' issues, including changing human resource models and people analytics. She served as the Chair of EEOC's Workgroup on Big Data and as a senior advisor on its Committee of Advisors on Systemic Enforcement. Kelly also co-chaired EEOC's annual academic conference, EEODataNet.

DEAN W. BRADLEY WENDEL
BIOGRAPHY

Brad Wendel joined the Cornell faculty in 2004, after teaching at Washington and Lee Law School from 1999-2004. Before entering graduate school and law teaching, he was a product liability litigator at Bogle & Gates in Seattle and a law clerk for Judge Andrew J. Kleinfeld on the U.S. Court of Appeals for the Ninth Circuit.

His teaching interests are in the regulation of the legal profession and torts, and his research focuses on the application of moral and political philosophy to problems of legal ethics.

DR. GERLIND WISSKIRCHEN
BIOGRAPHY

Gerlind Wisskirchen is a specialist lawyer in the area of labor and employment law with a special focus on advising international corporations. The excellence of her advice lies in her profound understanding of the business environments of her clients, her analytic ability and her strategic, precise, clear recommendations. Her endeavors extend beyond simply providing legal advice. She and her team are performance-driven and creative and strive to forge workable and strategic client-focused solutions so that businesses can achieve their business objectives. Part of this advice is project management, thus understanding the relevant factors, defining the goals, selecting the best methods and tools, and precisely implementing the set objectives. Gerlind Wisskirchen advises multinational corporations particularly on the issues of reorganization, national and international labor and employment law and compliance. She provides support to management – as a strategic advisor or member of the supervisory/advisory board – from the HR and labor and employment law perspective when business plans and strategies are being developed. Gerlind Wisskirchen is an expert on digitalization of the world of work and editor of the report ""Artificial Intelligence and Robotics and Their Impact on the Workplace" for the Global Employment Institute.

In a globalized world in which national borders are increasingly diminishing and corporations are facing global challenges, she has particular expertise in cross-border projects like business reorganizations (outsourcing, off-shoring), compliance issues, cross-border compensation programs, cross-border audits and internal investigations, board level codetermination, matrix structures of multinational corporations, the European works council, the implementation of codes of conduct, whistleblowing systems and IT-systems, the posting of employees and data privacy protection issues. She developed the "EU Labor & Employment Law Navigator," a comparative analysis of the labor and employment law systems in Europe.

Gerlind Wisskirchen is a regular moderator and panelist at national and international conferences on the legal issues of international HR management and on issues of cross-border Labor and employment law, such as the International Bar Association, the American Bar Association and the American Employment Law Council. She is a lecturer for the MBA program "International Human Resources Management" at Cranfield University, UK, one of the leading European business schools. She has published numerous articles in German and in English.

RICHARD K. ZUCKERMAN, ESQ.
BIOGRAPHY

Richard K. Zuckerman represents management in all public and private sector labor and employment law areas, including collective bargaining, discipline and litigation-related matters. His public sector clients include school districts, libraries, cities, counties, towns, villages and fire and ferry districts. He also serves as general counsel to school districts and as a hearing officer in General Municipal Law Section 207-a and 207-c disputes.

Mr. Zuckerman is the immediate past Chair of the New York State Bar Association (NYSBA's) Local and State Government Law Section and a former Chair of the NYSBA's Labor and Employment Law Section, as well as a former President of the New York State Association of School Attorneys.

He has also served as a member of the NYSBA's House of Delegates. Mr. Zuckerman is a Fellow of the Governors of The College of Labor and Employment Lawyers, a Fellow of the American and New York Bar Foundations, and an Inaugural Member of the Board of Advisors for the St. John's University School of Law Center for Labor and Employment Law. He is one of the co-editors for the New York State Bar Association's treatise "Lefkowitz on Public Sector Labor and Employment Law, Fourth Edition," as well as its Third Edition and Supplements, and was an editor for the American Bar Association's treatise "Discipline and Discharge in Arbitration" and Supplement. In addition, he was a contributing author to the 6th edition of the ABA's contract arbitration treatise, "How Arbitration Works" (Elkouri & Elkouri), and has co-authored numerous practice-related articles.

Mr. Zuckerman has been named as a Best Lawyer in America© since 2012 and is the Best Lawyers' 2019 "Lawyer of the Year: Labor Law- Management" for Long Island, as well as in 2017, in addition to being the 2015 New York City "Labor Law - Management "Lawyer of the Year." He has also repeatedly been named a New York Super Lawyer® in Labor and Employment Law, a Who's Who in American Law®, and a Long Island Business News' Who's Who in Labor Law. He has presented at numerous programs regarding various labor, education and employment law-related topics. He is admitted to practice before the United States Supreme Court, the federal Second Circuit Court of Appeals and the Eastern and Southern Districts of New York, as well as New York State courts.

Mr. Zuckerman is a graduate of the Columbia University School of Law, where he served as Director of the First Year Moot Court program. He graduated summa cum laude from the State University of New York at Stony Brook, where he was elected to Phi Beta Kappa in his junior year and received the William J. Sullivan Award, the University's most prestigious academic and service award.