

## SYMPOSIUM ARTICLES

# IT IS TIME FOR SOMETHING NEW: A 21ST CENTURY JOINT-EMPLOYER DOCTRINE FOR 21ST CENTURY FRANCHISING

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*The United States is competing in a 21st century global economy, and this leads to 21st century employment relations issues. Unfortunately, the government, courts, and administrative agencies are trying to solve these 21st century global problems with agency theory, joint-employer doctrine, single entity doctrine, and apparent authority, 20th, 19th, 18th . . . century legal doctrines.*

Introduction.....	6
I. Franchising History and Structure.....	7
II. The Joint-Employer Doctrine.....	12
A. The Joint-Employer Standard under Title VII of the Civil Rights Act of 1964 As It Applies to Franchising .....	13
B. The Joint-Employer Standard under the Fair Labor Standards Act.....	15

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C. Browning-Ferris and the Future of the Definition of “Joint Employer” under the NLRA and the Other Labor and Employment Laws .....	18
D. Employment and Labor Laws Differ .....	22
III. Browning-Ferris .....	23
A. The Standard Is Unclear .....	24
B. The New Test Expands the Reach of the Joint-Employer Doctrine .....	26
IV. The New and Old Test Result in Huge Costs or Perverse Incentives .....	26
A. The Benefits of BFI: Union Organizing .....	26
B. The Cost of BFI Applying to Franchising .....	29
C. The Socio-Economic Impact of BFI .....	31
Conclusion .....	35

## INTRODUCTION

The joint-employer doctrine is perhaps the hottest issue in labor and employment law for 2015 and the foreseeable future. In the September 2015 *Browning-Ferris* (“*BFP*”) decision,<sup>1</sup> the National Labor Relations Board (the “NLRB” or the “Board”), the administrative agency that enforces the National Labor Relations Act (the “NLRA” or the “Act”), issued what is expected to be the first of two decisions, expanding the joint-employer doctrine. In the *BFI* decision, the so-called putative employer (e.g., the lessor of employees or a franchisor) is now considered the employer of individuals who had in the past been considered employees of the supplier employer. Like in *Browning-Ferris*, a number of McDonald’s employees and the Service Employees International Union (“SEIU”) are arguing that the world’s largest franchisor is the joint employer of all its franchisees’ employees.<sup>2</sup> At first blush, one might believe that this is another esoteric labor and employment law issue that only lawyers and scholars care about. However, depending on how the Board and courts rule on this issue, the joint-employer doctrine could fundamentally change business in the United States by destroying the franchise model.

The purpose of this Article is to fully explore the joint-employer doctrine in the franchise industry. It provides a quick overview of the history and breadth of the franchise industry. Included in this Section is an analysis of

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1. See generally *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. No. 186 (2015).

2. See *NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald’s Franchisees and their Franchisor McDonald’s, USA, LLC as Joint Employers*, NLRB (Dec. 19, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against>.

why employers/people become franchisors and franchisees. Section II analyses the joint-employer doctrine with regard to franchisees and franchisors. This section not only explores the current state of the law, but it also discusses the arguments presented by the Board, the EEOC, and other employee advocates to expand the doctrine. Section III discusses the latest administrative decision on the joint-employer doctrine. Section IV notes that expanding the joint-employer doctrine will be counterproductive to employees unless all, or at least substantially all, franchisees' employees are joint employees of their franchisors. Section V explains that, because there is now too much focus on legal concerns, our country is ignoring the realities of the modern workplace and the realities of the modern consumer and that governmental entities should look for a "third way" to protect employees while also protecting the franchise model.

### I. FRANCHISING HISTORY AND STRUCTURE

At its most basic level, franchising is a business model where the brands/franchisors contract with franchisees to own/operate outlets of the franchisors' business. The franchisees own the business, generally use their own capital to build/build out/lease the property, employ the employees, are liable for any employment or tort lawsuits, and keep all the profits. The franchisors, among other things, charge the franchisee an initial franchise fee and take a royalty fee through a percentage of the gross revenue from on-going operations. In addition, the franchisor charges the franchisee additional fees for marketing and advertising. The sum of these fees can be substantial, often exceeding ten percent of total revenue.<sup>3</sup>

In exchange, franchisors provide their franchisees with a business model, brand recognition, education for the franchisees on how to operate their businesses, and other services. Most importantly, franchisors provide the franchisees with a brand that holds the promise of creating value through brand loyalty, brand awareness, perceived quality/consistency, and brand image.<sup>4</sup> In a world where everything, such as restaurants; clothes; and athletes, are considered "brands," the value of a brand's equity cannot be underestimated. The model works for both sides of the contract because franchisees get a turn-key business with support while franchisors get to expand relatively quickly without absorbing substantial financial risk and while tapping into their own scarce capital resources. This does not mean, however, that there is no risk involved. With each additional new

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3. See Stephen Rushmore, Jr. & Erin S. Bagley, *2014 United States Hotel Franchise Fee Guide*, HVS GLOBAL HOSPITALITY SERVICES 2, 9–11 (Oct. 5, 2014), <http://www.hvs.com/Jump/Article/Download.aspx?id=7097>.

4. See generally D.A. Aaker, *Measuring Brand Equity Across Products and Markets*, 38 CAL. MGMT. REV. 102 (1996).

franchisee, the franchisor risks its brand equity. Will the franchisees fail to live up to brand standards? If they fail to comply with brand standards, will the consistency and quality that drives the consumer to choose the brand be compromised? The value to a firm of their brand equity, or loss thereof, is substantial and is of paramount importance to the ongoing concern.<sup>5</sup> To mitigate this risk, franchisors require their franchisee partners to sign long, complex contracts in which the franchisees promise to uphold brand standards (e.g., the prescribed type of TV in a hotel room, a standard of cleanliness, and/or quality of the product). Franchisees who fail to comply with these brand standards are generally given a period of time to cure the defect and to comply with the contractual terms, or the franchisees can have their agreements terminated, risking “losing” the franchise.

Franchisees also face risk. Franchisees are responsible for all of the initial capital expenses—money that is lost if the business fails or if the franchisor eventually terminates the contract. Of course, failed franchises or franchises that are terminated have the effect of making the franchisors appear less appealing business partners to new franchisees. For the reasons above, the relationships are symbiotic; both sides are invested in each other and truly want the franchise to succeed.

Franchising has been part of the industrial culture since the 1800s, when Isaac Singer, of sewing machine fame, realized he could not sell and service his patented machines nationwide by himself. He therefore “sold” franchises to local employers.<sup>6</sup> The world’s most famous franchisor is probably Ray Kroc, a milkshake machine salesman who went into business with, and ultimately purchased the name and concept from the McDonald brothers, who owned several hamburger restaurants.<sup>7</sup> Since that time, other restaurants, hotels, car repair shops, health clubs, and numerous other businesses have used franchising as a method for expanding their businesses in terms of the number of units, revenue, and profits. The International Franchising Association estimates that as of January 2015 there were over 781,794 franchised establishments operating across

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5. See Kevin L. Keller, *Conceptualizing, Measuring, and Managing Customer Based Brand Equity*, 57 J. OF MKT. 1, 8–9 (1993). See generally Vijay Mahajan et al., *An Approach to Assess the Importance of Brand Equity in Acquisition Decisions*, 11 J. PROD. INNOVATION MGMT, 221 (1994). For franchisors, brand equity is the Holy Grail—it incentivizes franchisees to buy a franchise, it drives consumers to the unit and thus drives revenue. Brand equity is what the franchisor creates, maintains, and sells.

6. See Andrew B. Jack, *The Channels of Distribution For an Innovation: The Sewing-Machine Industry in America, 1860-1865*, 9 EXPLORATIONS IN ENTREPRENEURIAL HIST. 113 (1957).

7. See generally Claudio Vignali, *McDonald's: “think global, act local” - the marketing mix*, 103 BRITISH FOOD J. 97 (2001).

numerous sectors of the U.S. economy.<sup>8</sup> Moreover, franchising has become a vehicle for entrepreneurs seeking to mitigate risk and improve profitability.<sup>9</sup> Due to its attractiveness, franchising has become an enormous employer of workers, as well as an important source of tax revenue. According to estimates from the U.S. Census Bureau, franchisees employ 7.9 million employees and are responsible for \$153.7 billion in total payroll, as well as \$1.3 trillion in total sales.<sup>10</sup>

The reason why parties franchise has been the subject of numerous academic studies, and a full analysis is beyond the scope of this Article. However, it is important to quickly address “the why.” From the franchisee’s standpoint, the motivation for franchising can be readily identified and understood. Franchising reduces the franchisee’s risk because of the brand’s value to the consumer, the network of support, and the services provided (advertising, hotel reservation systems, loyalty programs etc.). Indeed, financial performances of independent businesses are significantly lower than those of comparable businesses that are franchisees.<sup>11</sup> Also, the probability of financial failure has been shown to be lower for firms that franchise versus those that operate as independent businesses.<sup>12</sup>

For the perspective of the franchisor, the reason for franchising is more complex. At its most basic level, academics have identified two primary motivations for franchising: “capital scarcity” and “agency conflict.” Capital scarcity is easy to understand since franchisees use their own (or borrowed) capital and they assume the financial risks. Thus, the franchisors can expand their brands without raising and risking their own capital. Agency conflict is more complicated. Given the existence of

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8. See *Franchise Business Outlook for 2015*, INT’L FRANCHISE ASSOC. 1, 2 (Jan. 2015), <http://emarket.franchise.org/FranchiseBizOutlook2015.pdf>.

9. See generally Patrick J. Kaufmann, *Franchising and the Choice of Self Employment*, 14 J. BUS. VENTURING 345 (1999); Russell M. Knight, *The Independence of the Franchisee Entrepreneur*, 22 J. SMALL BUS. MGMT. 53 (1984).

10. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2007 ECONOMIC CENSUS FRANCHISE REPORT [http://www.census.gov/econ/census/pdf/franchise\\_flyer.pdf](http://www.census.gov/econ/census/pdf/franchise_flyer.pdf). (last visited Nov. 15, 2015).

11. See Melih Madanoglu et al., *Franchising and firm financial performance among U.S. restaurants*, 87 J. OF RETAILING 406 (2011) (comparing the risk adjusted financial performance of restaurant firms that were franchised and non-franchised between 1995-2008 using five commonly employed financial performance measures. For each measure, franchising restaurant firms outperformed their non-franchising counterparts.).

12. See Paul Ingram & Joel A. C. Baum, *Chain Affiliation and the Failure of Manhattan Hotels, 1898–1980*, 42 ADMIN. SCI. Q. 68 (1997) (finding that, under most circumstances, chain affiliation improved the chances of survival for 558 hotels that operated in Manhattan between 1898 and 1980).

conflict in goals between principals and agents, at least three agency problems may exist when combined under the conditions of incomplete information and uncertainty: 1) moral hazard, where the principal will not be able to ensure that maximum effort is put forth by the agent; 2) adverse selection, whereby the principal may have difficulty assessing and ensuring the agent's quality; and 3) hold-up, where one or both parties will act opportunistically.<sup>13</sup> At its most basic level, agency conflict, in this context, stands for the proposition that, because franchisees are owner/managers, they will be more invested in the efficient and profitable operation of the business than company employees of the franchisor, and thus, they will work harder, be more honest, and do a better job. Furthermore, franchisees are, in the theory, local owners who know the idiosyncrasies of their local market better than the national franchisor and can better understand and serve the local consumer. The franchisor, however, must endure the cost of constantly monitoring franchisees to ensure they comply with their contracts and do not engage in opportunistic behavior that may benefit them at the expense of the franchisor and the brand. This Article considers much of the traditional agency conflict arguments unhelpful because they provide conflicting motivations regarding the tendency to franchise and do not reflect the modern realities of the franchise business environment.

First, it is not at all clear that franchisee owners will work harder than "company managers" seeking to move up the corporate ladder. Both types of managers have incentives to do the best they can, but the franchisee's manager's interests are often less aligned with the brand than are the company's own employee managers. This is the case for two reasons. First, there is a difference in what the franchisors and franchisees value: franchisees benefit from profits, while franchisors benefit from the unit's gross revenue. Second, the franchisee may not be as loyal to the brand as are the company's managers. In the modern world, many franchisees operate numerous brands. Indeed, there are several large hotel franchisees that own and operate Hilton, Marriott, and Choice brand hotels. It stands to reason that managers of hotels who work for these large franchisees, seeking to rise in the organization, will be more loyal to the franchisee company than the brands that they currently manage. Conversely, a manager who works for the brand must value and protect that brand. Unit-level managers who do not protect the brand are easily fired, while franchisees and their managers can free-ride off those who protect the brand and while skimping on brand standards. Company-owned units, therefore, are likely to have lower monitoring costs than franchised outlets,

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13. See Scott Shane, *Explaining the Distribution of Franchised and Company-Owned Outlets in Franchise Systems*, 24 J. OF MGMT. 717, 717-39 (1998).

especially when the franchisee is a multi-unit owner.

With regard to local ties and local owners, the world has changed. Among large franchise organizations, there are numerous franchisees that operate literally hundreds of franchisees. For example, Carrols Restaurants Group Inc., after a recent \$15.8 million transaction, owned a total of 575 Burger King Outlets across the United States, making it the system's largest single owner.<sup>14</sup> Similarly, eighty-eight percent of McDonald's owners own more than one store, with the average franchisee owning about five outlets.<sup>15</sup> The owners of these franchises are not necessarily "on the ground," and they do not necessarily have any more specific local knowledge than does the national franchisor. Instead, they are now, more than ever, large corporations with general managers, regional managers, legal staffs, human resource departments, and the entire range of corporate complexities that are not much different than the franchisor's own corporate structure, including the same concerns relating to agency conflicts and managerial shirking. The motivation to franchise, certainly among the larger brands, has clearly shifted due to some of the following factors: 1) the growth of multi-unit large corporate ownership; 2) the homogenization of the American consumer that has taken away, in many product categories, the need for local knowledge; 3) the availability of capital for large brands (whether they franchise or not); and 4) the company run units have similar or even lower brand monitoring costs than franchised outlets. Thus, the motivation has shifted toward a different paradigm: "capital agency."

The idea behind capital agency is simple: 1) it takes substantial time and the use of capital and other firm resources to operate a business; and 2) franchisors would rather focus on their brands, and the market value of the brand equity derived from it, than on day-to-day operations. The franchisor does not want to invest in the infrastructure to manage hundreds or thousands of employees and properties. Instead, it wants to offload that task to another party: in this case, the franchisee. For instance, there is evidence of this throughout the quick service restaurant industry as companies like McDonald's and Burger King are decreasing the number of owned units. As explained above, contrary to agency conflict theory, the franchisors are not motivated toward a choice between company-owned and franchised units because they believe that the franchisee will have an

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14. Angus Loten, *The Big Get Bigger*, WALL ST. J., (May 18, 2012, 2:04PM), <http://www.wsj.com/articles/SB10001424052702304723304577370431589231276?alg=y>.

15. *2015 Franchise 500: McDonald's At A Glance*, ENTREPRENEUR MAG. (2015), <http://www.entrepreneur.com/franchises/mcdonalds/282570-0.html> (last visited Nov. 17, 2015).

owner on the ground who will be more invested in the brand than a company manager would be.

Instead, our capital agency theory is based on focus, know-how, cost, and risk. Franchisors are experts in brand management. Brand management is a different skill-set than human resource, property, and operational management. The brands recognize this as does Wall Street. Wall Street has long favored hotel companies that do not own real estate (a reason why most publicly traded hotel companies no longer own their hotels), and Wall Street is even more favorable to franchisors who, in addition to having no risk of infrastructure exposure and capital expenses, now have limited management expenses and no employee and tort liability associated with owning and operating the businesses. The franchisor contracts with a franchisee to operate the business. If the franchisee is a single-unit operator, the franchisor hopes that the personal incentive will lead to top performance. If the franchisee is a large company, the franchisor is trusting its brand to an operating expert. Regardless, the franchisor is allowed to greatly limit its focus on operating infrastructure and liability. This Article, therefore, argues that capital agency is the logical driver of the franchise model; unless, of course, the law changes, and capital agency is no longer possible.

## II. THE JOINT-EMPLOYER DOCTRINE

The reason that the franchisor/franchisee relationship is now at issue is that the NLRB, the U.S. Department of Labor (“DOL”), the Equal Employment Opportunity Commission (“EEOC”), and plaintiffs’ lawyers are bringing employment related lawsuits against franchisors on behalf of franchisee employees. The franchisors’ response has been, predictably, to contend that they are not the employer and that they should not be a party to such actions. The administrative agencies listed above, as well as the plaintiffs’ lawyers, state this contention by arguing that the franchisee and franchisor are together “joint employers,” which means that the employee has two (or more) employers responsible for any employer obligations and liabilities. The question is simple: when are two or more entities “joint employers”? The answer is complex for two reasons. First, different agencies apply different tests, and thus, there are different standards across statutes. Second, as in all areas of administrative law, the agencies often push to change standards. Thus, our country has different standards between statutes and agencies, and agencies are attempting to change the laws that they enforce. Below, this Article tries to make sense of the legal side of the joint-employer doctrine.

In the employment context, there are three different administrative agencies whose use of the joint-employer doctrine is relevant to employers

on a day-to-day basis: the EEOC (Title VII of the Civil Rights Act of 1964 (“Title VII”),<sup>16</sup> Age Discrimination in Employment Act (“ADEA”),<sup>17</sup> and Americans with Disabilities Act (“ADA”);<sup>18</sup> the DOL (the Fair Labor Standards Act (“FLSA”);<sup>19</sup> and the NLRB (the NLRA).<sup>20</sup> As stated above, each agency employs a somewhat different test to determine joint-employer liability.

*A. The Joint-Employer Standard under Title VII of the Civil Rights Act of 1964 As It Applies to Franchising*

Title VII imposes liability for employment discrimination on “the employer,” who is defined by the statute as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such a person.”<sup>21</sup>

With regard to franchising in Title VII cases, “[a] franchisor is not a joint employer unless it has significant control over the employment relationship.”<sup>22</sup> Under this standard, a franchisor is considered a joint employer only if the franchisor exercises significant actual control over employees’ terms and conditions of employment.<sup>23</sup>

For example, in *McFarland v. Breads of World*, the court found no joint-employer relationship between a franchisor and franchisee because the franchisor showed that “it played no role at all in [the franchisee’s]

16. 42 U.S.C. § 2000e(2) (2015).

17. 29 U.S.C. §§ 621–634 (2015).

18. 42 U.S.C. §§ 12111–12117.

19. 29 U.S.C. §§ 201–262.

20. *Id.* §§ 151–169.

21. 42 U.S.C. § 2000e(b); *see also* *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995) (citing *Spirit v. Teachers Ins. & Annuity Ass’n*, 691 F.2d 1054, 1063 (2d Cir. 1982)) (describing the term “employer” as “sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether the party may technically be described as an ‘employer’ . . . at common law”); *Lima v. Addeco*, 634 F. Supp. 2d 394, 399 (S.D.N.Y. 2009) (citing *Goodwin v. Orange & Rockland Utils., Inc.*, No. 04 Civ. 0207(WCC), 2005 U.S. Dist. LEXIS 42466, at \*3 (S.D.N.Y. Oct. 14, 2005)) (“The definition of ‘employer’ has been construed liberally for Title VII purposes ‘and does not require a direct employer/employee relationship.’”).

22. *Courtland v. CGEP-Surprise, LLC*, No. CV-12-00349-PHX-GMS, 2013 U.S. Dist. LEXIS 105780, at \*7–9 (D. Ariz. July 29, 2013) (finding that no employment relationship existed because the franchisor had independence in making employment decisions. The court reached its determination after evaluating the nature and degree of control that the entities had over the employees, including an assessment of who supervised their work, who determined their compensation, who paid them, and who had the right to hire or fire them.).

23. *Id.*

employee relations issues.”<sup>24</sup> The plaintiff was employed by Breads of the World, a franchisee that owned and operated several Panera Bread stores, including the one where the plaintiff worked.<sup>25</sup> Both Panera Bread and the franchisee were named as defendants in this case in which the plaintiff alleged that he was terminated because he opposed discriminatory hiring practices.<sup>26</sup> On a motion to dismiss, the court considered whether the franchisor should be considered the plaintiff’s employer by virtue of the franchisor/franchisee relationship between the two entities.<sup>27</sup> Although the court noted that “courts have been nearly uniform in holding that a franchisor should not be deemed an ‘employer’ for purposes of Title VII when the plaintiff works for an independently owned franchise,” it cautioned that “the mere existence of a franchisor/franchisee contract does not insulate the franchisor from liability.”<sup>28</sup> Based on the facts presented, the court held that the franchisor was not a joint employer because it offered un rebutted evidence that it played “no role at all in Breads’ employee relations issues, including, but not limited to, the day-to-day supervision of Breads’ employees.”<sup>29</sup>

Similarly, in *Courtland v. GCEP-Surprise, LLC*, franchisor Buffalo Wild Wings maintained more than 470 franchised restaurants around the country.<sup>30</sup> The plaintiff, who alleged sex discrimination and harassment, was hired, trained on employment matters, supervised, and ultimately terminated by the local franchisee.<sup>31</sup> In considering whether the franchisor and franchisee were joint employers for Title VII purposes, the court looked to the nature and degree of control of the workers; the degree of supervision of the work; the power to determine pay rates or methods of payment of the workers; the right to hire, fire, or modify the employment conditions of the workers; and the preparation of payroll and the payment of wages.<sup>32</sup> The franchisee was responsible for hiring, firing, supervising, and training employees.<sup>33</sup> The franchisor was not involved with human resources (“HR”) matters nor did it influence the conduct of the

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24. *McFarland v. Breads of the World, LLC*, No. 1:09-cv-929, 2011 U.S. Dist. LEXIS 20703, at \*31 (S.D. Ohio Feb. 1, 2011).

25. *Id.* at \*17.

26. *Id.* at \*3.

27. *Id.* at \*20.

28. *Id.* at \*20–21.

29. *Id.* at \*31.

30. *Courtland v. CGEP-Surprise, LLC*, No. CV-12-00349-PHX-GMS, 2013 U.S. Dist. LEXIS 105780, at \*2 (D. Ariz. July 29, 2013).

31. *Id.*

32. *Id.* at \*3.

33. *Id.* at \*4.

restaurant's daily operations.<sup>34</sup> Noting that “[a] franchisor is not a joint employer unless it has significant control over the employment relationship,” the court found that no joint-employer relationship existed.<sup>35</sup>

Some courts have found, on the facts presented, significant enough ties between a franchisor and franchisee so as to create a joint-employer relationship. The plaintiff in *Myers v. Garfield & Johnson Enterprises, Inc.* worked as a tax preparer at Jackson Hewitt Tax Service Inc. (“Jackson Hewitt”), where as an employee, she received the “Jackson Hewitt Code of Conduct” that prohibited harassment and discrimination in the workplace, completed training modules prepared by Jackson Hewitt, used Jackson Hewitt’s intranet site, and interacted with Jackson Hewitt employees.<sup>36</sup> The Jackson Hewitt office, where the plaintiff worked, was a franchise operated by Garfield & Johnson Enterprises, Inc.<sup>37</sup> The plaintiff was paid by the franchisee and not by Jackson Hewitt.<sup>38</sup> According to the allegations in the complaint, Jackson Hewitt had the authority to promulgate work rules, set the conditions of employment, require the franchisee’s managers to submit to training and obey employment laws, and require its franchisees codes of conduct to terminate employees in certain circumstances.<sup>39</sup> The complaint also alleged that Jackson Hewitt participated in the daily supervision of Garfield & Johnson employees and that it assumed some degree of control over its employee records.<sup>40</sup> Although Jackson Hewitt did not pay the plaintiff, the court found that ties between the franchisor and franchisee were sufficient to deny the franchisor’s motion to dismiss sexual harassment claims.<sup>41</sup>

### *B. The Joint-Employer Standard under the Fair Labor Standards Act*

Under the FLSA, an “employer” is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>42</sup> The FLSA defines “employ” as “to suffer or permit to work.”<sup>43</sup> This is considered among the broadest definitions of “employ” that has ever been included in any legislation, and encompasses working

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34. *Id.*

35. *Id.*

36. *Myers v. Garfield & Johnson Enter., Inc.*, 679 F. Supp. 2d 598, 600–601 (E.D. Pa. 2010).

37. *Id.* at 600–01.

38. *Id.* at 601.

39. *Id.* at 610.

40. *Id.*

41. *Id.* at 609–10.

42. 29 U.S.C. § 203(d) (2015).

43. *Id.* § 203(g).

relationships that, prior to the FLSA, were not deemed to fall within an employer-employee category.<sup>44</sup> Title VII's definition of an employer is "much narrower" than the FLSA's definition.<sup>45</sup>

There are significant implications under the FLSA to a finding that a joint-employer relationship exists. The DOL has explained, in its regulations, that when "employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the [FLSA]."<sup>46</sup> Joint employers thus "are responsible, both individually and jointly" for compliance with all of the applicable provisions of the statute, including overtime provisions.<sup>47</sup> This is a basic and significant distinction between the FLSA and Title VII. As described above, joint employment under Title VII will not cause one employer to become vicariously liable for the discriminatory acts of another entity; each employer remains liable only for its own actions.<sup>48</sup>

As under Title VII, the existence of a franchisor-franchisee relationship does not automatically establish a joint-employer relationship in FLSA cases. Instead, courts will scrutinize the relationships between franchisors and employees of franchisees using the economic reality test.<sup>49</sup> The

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44. *Cordova v. SCCF, Inc.*, No. 13CV05665-LTS-HBP, 2014 U.S. Dist. LEXIS 97390, at \*3 (S.D.N.Y. July 16, 2014).

45. *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 415 n.6 (3d Cir. 2012).

46. 29 C.F.R. 791.2(a) (2015).

47. *Id.*

48. *See Whitaker v. Milwaukee County*, 772 F.3d 802, 811 (7th Cir. 2014) ("[E]stablishing a 'joint employer' relationship does not create liability in the co-employer for actions taken by the other employer."); *see also Torres-Negron v. Merck & Co.*, 488 F.3d 34, 41 n.6 (1st Cir. 2007) ("[J]oint-employer liability does not by itself implicate vicarious liability [ . . . ] [A] finding that two companies are an employee's 'joint employers' only affects each employer's liability to the employee for their *own* actions, not for each other's actions [ . . . ]").

49. *See, e.g., Cano v. DPNY, Inc.*, 287 F.R.D. 251, 2582 (S.D.N.Y. Nov. 8, 2012); *Orozco v. Plackis*, No. A-11 CV-703 LY, 2012 U.S. Dist. LEXIS 91916, at \*21 (W.D. Tex. July 3, 2012); *see also Chen v. Domino's Pizza, Inc.*, No. 09-107 (JAP), 2009 U.S. Dist. LEXIS 96362, at \*10 (D.N.J. Oct. 16, 2009) ("Courts have consistently held that the franchisor/franchisee relationship does not create an employment relationship between a franchisor and a franchisee's employees."). The *Chen* case cited other cases exploring franchisor/franchisee relationships. *See generally Abdelkhalq v. Precision Door*, No. 5:07CV03585, 2008 U.S. Dist. LEXIS 64464, at \*12 (N.D. Ohio Aug. 21, 2008) ("[T]he shared right to use the brand name of a manufacturer or distributor between a franchisor and a franchisee does not make the two a single entity for purposes of FLSA."); *Marshall v. Shan-An-Dan, Inc.*, 747 F.2d 1084, 1088-89 (6th Cir. 1984); *Howell v. Chick-Fil-A, Inc.*, No. 92-30188-RV, 1993 U.S. Dist. LEXIS 19030, at \*15 (N.D. Fla. Nov. 1, 1993) (explaining that the owner/operator of a fast food franchise is not an employee of the franchisor, therefore, employees of the

economic reality test generally examines whether the defendant exercised “control” over each individual plaintiffs’ work,<sup>50</sup> courts generally look to four factors: whether the putative employer (i) had the power to hire and fire the employees; (ii) supervised and controlled work schedules or conditions of employment; (iii) determined the rate and method of payment; and (iv) maintained employment records.<sup>51</sup> No one factor is determinative, and courts look at the totality of the circumstances in determining whether an entity has enough control to make it a joint employer.<sup>52</sup>

For example, in *Olvera v. Bareburger Group LLC*, the defendant moved to dismiss the complaint alleging violations of the FLSA on the basis that no employment relationship existed between the franchisor and the franchisee’s employees.<sup>53</sup> Using the economic reality test, the court pointed to factual allegations that the franchisor defendants guided franchisees on how to hire and train employees; set and enforced requirements for the operations of franchises; monitored employee performance; specified the methods and procedures used by those employees to prepare customer orders; exercised control over the work of employees; required franchises to employ recordkeeping of operations; and exercised control over their franchisees’ timekeeping and payroll records.<sup>54</sup> The court found that these allegations were sufficient to state a plausible claim that the franchisor defendants were the plaintiffs’ joint employers under the FLSA.<sup>55</sup>

On the other hand, in *Singh v. 7-Eleven, Inc.*, the court found no employment relationship between a franchisor and franchisee when the franchisor retained no control over the store’s day-to-day operations.<sup>56</sup> The plaintiff alleged that he was not properly paid for all hours worked and that both the franchisor and franchisee bore responsibility for the miscalculated payments.<sup>57</sup> Applying the economic reality test, the court found that the franchisor was not a joint employer of the plaintiff because there was no evidence that it exercised any control or influence over any terms and

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owner/operator are likewise not employees of the franchisor).

50. See *Barfield v. N.Y. City Health & Hosp. Corp.*, 537 F.3d 132, 142 (2d Cir. 2008) (citing *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)).

51. *Id.*

52. *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71 n.8 (2d Cir. 2003).

53. *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 203 (S.D.N.Y. 2014).

54. *Id.* at 207.

55. *Id.*

56. *Singh v. 7-Eleven, Inc.*, No. 5 Civ. 4534, 2007 U.S. Dist. LEXIS 16677, at \*18 (N.D. Cal. Mar. 8, 2007).

57. *Id.* at \*4–5.

conditions of employment, including hiring and firing practices, and that the franchisee controlled work schedules.<sup>58</sup> With respect to the determination of the rate and method of payment and the maintenance of employment records, the plaintiff claimed that 7-Eleven Inc. (“7-Eleven”) had control over payroll functions such as keeping and generating time records; withholding and paying federal and state taxes, worker’s compensation premiums; delivering paychecks; filing returns; and providing employees with annual W-2s.<sup>59</sup> The court held that 7-Eleven’s control over “these ministerial functions” did not establish an employment relationship.<sup>60</sup> Because 7-Eleven was not using its own funds to pay plaintiff wages or employment benefits, no joint-employer relationship existed.<sup>61</sup>

*C. Browning-Ferris and the Future of the Definition of “Joint Employer” under the NLRA and the Other Labor and Employment Laws*

For the past three decades the NLRB has determined whether two separate entities are joint employers by assessing whether they exert such direct and significant control over the same employees that they “share or codetermine those matters governing the essential terms and conditions of employment [ . . . ]”<sup>62</sup> The Board has long applied this analysis by evaluating whether a putative joint employer “meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction” and whether the entity’s control over such matters is direct and immediate.<sup>63</sup> This decades-old standard affords

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58. *Id.* at \*11–16.

59. *Id.* at \*17.

60. *Id.*

61. *Id.*

62. *TLI, Inc.*, 271 N.L.R.B. 798, 798 (1984); *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325 (1984).

63. *Airborne Freight Co.*, 338 N.L.R.B. 597, 597 (2002) (citing *Laerco Transp.*, 269 N.L.R.B. at 325; see *TLI Inc.*, 271 NLRB at 798 (citing *Laerco Transp.*, 269 N.L.R.B. 324 (1984)); see also *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding that supervision which is “limited and routine” in nature does not support a joint-employer finding, and that supervision is generally considered “limited and routine” where a “supervisor’s instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work”) (citation omitted); *Holyoke Visiting Nurses Ass’n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (finding joint-employer status where the putative joint employer had “unfettered” power to refuse to hire certain employees, monitored the performance of referred employees; assumed day-to-day supervisory control over such employees, gave such employees their daily assignments, reports, supplies, and directions; and held itself out as the party whom employees could contact if they encountered a problem during the work day); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (finding joint-employer status where the putative joint employer “exercised substantial

companies stability and predictability and allows for effective collective bargaining between unions and the employer that actually sets the terms and conditions of employment.

In 2014, in *BFI*, the NLRB invited briefing on whether to alter its long-established “direct control” standard.<sup>64</sup> Multiple briefs were submitted addressing whether the Board should adhere to the established standard and, if not, what standard the Board should adopt.

The General Counsel of the NLRB submitted an amicus brief in *Browning-Ferris* urging that the Board adopt a joint-employer standard that would “make no 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.”<sup>65</sup> The General Counsel’s brief argued that this expansive test for joint-employer status was necessary because collective bargaining representatives must be capable of addressing their employment conditions with the entity that has the power to implement those terms.<sup>66</sup> The theory is that the exercise of limited control, or even potential control, relevant to even one aspect of an employee’s conditions of employment is enough to establish a joint-employer relationship because such a determination would necessitate the putative joint employer’s presence at the bargaining table.<sup>67</sup>

The EEOC and DOL similarly became interested in more expansive approaches to the joint-employer standard. In an amicus brief filed in the *Browning-Ferris* case, the EEOC advocated for a broad and flexible definition of “joint employer.”<sup>68</sup> The brief quoted the EEOC Compliance Manual, which states that “[t]he term ‘joint employer’ refers to two or more employers that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer.”<sup>69</sup> The EEOC argued that factors

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day-to-day control over the drivers’ working conditions,” was consulted “over wages and fringe benefits for the drivers,” and “had the authority to reject any driver that did not meet its standards” and to direct the actual employer to “remove any driver whose conduct was not in [the putative joint employer’s] best interests”).

64. See generally *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. No. 186 (2015).

65. Amicus Brief of the General Counsel at 17, *Browning-Ferris Indus. Inc.* 362 N.L.R.B. No. 186 (2015) (No. 32-RC-109684), <http://apps.nlr.gov/link/document.aspx/09031d45817b1e83>.

66. *Id.*

67. *Id.* at 23.

68. Amicus Brief of the EEOC at 5–11, *Browning-Ferris Indus. Inc.* 362 N.L.R.B. No. 186 (2015) (No. 32-RC-109684), [http://www.eeoc.gov/eeoc/litigation/briefs/browning.html#\\_ftn1](http://www.eeoc.gov/eeoc/litigation/briefs/browning.html#_ftn1).

69. See *Special Issues Regarding Multiple Entities: Joint Employers*, 2 EEOC COMPLIANCE MANUAL § 2-III(B)(1)(a)(iii)(b) (Aug. 6, 2009), <http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1> [hereinafter EEOC COMPLIANCE MANUAL]; see also

derived from common law principles of agency should be applied in determining whether entities exercise sufficient control over employees to establish a joint-employer relationship.<sup>70</sup> In applying these factors, the EEOC suggested that the relevant criteria include who hires and fires, who assigns work, who controls daily activities, who furnishes equipment, where work is performed, who pays the employee, who provides employee benefits, how the worker is treated for tax purposes, and whether the worker and the putative employer believe that they are creating an employer-employee relationship.<sup>71</sup>

The EEOC brief stated that “[i]n light of the remedial purposes of Title VII and the NLRA, the EEOC’s joint-employer definition more accurately reflects congressional intent than the Board’s definition.”<sup>72</sup> Varied workplace relationships, in which the increasing “contracting-out of work is blurring . . . distinctions between employer and client contractor,” require a flexible definition of joint employer.<sup>73</sup> The EEOC urged the NLRB to accept its flexible approach and to abandon the “direct and immediate control” analysis currently used by the Board.

Dr. David Weil, the Wage and Hour Division (“WHD”) Administrator at the DOL since May 2014, authored a report in 2010 in which he described his view of the joint-employer standard. In the report to the WHD titled *Improving Workplace Conditions Through Strategic Enforcement: Report to the Wage and Hour Division* (“WHD Report”) Dr. Weil called for clarification of the meaning of joint employment.<sup>74</sup>

In describing the characteristics of industries that make workers vulnerable to violations of labor standards, workplace safety, and other rights in the workplace, the WHD Report points to the “fissuring” of the employment relationship as a cause of such problems.<sup>75</sup> “Fissuring” arises

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EEOC Notice from Gilbert Casellas, Chairman, EEOC, EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997) (on file at <http://www.eeoc.gov/policy/docs/conting.html>) [hereinafter EEOC Enforcement Guidance] (“[A]ll of the circumstances in the worker’s relationship with each of the businesses should be considered to determine if either or both should be deemed his or her employer.”).

70. See Amicus Brief of the General Counsel *supra* note 66, at 10, n.17.

71. See EEOC COMPLIANCE MANUAL, *supra* note 69, § 2-III(A)(1), n.71 (citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992)).

72. See Amicus Brief of the EEOC, *supra* note 68, at 11.

73. *Id.* (quoting *Airborne Freight Co.*, 338 N.L.R.B. 597, 599 (2002) (Member Liebman, concurring)).

74. See DAVID WEIL, REP. TO DEP’T OF LABOR: WAGE & HOUR DIV., IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT 4 (May 2010), <http://www.dol.gov/whd/resources/strategicenforcement.pdf>.

75. *Id.* at 18.

in industries where large companies have delegated away employment and the responsibility to oversee the workforce to smaller businesses.<sup>76</sup> The WHD Report points to specific industries—such as retail, construction, and manufacturing—with high percentages of low-wage workers.<sup>77</sup> Although it addressed a variety of factors that may contribute to why “vulnerable” workers may be concentrated in specific industries, the WHD Report pointed to the *structure* of these industries as a direct cause of workforce vulnerability.<sup>78</sup> The employment relationship, according to the WHD Report, has shifted from large employers to a number of fragmented smaller employers, by way of franchising, subcontracting, and other related forms. These smaller entities are pressured to keep their costs as low as possible to offer low prices in a competitive market.<sup>79</sup> As a result, the worker-employer relationship is not clear.<sup>80</sup>

The WHD Report recommended that the WHD “seek to clarify joint employment in the many industries and sectors where the locus of employment has blurred.”<sup>81</sup> Noting that there is a need to redefine joint employment as new employment contexts arise, the WHD Report recommended bringing significant cases that will require courts to consider and clarify the boundaries of employment in major industries and also in various organizational forms (*e.g.*, franchising and third-party management).<sup>82</sup>

The WHD Report also recommended that the WHD pursue litigation based on evidence of systemic violations across different owners linked by a common brand or high-level entity as a means of establishing joint-employer responsibility.<sup>83</sup> For example, according to the WHD Report, franchises, which are generally viewed as the direct and sole employer of workers, should be reexamined to determine whether the franchisor/franchisee relationship is in truth a “joint venture” due to the close relationship between the entities.<sup>84</sup> The WHD Report specifically noted that the WHD and Office of the Solicitor should coordinate closely “in pursuing the ambitious litigation agenda directed towards clarifying joint employment and related questions involving employer responsibility under

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76. *Id.* at 19.

77. *Id.* at 20.

78. *Id.*

79. *Id.* at 20–21.

80. *Id.* at 21.

81. *Id.* at 79.

82. *Id.* at 80.

83. *Id.*

84. *Id.*

the FLSA.”<sup>85</sup>

#### *D. Employment and Labor Laws Differ*

Title VII, the FLSA, and the NLRA all serve different purposes. Title VII aims to address discrimination in the workplace. The statute imposes liability for employment discrimination on an “employer,” defined as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such a person.”<sup>86</sup> The joint-employer test under Title VII is rather inexact, focusing on control over general employment matters.<sup>87</sup> In Title VII cases, if discriminatory acts occur and two or more entities constitute joint employers, only the entity responsible for those acts will be held liable.<sup>88</sup> In one section of the EEOC Compliance Manual, it provides guidance addressing joint-employer relationships and suggests that the purpose of joint-employer status in the context of discrimination claims is to make an entity other than the principal employer liable for conduct relating to a specific employee.<sup>89</sup> The EEOC Compliance Manual, which was written for the context of temporary employment agencies sending employees to clients, specifically addresses whether an agency can be responsible for its client’s discriminatory acts.<sup>90</sup> According to the EEOC, the 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.<sup>91</sup>

Courts, addressing situations where one of the multiple employers engaged in discriminatory conduct, therefore, will hold liable only those entities responsible for the wrongful conduct.<sup>92</sup>

Under the FLSA, by contrast, the issue is whether a putative joint employer may be held liable for violations of the minimum wage and hour

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85. *Id.* at 90.

86. 42 U.S.C. § 2000(e)(b) (2015).

87. *See supra* pp. 12–21.

88. *See, e.g., Whitaker v. Milwaukee Cnty.*, 772 F.3d 802, 811 (7th Cir. 2014).

89. *See id.* at 811–12. *See generally* EEOC COMPLIANCE MANUAL *supra* note 69.

90. *See generally* EEOC Enforcement Guidance, *supra* note 69.

91. *See id.* (emphasis added).

92. *See Courtland v. GCEP-Sunrise*, No. CV-12-00349-PHX-GMS, 2013 U.S. Dist. LEXIS 105780, \*8–9 (D. Ariz. July 29, 2013).

laws. The statutory language of the FLSA defines “employer” to include anyone acting directly or indirectly in the interest of an employer in relation to an employee, as well as the Congressional purpose of the Act, and it reflects the legal obligation to pay employees fairly.<sup>93</sup> In both of these employment law contexts, joint-employer status bears on economic concerns, should the entity become liable for wrongful conduct. Thus, while the joint employer may become retroactively liable for wrongful conduct, joint-employer status does not necessarily saddle the employer with any prospective, affirmative obligations.

Under the NLRA, however, the joint-employer inquiry has an entirely different purpose. Joint-employer status compels a putative joint employer to undertake myriad duties and responsibilities required under the Act: including collective bargaining and its attendant responsibilities (where the entity establishing the terms and conditions of employment is the direct employer). The NLRA is distinct from other employment laws because it establishes these broad, prospective obligations; a joint employer under the NLRA will be subject to numerous legal obligations, whereas a joint employer under Title VII or the FLSA will have mainly economic responsibilities in relation to its joint-employer status. It is under this backdrop that this Article examines the Board’s recent *BFI* decision.

### III. BROWNING-FERRIS

*BFI* is a case about employee leasing/temporary employees and not franchising. This distinction should not, however, lead one to believe that the issues are mutually exclusive and that the holding is not relevant to the franchisor/franchisee/employee relationship. The joint-employer test under the NLRB has never made a distinction between temporary employees and franchisee employees. It is possible, of course, that the Administrative Law Judge (“ALJ”) will distinguish the two issues. Thus, this Article examines the *BFI* decision, knowing it applies to the temporary employees while expecting it will be applied to franchising.

As stated above, in determining joint-employer status, the Board’s choice in *BFI* seemed to be whether 1) to follow the test of the last thirty years and require proof that the putative employer exerted direct and significant control over employees;<sup>94</sup> or 2) to return to a prior test and find such status if the putative employer simply reserved the right to exercise such control. The Board went with the latter definition. If applied in the broader context, this seemingly innocuous difference can have a

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93. 29 C.F.R. § 791.2(a) (1984).

94. See *TLI Inc.*, 271 N.L.R.B. 798, 798–99 (1984); *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325 (1984).

tremendous effect on the franchise industry. The Board's explanation of this new standard has three major problems: 1) it is near impossible to figure out; 2) in application, it expands the joint-employer definition; and 3) it creates perverse incentives.

#### *A. The Standard Is Unclear*

There is a threshold issue under the new test. Is the putative employer an employer under the common law definition of employer? Such a determination is, according to the Board, not always a simple task.<sup>95</sup> Indeed, the Board recommends looking to the 1958 Restatement (Second) of Agency ("Restatement") for guidance.<sup>96</sup> The Restatement provides that "a servant is 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."<sup>97</sup> Clearly, this 1958 standard is nearly impossible to operationalize. To make matters worse, this standard is necessary, but it is not sufficient to establish joint-employer status. The next step, according to the Board, is control. The Board, however, does not define control. Indeed, in response to the dissent's criticism of this inexact test, the Board states the following:

[W]e do not and cannot attempt to today to articulate every fact and circumstance that could define the contours of a joint employment relationship. Issues related to the nature 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.'<sup>98</sup>

The Board continued stating that "[t]oday's decision, however, makes it clear that 'all of incidents of the relationship must be assessed'" and that its conclusion that BFI is a joint employer is based on a "full assessment of the facts."<sup>99</sup> This is a long way of saying that the joint-employer status will be determined on a case-by-case basis.

The amorphous standard is not a piece of our imagination. The Board explains that it is probative if a putative employer retains the right to reject or terminate employees, set wage rates, set working hours, approve

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95. *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. No. 186, at 18 (2015).

96. *See generally* RESTATEMENT (SECOND) OF AGENCY (AM. LAW INST. 1958).

97. *Id.* § 220.

98. *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. at 16.

99. *Id.*

overtime, dictate the number of employees to be supplied, determine the manner and method of work performance, inspect and approve work, and terminate the contract at will.<sup>100</sup>

In a vacuum, the Board's statement does not seem so problematic because law develops through cases, and cases are decided on facts. In context, the Board's statement that "uncertainty is acceptable" is unworkable because 1) it applies to too large a percentage of the economy; and 2) its effects can define the business.

The Board notes that temporary employment is one of the largest- and fastest-growing industries in terms of employment.<sup>101</sup> Indeed, by 2022, there will be an estimated 4 million temporary workers.<sup>102</sup> Similarly, franchising is a large and growing component of the economy, accounting for more than 8.569 million employees today with estimates that employment growth in the franchise sector will continue to outpace the growth of employment in all businesses economy-wide.<sup>103</sup> Whether an employer is a joint employer has significant tangible consequences. A franchisor who is not a joint employer cannot enter card-check neutrality with a union (and will not be susceptible to a union's corporate campaign), cannot be picketed, has no obligation to reply to an unfair labor practice, and will not have to bargain with a union. An employer who has such obligations has every incentive to create a sophisticated HR department, will provide training to ensure NLRA compliance, and may create a union-avoidance strategy. An employer who is not a joint employer will avoid all such activities, as such could be seen as evidence of joint-employer status. Such a distinction and certainty could be the driver as to whether a nascent owner/operator franchisor would, in fact, decide to enter into the field of franchising and seek out others for franchise arrangements.

Uncertainty seems like a chamber of commerce/conservative euphemism for being anti-regulation, anti-progressive, and anti-tax. The previous statement is not this Article's argument. Because temporary workers and franchisees' employees are a rising aspect of the workforce, the Board wants such employees to be able to unionize. The Board has the power to define joint employment, and then, it should define it. Parties may litigate over it, but setting a standard, that will need decades to define, and

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100. *Id.* at 9.

101. *Id.* at 11.

102. Richard Henderson, *Industry Employment and Output Projections to 2022*, BUREAU OF LABOR STATISTICS MONTHLY LABOR REVIEW (December 2013), <http://www.bls.gov/opub/mlr/2013/article/industry-employment-and-output-projections-to-2022.htm>.

103. *Franchise Business Economic Outlook Infographic*, INT'L FRANCHISE ASSOC. (Jan. 2015), <http://emarket.franchise.org/EconomicInfographicJanuary2015.pdf>.

claiming that this is the proper way to enforce the law is, at best, disingenuous and, at worst, dangerous.

*B. The New Test Expands the Reach of the Joint-Employer Doctrine*

The fact that the Board is resurrecting a 30-year-old test, and that the EEOC and DOL agree, does not mean that this is not a sea-change in the American business landscape. Overruling a law that putative employers relied on and creating a much more liberal test will, of course, lead to more putative employers being named joint employers. Simply put, the new test makes reserved rights, which are standard in the vast majority of contracts and had not resulted in joint-employer status for decades, now determinative. One need not look any further than *BFI*. The Regional Director, applying the old test, found that BFI was not a joint-employer;<sup>104</sup> the Board, applying the new test, found BFI was a joint-employer.<sup>105</sup> After the *BFI* decision, numerous employers all over the country became joint employers. It is not clear which employers made this exact change.

IV. THE NEW AND OLD TEST RESULT IN HUGE COSTS OR PERVERSE INCENTIVES

The driver of the joint-employer doctrine is control. Putative employers that exercise too much control end up with joint-employer obligations. Knowing this, franchisors have done all they could to ensure that they did not cross the joint-employer line. They did this by limiting the control exercised. These limits resulted in tension between operators and counsel. Counsel wanted to ensure that its franchisor client did not cross the line. However, operators and managers wanted to preserve the brand and the business. Now, the line has been moved, and franchisors are faced with a decision: Should they 1) embrace the joint-employer status; or 2) exercise even less control and suffer the potential market consequences?

Is the *BFI* standard a positive legal development? What are the costs? What are the benefits? The benefits are that unions will be able to engage in top-down organizing, and the EEOC, DOL, and plaintiffs will be able to sue and collect from franchisors. Before exploring the “costs,” this Article will examine the “benefits” of applying the new test to franchising. Some of these benefits include 1) increased union organizing; and 2) deeper pocketed defendants to sue.

*A. The Benefits of BFI: Union Organizing*

It is beyond the scope of this Article to argue whether unionization is a

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104. See *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. No. 186, at 1.

105. See *id.*

net gain or loss for the economy. Instead, this Article contends that there is no evidence that making franchisors joint-employers will increase unionization. McDonald's, for example, has approximately 1,500 company-owned stores, and none are unionized.<sup>106</sup> Will making McDonald's a joint-employer result in the approximately 13,500 franchisees unionizing? The SEIU, the union arguing that McDonald's is a joint employer, seemingly claims that McDonald's' approximately 75,000 "unit" employees are not worth organizing through top-down organizing.<sup>107</sup> Instead, the union will only engage in representation if it can organize 750,000 workers. Unite-Here, the world's largest hotel and restaurant union, has a total of 270,000 members. The SEIU has approximately 2 million members—half of whom are public employees from municipalities throughout the country. SEIU also represents healthcare workers like nurses, doctors, lab technicians, nursing home aides, janitors, and other employees of office and apartment buildings.<sup>108</sup> It makes no sense to argue that one union with 270,000 members and another with 2 million members (from over 100 occupations, who work for many small municipalities and employers) cannot waste resources on a company with 75,000 employees. Instead, the NLRB needs to change law and policy so SEIU and Unite-Here can both organize 750,000 employees. From a theoretical perspective, mass unionization is speculative. From a practical perspective, it is unrealistic.

To organize franchisee employees, both the SEIU and Unite-Here would likely use their preferred method of top-down organizing. Top-down organizing consists of using leverage to force the employer to sign card-check neutrality agreements.<sup>109</sup> It is worth exploring how this will play out.

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106. Steven Greenhouse, *Fight For \$15: The Strategist Going To War To Make McDonald's Pay*, THE GUARDIAN (Aug. 30, 2015), <http://www.theguardian.com/us-news/2015/aug/30/fight-for-15-strategist-mcdonalds-unions>.

107. See Lydia DePillis, *Why labor groups genuinely believe they can unionize McDonald's one day*, WASH. POST (June 8, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/08/why-labor-groups-genuinely-believe-they-can-unionize-mcdonalds-one-day/>; see also Bill Morris, *NLRB Opens Door for SEIU at McDonalds*, THE WASH. FREE BEACON (Dec. 19, 2014, 4:25PM), <http://freebeacon.com/issues/nlr-opens-door-for-seiu-at-mcdonalds/>.

108. See generally *These fast facts will tell you how we're organized and what we do*, SEIU, <http://www.seiu.org/cards/these-fast-facts-will-tell-you-how-were-organized/> (last accessed Dec. 1, 2015).

109. See *What is a "Neutrality Agreement" and how does it affect workers?*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., INC., [http://www.nrtw.org/neutrality/na\\_1.htm](http://www.nrtw.org/neutrality/na_1.htm) (explaining that a "neutrality agreement" is a contract between a union and an employer under which the employer agrees to support a union's attempt to organize its workforce. Most neutrality agreements include a "card check" arrangement, in which employers allow unions to collect cards from workers saying they want a union, rather than putting the question to a secret vote.); see also Zev J. Eigen & David Sherwyn, *A*

If the *BFI* holding is expanded to franchisors, the unions would seek to force the franchisors to sign such agreements. The franchisors, regardless of their “control,” will claim that they are not joint employers. The union, as it did with McDonald’s, will encourage employees to file unfair labor practices and allege joint-employer status. The large franchisor may fight the determination. However, smaller franchisors will not have the resources and may have to accept the regional directors’ determination. After joint status is adjudicated or accepted, the union will request and/or demand card-check neutrality. The franchisors will contend they cannot agree to that, for their current franchisees as they have no such right under their franchise agreements. The union could begin a corporate campaign which will feature boycotts, name-calling, threats, and other legal and ethical as well as arguably unethical or illegal acts. The franchisor may file a Racketeer Influenced and Corrupt Organizations Act (“RICO”) action against the union.<sup>110</sup> If the franchisor does agree to a neutrality agreement, the franchisee may either sue or simply refuse to accept the terms of the neutrality agreement. Litigation over each of these issues will take years.

Even if all of these issues are resolved in the union’s favor, the stores will still be separate bargaining units (maybe several could be considered one unit), and the union will still need the employees to sign cards to unionize. The union will then need to convince millions of employees, within an industry with huge turnover, that they will be better off signing cards when unionization typically benefits long-term employee units<sup>111</sup> over short-term employees. Moreover, the union’s “fight for \$15”<sup>112</sup> and other minimum wage initiatives will force employees to question what else they can get.

The evidence does not support the argument that unions will suddenly be successful with such a change in the joint-employer standard. Indeed, after the summer of 2006, Unite-Here secured numerous card-check neutrality

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*Moral/contractual Approach to Labor Law Reform*, 63 HASTINGS L.J. 695, 695–746 (2012).

110. Cf. Gregory B. Robertson & Kurt G. Larkin, *RICO: A New Tool for Employers Facing Union Corporate Campaigns?*, THE CORPORATE COUNSELOR (May 2009), [https://www.hunton.com/files/Publication/972f4e96-7f57-4a07-b224-3d0edb9d1d86/Presentation/PublicationAttachment/9741b3f0-f4ee-4cb2-bbc7-27de4933caea/RICO\\_A\\_New\\_Tool\\_5.09.pdf](https://www.hunton.com/files/Publication/972f4e96-7f57-4a07-b224-3d0edb9d1d86/Presentation/PublicationAttachment/9741b3f0-f4ee-4cb2-bbc7-27de4933caea/RICO_A_New_Tool_5.09.pdf) (applying RICO to corporate campaigns).

111. See generally BENJAMIN I. SACHS, RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 157, (eds. Michael L. Wachter & Cynthia L. Estlund, 2012) (contrasting benefits for long-term and short-term employees).

112. FIGHT FOR \$15, <http://fightfor15.org/> (last visited Nov. 17, 2015); see e.g., Laila Kearney, *Protesters rally for higher U.S. fast-food wages, union rights*, REUTERS (Nov. 10, 2015, 9:03PM), <http://www.reuters.com/article/2015/11/11/us-usa-wages-protests-idUSKCN0SZ1KB20151111#pArpPoSD4EvYMkb5.97> (demanding a \$15-per-hour minimum wage and union rights for certain workers).

agreements, and pundits predicted that union density in the hotel industry would rise.<sup>113</sup> Union density did not increase.<sup>114</sup> Moreover, this Article contends the card-check agreements led, in part, to the rise in boutique hotels that the union has been unable to organize and which led to the rise of management companies and franchisees who were and still are non-signatories to card-check contracts. There is simply no evidence that making franchisors joint-employers will help unionization.

The second benefit of extending *BFI* to franchising is that DOL, EEOC, and the plaintiffs' lawyers will be able to sue franchisors for legal violations. Moreover, Dr. Weil, in his latest paper concludes that franchisors and large franchisees have a much better level of compliance with the FLSA than smaller franchisees have.<sup>115</sup> The implication is clear: make all franchisors joint-employers and increase the levels of compliance. This theory may work if all franchisors embrace the joint-employer doctrine. But, will they? What if they do not?

### *B. The Cost of BFI Applying to Franchising*

Franchisors will have to decide whether to embrace joint-employer status or to exercise less control. This decision will not be done without much thought and research. It is an empirical question for the company: what does it cost to be the employer? Some franchisors have company-operated stores. Such franchisors have extensive HR departments and labor counsel for company stores, but some franchisors do not have the corporate structures. Regardless, franchisors devote significantly less resources to HR and labor counsel for franchisees than firms do for their own employees. Further, extensive HR and counsel for franchisees' employees might be evidence of too much control. Companies that accept joint-employer status and want to ensure legal compliance will have to create infrastructure for their franchisees. The additional infrastructure building will result in additional costs without an accompanying revenue stream. In this case, who will pay? If the franchisor should pay, will the endeavor be worth it? If the franchisee does, instead, will the franchisee's endeavor be worth it? In regards to the consumers, how elastic is their demand? What will happen to profit-sharing, health insurance, and other ERISA plans?

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113. Richard W. Hurd, *The Origins, Effectiveness and Future of Neutrality Agreements*, CORNELL UNIVERSITY ILR SCHOOL (2008), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1305&context=articles>.

114. MIA GRAY, *A HOSPITABLE WORLD?: ORGANISING WORK AND WORKERS IN HOTELS AND TOURIST RESORTS* 181 (eds. David Jordhus-Lier, Anders Underthun, 2015).

115. See generally MinWoong Ji & David Weil, *The Impact of Franchising on Labor Standards Compliance*, 68 ILR REV. 977, 991–1006 (Oct. 2015).

Will franchisors have to include franchisees' employees in such plans? If they do not, what will the costs be? Will franchisors eliminate such employee benefits? The questions can eventually be answered, but they will take years to be determined. In the meantime, what should franchisors do?

Franchisors who cannot or will not embrace joint-employer status now have a perverse incentive to 1) exercise even less control; and 2) only franchise with established franchisees and no longer work with smaller entrepreneurs. A franchisor looking to insulate itself should exercise as little control as possible. Of course, brand standards may be compromised to the dismay of consumers and operators, but legal liability will be reduced. The question is the following: who does this new joint-employer standard help? Will a franchisee's employees be better off if the franchisor is incentivized to be even further hands-off than they are now? Currently, franchisors, fearing being accused of exercising too much control, may advise, but they would never require legal compliance training, sexual harassment policies, wage and hour audits, and other practices that sophisticated HR departments provide and that franchisors provide for their own stores. Now, franchisors will provide even less guidance. Does this help society? Established businesses, with reputations at stake and deep pockets to draw upon, will work to ensure legal compliance. Fledgling franchisees will often have neither the resources nor the knowledge to fully comply. As proof, there is no better source than Dr. Weil's paper.<sup>116</sup> As stated, Dr. Weil found that small franchisees violate wage and hour law at a much greater rate than franchisees with more than 110 outlets (large franchisees) and franchisors.<sup>117</sup> Dr. Weil posits a number of reasons for this phenomenon. Specifically, Dr. Weil contends, franchisors and large franchisees because they 1) have a higher probability of being caught by the government for non-compliance; 2) have more resources because they do not pay franchisee fees or because of their size the fees are not onerous; and 3) stay more loyal to the brand and fear hurting it by not complying with the FLSA.<sup>118</sup>

Dr. Weil does identify the most obvious reason for his findings: small franchisees, those with 110 outlets or less, lack knowledge and resources.<sup>119</sup> But, he dismisses it because "mid-size" franchisees' non-compliance rates are similar to single franchisees' rates. Dr. Weil's conclusion is contestable. The fact that franchises with twelve stores have a higher non-compliance

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116. *See generally id.*

117. *Id.*

118. *See generally id.*

119. *See id.* at 1002.

rate than a single owner does not undermine the effect of resources devoted to HR which affect compliance. In fact, it is the opposite. A twelve-store franchisee cannot afford extensive HR, counsel, and training. Larger employers (franchisors or franchisees) have resources, experience, and knowledge to comply with the FLSA and other labor and employment laws.

Dr. Weil and this Article have different assumptions. Dr. Weil seemingly believes that all employers seek to violate the FLSA and cheat their employees, unless they think they will be caught and have to pay damages. This Article contends that most employers would strongly prefer to comply, but it finds the law's nuances confusing and difficult. Employers with resources hire HR professionals and lawyers to analyze their practices, monitor their classifications, and ensure that rogue managers do not violate the law. Small franchisees, Dr. Weil proves, do not have the resources to do this.<sup>120</sup> According to Dr. Weil, the NLRB and EEOC's solution is to incentivize franchisors to hold even less control over their franchisees.<sup>121</sup> This Article finds that there are consequences to this proposed solution.<sup>122</sup> First, franchisors will do all they can to exercise even less control so that millions of employees will work for employers that do not know how, or cannot afford, to comply with Title VII, ADEA, ADA, and the FLSA. Second, franchisors will be uncertain if they are joint employers or not, and thus, they will no longer take risks by contracting with rising entrepreneurs who cannot indemnify the franchisors. Third, and finally, entrepreneurs who lacked the capital to expand their business will no longer see franchising as a viable method.

Having employees working for fledgling employers, who lack guidance, is a not a positive for society. Will this problem be solved if franchisors only franchise with large franchisees, or, instead, do they stay out of the franchise business? Such decisions will result in more costs than benefits.

### *C. The Socio-Economic Impact of BFI*

The primary effect of the *BFI* decision, if it remains and it leads to its likely conclusion, is that it will have a direct impact on the decision-making of franchisors. Franchising businesses and the entrepreneurs who run these businesses are among the most robust in the current U.S. economy. The International Franchise Association ("IFA") forecasts growth, in the number of franchise units, total employment, and total output, to be at their

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120. See generally Ji & Weil, *supra* note 115.

121. See generally Weil, *supra* note 74.

122. See Press Release, Int'l Franchise Assoc., Franchise Business Index Hits Post-Recession High (Aug. 14, 2013) (on file at <http://www.franchise.org/franchise-business-index-hits-post-recession-high>).

highest levels seen since the great recession.<sup>123</sup> The IFA Report also suggests that, in 2015 alone, over 12,000 franchise establishments are projected to open; but, as the IFA Report continues, it states that “there is considerable downside risk to this forecast created by a recent ruling by the NLRB . . . . If this ruling survives legal challenges, it will impose additional costs on franchisors associated with more oversight and insurance against risk.”<sup>124</sup>

In the closing monologue in Charles Dickens’ a Christmas Carol, Scrooge asked, “Are these the shadows of things that Will be or are they the shadows of things that May be?”;<sup>125</sup> if these shadows “will be” the law, then the 150 year old world of franchising will be severely altered. For the sake of illustration, this Article offers a view of the potential change from two perspectives: first, from the viewpoint of the large franchisor and second, from the vantage point of the small entrepreneur owner-operator and hopeful franchisor.

Large franchisors like McDonald’s and Burger King have billions of dollars invested in their brand, and they will have the ability to continue to operate. The two entities also have thousands of franchisees currently operating here in the United States. They will need to adapt and innovate to maintain the value of their brand equity in the market. Through costly indemnification and monitoring of current franchisees, they will seek to mitigate the risk associated with now being a joint employer. Absent the issue of unionization, they will still have myriad of other employment law compliance costs that need to be managed or immunized against. The question is not whether these practices will be costly to all franchisors. They will be costly; the real question is of who will bear the cost.

If the contracts allow it, large franchisors will seek to redistribute the costs associated with being a joint employer back where they belong: on the operating unit. Franchisees, like those at McDonald’s, will face a quandary when this happens: bear the cost internally, or shift the additional cost to the consumer. Quick Service restaurants have an elasticity of demand estimate close to 1.<sup>126</sup> This value reveals that, for every percent increase in price, demand will decline by approximately the same percent, causing the owner/franchisee’s profit to decline. Estimates suggest current

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123. *Franchise Business Economic Outlook for 2015*, *supra* note 8, at 13.

124. *Id.*

125. CHARLES DICKENS, A CHRISTMAS CAROL (1843).

126. Abigail Okrent & Aylin Kumcu, Presentation of Paper: What’s Cooking? Demand for Convenience Foods in the United States at the Agricultural and Applied Economics Association’s 2014 Annual Meeting (July 28, 2014) <http://ageconsearch.umn.edu/bitstream/170541/2/OkrentKumcu%205-28-14%20AAEA.pdf>.

McDonald's earn on average six percent,<sup>127</sup> so it may or may not be able to absorb the cost from operating profits. However, unless the owners want to bear the full brunt of the lost profit, they will, on the margins, cut costs where they can. They can cut costs through lowering marginal hours of employment or reducing ancillary services purchased, and these cost-cutting measures will have a dampening effect on the total wages paid, local incomes, and taxes collected. These effects are unintended consequences of the *BFI* ruling, and they are too important to dismiss.

Aside from how these large franchisors manage the cost shift with current franchisees, large franchisors will also logically change their behavior as it relates to growth in new franchises. Since smaller single-unit franchisees would be less able to bear the higher costs of operations, now imputed by the cost shifts, franchisors will increasingly be open to applications for new units from only larger multi-unit franchisees. This change will, on the margin, shut out the nascent entrepreneur franchisee from the market. It may be only an unintended consequence of the NLRB, but its decision in *BFI* will lead to fewer new franchises awarded to small entrepreneurs, further concentrating the already increasing concentrated world of multi-unit franchisees.

Perhaps the more meaningful impact will be felt in a different component of the franchising space. Each year, hundreds of aspiring owner/operators develop business plans and prepare to launch a franchise. The launch process is not an easy task. According to the Franchise Performance Group, it will cost between \$100,000 and \$150,000 to launch a franchise system and between \$500,000 and \$2 million to take them from launch through the initial ramp-up to fifty units, where estimates show royalty revenues are covering costs.<sup>128</sup> These entrepreneurs will be launching their business into a very competitive space and must then rely on hitting that fifty-store threshold before their start-up capital runs out. These people all hope to be their own version of Ray Kroc;<sup>129</sup> unfortunately, most will not succeed, and evidence shows that seventy-five percent of newly formed franchises will cease to exist within twelve years.<sup>130</sup> This enormously high failure rate existed prior to the *BFI*

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127. See generally William Johnson, *What is the best advice for a young, first-time startup CEO?*, QUORA, <https://www.quora.com/What-is-the-best-advice-for-a-young-first-time-startup-CEO> (last visited Dec. 1, 2015).

128. Joe Mathews & Thomas Scott, *Why Do Franchises Fail?*, FRANCHISE PERFORMANCE GRP. BLOG (May 16, 2014), <http://www.franchiseperformancegroup.com/franchising-failed-model/>.

129. *The Ray Kroc Story*, MCDONALD'S CORP., [http://www.mcdonalds.com/us/en/our\\_story/our\\_history/the\\_ray\\_kroc\\_story.html](http://www.mcdonalds.com/us/en/our_story/our_history/the_ray_kroc_story.html) (last visited Dec. 1, 2015).

130. Scott Shane & Chester Spell, *Factors for New Franchise Success*, MIT SLOAN MGMT. REV. 44 (Apr. 15, 1998).

decision. Through its action, the NLRB has now added additional costs into an already risky business environment. Budding entrepreneurs will now face the prospect of the joint-employment doctrine.

This Article is not talking about multi-billion dollar, multi-national enterprises; to understand who will now bear this burden, one only needs to peruse the Entrepreneur Magazine list of top new franchises for 2015.<sup>131</sup> For example, Sweet Frog Premium Frozen Yogurt (“Sweet Frog”) is number 6 on the list,<sup>132</sup> and after growing his business to ten units, Derek Cha decided to go the franchising route in 2012.<sup>133</sup> In the first year, he sold twenty-nine franchises.<sup>134</sup> Over three years (by 2014), there were 200 units, and most recently, there were 272 units.<sup>135</sup> Cha estimates that each unit will need to employ thirteen employees.<sup>136</sup> If, in 2012, the NLRB ruling informed Cha he may be the joint employer of 377 employees (29\*13) within one year and the joint employer of 3,536 employees (272\*13) over a little more than three years, he may have been intimidated out of the market. All of the people currently employed by the franchisees of Sweet Frog would have never been offered a job. All of the entrepreneurs who bought into a now very successful system would never had the chance to open and earn their profits. All of the landlords renting to Sweet Frog may still be sitting with empty storefronts. All of Sweet Frog’s local, state, and federal tax revenue would be non-existent.

This outcome may be one that the NLRB had anticipated, but it is a likely external cost of its decision. Do the benefits, making McDonald’s easier to unionize, outweigh the costs discussed above? These costs, which are borne by entrepreneurs; small business people; ancillary service providers; local, state, and federal governments, do not only affect McDonald’s. It also affects other large franchisors. Instead, these large franchisors would irrevocably change the landscape of the entrepreneur entering the business of franchising.<sup>137</sup> The costs do outweigh the benefits.

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131. See generally *2015 New Franchise Rankings*, ENTREPRENEUR MAG. (2015), <http://www.entrepreneur.com/franchises/rankings/topnew-115520/2015,-1.html>.

132. *Id.*

133. *2015 Franchise 500: Sweet Frog At A Glance*, ENTREPRENEUR MAGAZINE (2015), <http://www.entrepreneur.com/franchises/sweetfrogpremiumfrozenyogurt/334242-0.html> (last visited Nov. 17, 2015).

134. *Id.*

135. *Id.*

136. *Id.*

137. This is no anecdotal story. The list includes many other examples including but not limited to Brickhouse Cardio Club, Engineering For Kids, and Human Healthy Markets.

## CONCLUSION

Applying the *BFI* holding and the DOL and the EEOC advocated control test to franchising is a disingenuous way of trying to make all franchisors liable for a franchisee's legal violations, and it makes it easier for unions to organize such employees. There is simply no basis to argue that franchisee employees are better off when their franchisors exercise even less control. The test is set up to make sure that franchisors cannot avoid joint-employer status. If, however, franchisors find a way to toe that line, it seems clear that franchisee employees and society will be worse off. Such a result is a natural result of using 16th-20th century common law to solve a 21st century problem. These governmental entities should therefore craft a 21st century solution to the problem.

To develop such a standard, this Article proposes setting a goal and trying to achieve it by examining the realities of the workplace. The goal, at a minimum, is legal compliance. As Dr. Weil proves, small franchisees, as well as franchisors, do not comply with the FLSA.<sup>138</sup> Thus, governmental entities need to encourage franchisors to have more control, not less. This is what the *BFI* holding seeks to do; however, it could either 1) fail because franchisors will exercise less control to avoid liability; or 2) severely compromise the franchise model. Accordingly, franchisors should have an incentive or, better yet, a requirement to comply with law without the strict liability.

All franchisors have a "brand standard" of legal compliance. It is not necessary to develop a process for such compliance in a vacuum. Instead, these entities can look to sexual harassment law with respect to vicarious liability—specifically to the application of the Faragher/ Ellerth standard has been applied.<sup>139</sup>

A similar standard should exist for franchisors/franchisees. Franchisors must exercise reasonable care to ensure that franchisees are aware of employment laws with which they must comply. There will be no such thing as too much reasonable care, but policies and training of the franchisee will suffice. All franchisee employees must be made aware that, if they believe they have been the victim of legal violations, they should

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138. See generally Weil, *supra* note 74

139. See generally *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). Under *Ellerth and Faragher*, employers can avoid liability for sexual harassment if they 1) exercised reasonable care to prevent and correct harassment; and 2) the employee unreasonably failed to take advantage of what the employer provided or otherwise avoid harm. In practice, courts have made it clear, employers will not be liable if they 1) have a strong anti-harassment policy; and 2) legitimately investigate such claims, fix the problem (if there is one), and discipline the harasser (if necessary).

report it to the franchisor. The franchisors will have an obligation to investigate. If they find violations, they need to make sure the franchisee corrects the problem and pays damages. A franchisee who does not cure the problem within sixty to ninety days, of being notified, will lose its franchise. A franchisor who fails to investigate or force the franchisee to cure the problem will be liable for damages.

This proposed standard is not perfect. First, it does not help unions who wish to organize franchisors with top-down organizing; this “failure” is acceptable. While the NLRA allows top-down organizing, it is bad policy to alter an entire business structure with numerous opportunities and economic positives simply on the assumption that this may help unions organize. As stated, there are enough franchisor stores and large franchisees for unions to engage in top-down organizing. Besides, the NLRA was promulgated to encourage bottom-up organizing.<sup>140</sup> Franchisors, especially nascent franchisors, may balk at the requirement, and franchisees may believe that the standard compromises their independence. The old axiom, that a good deal occurs when no one is truly happy, applies here in this case.

On the other hand, this Article’s proposed standard solves many of the problems that concern employee advocates, and, while it does put additional obligations on franchisors, it protects the business model and allows the franchisor to impart knowledge to ensure a better workplace. As it stands, the *BFI* standard raises interesting questions. One’s choice is heavily influenced by the values of the majority of franchisors and franchisees in this country. Franchisors and franchisees would like to comply with the law and would prefer that their employees are not abused. Also, litigation is long, expensive, draining, and, all-in-all, an awful process. Thus, imparting knowledge, to ensure compliance and creating methods to fix problems without litigation, is a positive development for the United States economy, employees, and society. Another theory is that the vast majority of franchisors and franchisees are bad actors who want to take advantage of employees by violating the law. Under this theory, litigation, and the overarching threat of litigation, is necessary to curtail the desires of these bad actors. If you believe the former, the proposed standard in this Article is a vast improvement. If you believe the latter, there is a much bigger problems than the joint-employer doctrine.

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140. Another potential problem is that unions could invoke an organizing tactic—mass applications—to harass franchisors. Labor organizations could encourage employees to file mass frivolous claims. The law could allow for a cause of action against those who file mass frivolous claims.