



Testimony of
Catherine K. Ruckelshaus
National Employment Law Project

Hearing Before the
United States Congress
House Education and the Workforce Committee:
Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship

July 12, 2017

**Catherine K. Ruckelshaus, General Counsel
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(646) 693-8221
cruckelshaus@nelp.org**

**Testimony of
Catherine K. Ruckelshaus
National Employment Law Project**

**Hearing Before the
United States Congress
House Education and the Workforce Committee:
*Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship***

Chair Foxx, Ranking Member Scott, and members of the Committee: thank you for this opportunity to testify today on the important subject of joint employer responsibility and its impacts on workers and their families, law abiding employers, and the broader economy.

My name is Cathy Ruckelshaus, and I am General Counsel of the National Employment Law Project (NELP), a non-profit organization that for nearly 50 years has promoted policies and programs that create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing through improved benefits and services.

At NELP, we set up a contracted work project called “Who’s the Boss” to address the problems faced by low-wage workers in our economy’s increasingly outsourced growth sectors. Janitors, home care workers, construction drywallers, warehouse lumpers, and agricultural and garment workers—some placed by temp or staffing firms, some contracted-out multiple levels away from their boss -- are the workers we see who aren’t sure who their boss is, and who is responsible for job conditions.¹

These workers too often lose out on labor and employment protections including workers compensation, unemployment insurance, fair pay, health and safety and organizing safeguards. The corporations that engage them and then look the other way have a leg up on companies that play by the rules, resulting in a race to the bottom that rewards cheaters. This affects the quality of what should be middle class jobs that could stimulate our economy.

My testimony will cover three primary topics: (1) what is joint employment and why it is important; (2) the impacts of outsourcing on job quality; and (3) what the Browning-Ferris decision says and means. I conclude with very brief suggestions for reform to alleviate the problems that occur when companies skirt employment and labor responsibilities by outsourcing.

¹ See, National Employment Law Project, [Who’s the Boss](#).

I. What is joint employment and why is it important?

Our nation's labor and employment statutes all have definitions that permit more than one entity – a corporation, a subcontractor, an individual – to be found to be an “employer” responsible for the labor protections in the particular law. That's what joint employment is – more than one entity can be responsible as an employer. These definitions have been in the laws since their inception, and corporations have been operating under the definitions since the 1930's in some cases. The reason all of our labor and employment laws permit more than one responsible employer is because it improves compliance by ensuring that corporations do not outsource responsibility for their workers.

Despite claims by the Chamber of Commerce and International Franchise Association², virtually all U.S. labor and employment laws, from the Fair Labor Standards Act (FLSA), to our anti-discrimination laws, to the NLRA, have included joint employer liability since their inception.

The U.S. Supreme Court and myriad other courts have applied labor statutes to multiple businesses since the 1940's.³ Court decisions hold farm labor contractors and the growers that engage them responsible for unpaid minimum wages; garment workers have recovered unpaid wages from sweatshop operators and their jobbers. More recently, janitors have recovered unpaid overtime from big-box retailers when the smaller cleaning contractors they outsource to don't pay their workers, and temp and staffing workers have recovered from worksite and intermediary companies when labor standards go awry.

The federal Department of Labor has long-standing joint employment regulations⁴ and has over the years prioritized industries like agriculture, building services, and garment, where subcontracting abuses create entrenched wage violations with little accountability.⁵ The Equal Employment Opportunity Commission also has joint employment guidance⁶ that has been on the books for nearly two decades, and the

² See, U.S. Chamber of Commerce, *Opportunity at Risk: A New Joint Employer Standard and the Threat to Small Business*, available at <http://www.workforcefreedom.com/publications/opportunity-risk-new-joint-employer-standard-and-threat-small-business>

³ See, *Rutherford Food v. McComb*, 331 U.S. 722 (1947); *Falk v. Brennan*, 414 U.S. 190 (1973); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F2d 235 (5th Cir. 1973); *Zheng v. Liberty Apparel*, 355 F. 3d 61 (2^d Cir. 2003).

⁴ See 29 C.F.R. 791.2.

⁵ The USDOL recently removed recent guidance on joint employment under the Fair Labor Standards Act from its website, but because the guidance merely summarized longstanding existing case law, there has been no change to statutory definitions.

⁶ <http://www.eeoc.gov/policy/docs/conting.html>.

NLRB has enforced against joint employers in numerous cases since the middle of last century.

To find that one or more entity is jointly responsible under an employment or labor law, most laws require a showing that two or more entities share the right to control the work. While FLSA and related laws have a broader definition of “employer,” the NLRA and other statutes based in the common-law impose a narrower test to find a joint employer.

The examples I will give below show that it is important in some cases to find more than one responsible employer in order to secure compliance, but my research also shows that the number of joint employer claims and cases overall in the context of labor and employment enforcement is small, relative to the number of cases decided. The rich history of joint employer cases and the laws behind them are well-known and long-entrenched in our nation’s labor and industrial policy.

In contracted jobs, it is often the case that one employer is larger and more established, with a greater ability to implement policies or workplace changes to ensure compliance. When this happens, recognizing that businesses are joint employers is essential to achieve remedies for workers, future compliance with the law, and to hold all responsible parties accountable for their legal obligations. Contracting companies are in an especially strong position to retain authority over the labor when they engage labor-only subcontractors whose workers perform work on the company’s premises and who can only pay the workers after receiving payment from the lead company. The workers brought into a job by thinly-capitalized subcontractors are vulnerable to violations of labor laws as the subcontractors yield to the lead company’s controls or illegally cut labor costs to preserve their contract.

Corporate leaders’ decisions to contract-out labor-intensive aspects of their businesses is common in many service sector jobs today, including construction, janitorial, hospitality, warehousing, poultry and home care. While the reasons for the fissuring of jobs vary -- from legitimate needs to pare down multi-faceted business priorities to more brazen desires to skirt labor and employment and safety net protections -- the multiplicity of entities and potentially-responsible players too often results in lower wages, more dangerous workplaces, and less employer accountability for working conditions, especially in the lower-paid sectors in our economy. Outsourcing has created ambiguous legal status for workers and even wholesale exclusion of many from traditional labor protections. The precarious nature of work these days is [fueling anxiety](#) and is growing, when counting temporary, on-call, contracted, and “independent” jobs. It is one of the factors [driving lower wages and poor working conditions](#) across the economy.

The Wall Street Journal's recent article [Contract Workforce Outpaces Growth in Silicon Valley-Style 'Gig' Jobs](#) highlighted important research by economists Alan Krueger and Larry Katz that measured changes in various forms of contract work, including independent contractors and subcontracted workers, temp agency, and on-demand and day laborers. Katz and Krueger's research found that contract employment rose from below 10% in 1995, to almost 16% of the workforce in 2015. Between 2005 and 2015, the number of contract workers grew by more than half, while the overall workforce grew by only five percent. Our nation's largest companies-- from Amazon, to [Google to Virgin America to Walmart](#) --are deciding to hire more of their workers via contracts; Lauren Weber notes in her piece in the Wall Street Journal *The End of Employees* that companies try hard to *not* hire employees today.

A. Wage theft and other labor violations persist in labor-intensive and lower-wage jobs where outsourcing is prevalent.

To some extent, the increased prevalence of entities that are not "employers" results from legitimate structural change in the workplace in response to heightened competitive pressures. Businesses have compelling incentives to operate as efficiently, productively, and flexibly as possible. Keeping large numbers of workers on permanent staff through periods of fluctuating demand, incurring fixed costs that could potentially be avoided by transforming the nature of the employment relationship, and vertically integrating all work functions within a single entity rather than outsourcing or delegating tasks to be performed by more specialized or streamlined entities, is no longer the norm in many industries.

Recent experience demonstrates, though, that many of the difficulties workplace advocates face in determining what constitutes an "employer" reflects efforts by companies to exculpate themselves from liability, by inserting additional layers of management between themselves and their workers in order to disclaim responsibility for what occurs on the workplace floor.⁷

We have seen many examples, in many industries, of companies that deny legal responsibility for the workplace claims of individuals who, from a functional perspective, would traditionally have been considered those companies' employees, and this is where joint employment responsibility is important. Examples include:

⁷ NELP's reports [Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work](#) and our publications on [blue collar temp work](#), [manufacturing](#), [home care](#) and [warehouses servicing WalMart](#) give an overview of these subcontracting trends with closer looks within specific sectors and continue to be the baseline studies that make the case for why corporate contracting practices across the economy need to be paid attention to.

- Companies that outsource low-skilled and labor-intensive work to middlemen entities, as Wal-Mart and leading restaurant chains have done for their cleaning and janitorial services; as Tyson Foods has done for its poultry processing plants; and as Schneider Trucking has done for its warehouse “lumpers”;
- Companies that use temporary employment services or employee leasing firms to hire and place their workers, as Microsoft did with its “perma-temp” programmers and many auto plants suppliers do. In fact, more employers are using temp and staffing firms in traditionally “blue-collar” jobs, as the types of employers using temp and staffing arrangements has shifted from clerical and other white-collar work to hazardous construction and manufacturing work.⁸ Temporary agency workers (roughly 2% of the workforce) earn 20%-30% less than non-temp counterparts, depending on the occupation.
- General contractors in construction report that as much as 95% of workers on their worksites are employed by subcontractors.⁹ The industry is described by the authors of one recent report as “a fiercely competitive contract industry, characterized by slim profit margins, high injury and comp rates, comprised largely of numerous small to medium-sized companies whose numbers and size may make them more likely to operate beyond the view of state regulators.”¹⁰ In this labor-intensive industry, general contractors place enormous pressure on subcontractors to reduce labor costs, sometimes to the extent that they cannot meet basic labor standards requirements.¹¹ A leading survey of low-wage workers in New York, Chicago and Los Angeles found that 12.7% of workers in the residential construction industry experienced a minimum wage violation; 70.5% suffered an overtime violation; and 72.2% worked off-the-clock without receiving pay.¹²

⁸ While temporary and staffing work remains a relatively small portion of the overall workforce (2.8%, or just over 3.3 million workers), the sector has shifted away from clerical jobs towards low-wage manufacturing (39%) and logistics and transportation (20%) jobs that now dominate temp employment. See, e.g., NELP, [Manufacturing Low Pay](#).

⁹ Workers Defense Project, *Building Austin, Building Injustice: Working Conditions in Austin’s Construction Industry*, at 11 (June 2009), available at [http://www.buildaustin.org/Building%20 Austin_Report.pdf](http://www.buildaustin.org/Building%20Austin_Report.pdf) (“*Building Austin*”).

¹⁰ *Id.*

¹¹ See e.g. *Building Austin*.

¹² Annette Bernhardt et al., *Broken Laws, Unprotected Workers* (2009) at 32, 34, 35, available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>. Similarly, a study of the construction industry in Austin, Texas found one in five workers was denied payment for their work and fifty percent were not paid overtime, while only 11% of workers reported that they were able to recover their unpaid wages. *Building Austin* at 17.

- Warehouses and retailers use “third party logistics” firms, highly integrated companies with the capacity to handle goods at several different points in a supply chain. A reported 77 percent of Fortune 500 companies use third-party logistics firms.¹³ These third party logistics companies, in turn, contract with staffing agencies, which hire temporary workers to unpack, load, and ship goods to retail facilities across the country.¹⁴ Workers employed at the bottom of this supply chain face deteriorated working conditions, with significant increases in wage and hour and health and safety violations as staffing agencies cut corners. As one study of subcontracted and temporary logistics workers in New Jersey found, more than one in five workers earned incomes below the federal poverty level; more than one in ten had reported an injury on the job, and over 40 percent had not received necessary safety equipment.¹⁵
- Under a typical model of outsourced labor in the janitorial industry, a lead company contracts with a janitorial company to provide maintenance services at the lead company’s facilities.¹⁶ The janitorial company generally hires a second-tier subcontractor to supply workers to clean the facilities. Second-tier subcontractors shave labor costs by evading payroll taxes, workers’ compensation, and minimum wage and overtime requirements at the workers’ expense.¹⁷ Job quality has decreased significantly since the emergence of these contracting and franchising models, and violations of basic labor law protections are now endemic in the janitorial industry.¹⁸ Janitorial workers are also particularly vulnerable to dangerous working conditions and high workplace injury rates. As the U.S. Department of Labor has noted, “[j]anitors and building cleaners have one of the highest work-related injury rates,” where workers are susceptible to cuts, bruises, and burns from occupational hazards such as machinery, tools, and dangerous chemicals. Janitorial workers also face high

¹³ Tom Gorman, *How to Manage an Outsourced Workforce*, Material Handling Management (2009).

¹⁴ Jason Rowe, *New Jersey’s Supply Chain Pain: Warehouse and Logistics Work Under Wal-Mart and Other Big Box Retailers* (2012); Jason Sturna, et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, Policy Matters: A Quarterly Publication of the University of California, Riverside (2012).

¹⁵ *Id.*

¹⁶ *Who’s the Boss*, note 7, *supra*, at 9.

¹⁷ David Weil, *Market Structure and Compliance: Why Janitorial Franchising Leads to Labor Standards Problems* (Boston Univ. School of Mgmt., Working Paper 2011); Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, NY Times, July 13, 2005, at A19.

¹⁸ One academic study found that janitorial workers suffered a four-to-seven percent wage penalty from 1983 to 2000 as a result of outsourcing in the industry. Arindarajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Wage Service Occupations? Evidence from Janitors and Guards*, 63 *Indus. & Lab. Rel. Rev.* 287 (2010).

exposure to infectious diseases, and suffer from musculoskeletal injuries, slips, and falls on the job.¹⁹

Permitting employers in these jobs to get away with skirting basic labor and tax requirements will have a significant and long-term effect on the nature of jobs and our economy.

II. What is the Browning-Ferris decision and what does it mean?

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

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

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

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

Before issuing its decision as to who should be at the bargaining table, the Board undertook an extensive, deliberative and careful process through which it sought and received comments from a broad community of stakeholders, representing diverse and divergent positions on the issue of the correct standard for joint employment under the NLRA. After careful consideration, and noting its Supreme Court-mandated

¹⁹ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, Janitors and Building Cleaners* (2013), available at <http://www.bls.gov/ooh/building-and-grounds-cleaning/janitors-and-building-cleaners.htm>; National Safety Council, *Cleaning Up Safely: Janitors and Cleaners Face Multiple Hazards* (2013), available at <http://www.nsc.org/safetyhealth/Pages/312JanitorSafety.aspx#.UPeyJzkayfQ>.

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

Under this standard, the Board may find that two or more statutory employers are joint employers of the same statutory employees if they share or codetermine those matters governing the essential terms and conditions of employment. In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over the employees’ essential terms and conditions of employment to permit meaningful collective bargaining. *Browning-Ferris Indus.*, 362 NLRB No. 186 (August 27, 2015), Slip op. at 2.

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

By clarifying that the lead employer may be responsible for conditions of employment in contracted jobs, the Board’s decision will better enable workers to understand and assert their workplace rights and workers will have better opportunities to bargain for improved wages and working conditions.

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

III. Joint employment under the FLSA and OSHA

The Fair Labor Standards Act of 1938 (“FLSA”) “defines the verb ‘employ’ expansively to include to ‘suffer or permit to work.’” *Nationwide Mut. Ins. Co v. Darden*, 503 U.S. 318, 322, at 324 (1992). This is “the broadest definition that has ever been included in any one act” according to the Supreme Court in *United States v. Rosenwasser*, 323 U.S. 360 (1945), quoting the comments of then-Senator Hugo Black. Congress later incorporated this same broad statutory standard into the Family and Medical Leave Act (“FMLA”), the Equal Pay Act, and the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”).

This broad statutory definition of what it means for a person or entity to “employ” a worker has its historical roots in various state labor statutes. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947); *Nationwide Mut. Ins. Co v. Darden*, 503 U.S. 318, 322-24 (1992). That definition was intended to encompass many categories of employment relationships that would not be considered “employment” under the common law standard. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (“This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.”). When Congress enacted the FLSA, it made clear that one of its goals was to ensure that business owners could be held responsible for any violation of child labor standards in their workplace, and not just to pay minimum wages and overtime premiums to those workers – and the intended coverage for wage-and-overtime protections was meant to be co-extensive with the unquestionably broad coverage for child labor violations.²⁰

In enacting the FLSA, Congress knew that its goal of eliminating child labor and other harms would be undermined if companies could avoid responsibility as “employers” by place one or more layers of subcontractors between themselves and their employees. One mechanism Congress used to prevent this exculpatory practice was to define the employment relationship broadly – in particular, to define the term “employ” to *include* “to suffer or permit” to work. The terms “suffer” and “permit” were well known and accepted at the time of the FLSA’s enactment, and by incorporating that language into the statutory definition, Congress intended to incorporate as well the expansive construction of those terms that had become the norm under prior state law court decisions. The common law concept of “employ” that is included within the scope of FLSA employment coverage is relatively narrow in comparison with FLSA’s broader “suffer or permit” scope. While FLSA was designed to eliminate from commerce goods produced under substandard employment conditions, at common law the purpose of

²⁰ *See* Brief for the Administrator at 27-29 in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (No. 562) (footnotes omitted) (quoting S. 2475, 75th Cong. 6(a) (1937)); Brief for the Administrator at 21-22 in *Walling v. American Needlecrafts*, 139 F.2d 60 (6th Cir. 1943).

defining who was a master and who a servant, i.e., an employer and an employee, was not to offer societal protection for the employees. Rather, common law “employment” relations were litigated by injured third parties to determine tort liability of the master for the servant’s negligent acts.²¹

Joint employer decisions under the FLSA are made on a case-by-case basis, and a large number of decisions finding joint employment are in the agricultural sector, where too often lower-level farm labor contractors disappear and cannot pay minimum wage to the farmworkers.²² Our compilation of the reported cases show about half finding in favor of joint employment and half not; using the fact-specific test under the Act. The second-most common sector found in our survey of joint employer cases under the FLSA are jobs placed by temporary and staffing firms.²³

OSHA has had a [multi-employer](#) citation policy for many decades, starting in the 1970’s and more recently revised in 1999.²⁴ Under this policy, on multi-employer worksites, more than one employer may be cited for a hazardous condition that violates an OSHA standard. The policy, which was sustained by the 8th Circuit Court of Appeals in *Solis v Summit Constructors*, 558 F. 3d 815 (8th Cir. 2009), authorizes OSHA to cite an employer for hazards affecting the employees of another when that employer either creates the hazard, controls safety at the work site, exposes the employees to the hazard, or has the means to correct the hazard. As with the FLSA, EEOC and NLRA standards, the decision to cite more than one employer is made on a case by case basis and dependent on the specific facts of the case.

An example of OSHA’s use of this citation policy comes from 2005 when the BP oil refinery exploded and killed 15 workers, all of whom were employees of subcontractors. OSHA cited BP with the largest fine in [OSHA’s history](#).

OSHA has used this standard for decades in its regular protection of temporary workers as well. As joint employers, both the host employer and the staffing agency have responsibilities for protecting the safety and health of a temporary worker under the OSH Act. The extent of the obligations each employer has will vary depending on workplace conditions and may be clarified by their agreement or contract.

²¹ *Sec’y of Labor v. Lauritzen*, 835 F. 2d 1529, 1544 (7th Cir. 1987, J. Easterbrook, concurring).

²² *E.g.*, *Reyes v. Remington Hybrid Seed Co.*, No. 05–1628, 2007 WL 2067061 (7th Cir. 2007)(finding corn-detasslers to be jointly employed by a farm labor subcontractor and the grower); *compare with*, *Martinez-Mendoza v. Champion International Corp.*, 340 F.3d 1200 (11th Cir. 2003)(finding no joint employment in tree-planting case).

²³ *E.g.*, *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998)(finding joint employment for hospital workers placed by a temporary agency).

²⁴ It has been in [OSHA’s Field Operations Manual](#) for nearly 20 years.

In 1997 OSHA cited a Wisconsin hospital for failing to comply with OSHA's blood-borne pathogen standard.²⁵ The hospital hired a staffing company to place cleaners in the hospital, which said it was not responsible for protecting the workers from exposure to blood borne hazards. Staffing company workers were supervised by the hospital employees and worked alongside them performing housekeeping services. Direct hire workers were vaccinated for Hepatitis B, but the staffing company workers were not. In 2004 the OSHA Review Commission found that the Hospital was the employer of the staffing company workers for purposes of the OSHA Act, following the standard common law employment test and thus was jointly liable.

OSHA has not issued any joint employer citations against a franchisee and franchisor.

IV. Debunking the myth: Joint employment will not destroy franchising.

Among the dire and unsubstantiated predictions by some business interests, perhaps the most oft-repeated is that joint employment spells the demise of franchising, and by extension, small business growth.²⁶ The majority in *Browning-Ferris* explicitly noted that it was not making any findings as to franchising in its decision. *Browning-Ferris, supra*, at 20, fn. 120. In fact, franchising is growing, despite operating under long-standing joint employer rules. Under these rules, franchisors are only liable for the labor practices of their franchisees if they have control over these matters.

In my research, I have not been able to find any determinations that a corporate franchisor is liable as a joint employer along with its franchisee under even the broadest-defined statute – the FLSA -- meaning that the stated fears are vastly overblown. Determinations of joint employment status are still be made on a case-by-case basis, and it is simply wrong to suggest that franchisor-franchisee arrangements will often give rise to a finding of joint employment.

Even if a judge finds that there is joint responsibility between the more powerful corporate franchisor and the franchisee in a particular case, this only means that the corporate franchisor should ensure that violations do not occur in the franchises, by contracting with reputable franchisees, and by monitoring compliance and taking corrective action if needed.

In fact, in a recent fact-intensive analysis in conjunction with claimed unfair labor practices, the NLRB's General Counsel determined that franchisor Freshii Development was not a joint employer with its franchisee restaurant, Nutritionality, Inc., either under the then-existing standard or the proposed General Counsel's broader joint employer

²⁵ *Secretary of Labor v Froedtert Memorial Lutheran Hospital*, OSHAC Docket 97-1839 (January 15, 2004), available at https://www.oshrc.gov/decisions/pdf_2004/97-1839.pdf4

²⁶ <http://www.help.senate.gov/hearings/hearing/?id=22428fa0-5056-a032-5232-293d58c4db10>.

standard, which was adopted in the BFI case. Advice Memorandum No. 177-1650-0100 (April 28, 2015).

V. Recommendations for Reform.

A concerted effort to broaden responsibility and accountability for firms deciding to contract-out their businesses will create better jobs and impact a broad range of lower-wage workers. It will also shore up the occupations that are intended to generate the most jobs as our country struggles to shed the weaknesses of the Great Recession, creating more economically-sustainable outcomes for those working in our growth sectors.

Suggestions to improve outsourced jobs include:

- Enforce laws currently on the books that have broad definitions of responsible employers to hold more entities accountable as joint employers.
- Pass new laws, building on the good models being developed in the states and internationally that explicitly hold contracting businesses liable for the working conditions in their realm. Examples include California's [AB 1897](#), passed in 2014, which creates joint and several liability for wage and hour and workers' compensation violations for any contracting company along with its subcontractor.
- Encourage state and federal departments of labor and related agencies to target firms that use these structures to evade labor laws, using all tools at their disposal to send a strong message to outsourcing companies.
- Collect data on the magnitude and impacts of subcontracting and related structures to better refine and understand and assign responsibility for labor violations.