Written Testimony of
Anne Marie Lofaso
Professor of Law
West Virginia University College of Law

Before the U.S. House Committee on Education and the Workforce

Subcommittee on Health, Education, Labor, and Pensions

Hearing on H.R. 3459 Protecting Local Business Opportunity Act

September 29, 2015

Introduction

Good Morning, Chairman Roe, Ranking Member Polis and distinguished members of the Subcommittee. My name is Anne Marie Lofaso. I am a professor at West Virginia University College of Law, where I teach labor and employment law and serve as the Director of the Labor and Employment Law Certificate Program. I am also a former Senior Attorney of the National Labor Relations Board, where I served for ten years in the Appellate and Supreme Court Branch.

Thank you for inviting me to testify regarding H.R. 3459, the *Protecting Local Business Opportunity Act*, which would amend Section 2(2) of the National Labor Relations Act to add the following:

> Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate.

This amendment would substantially narrow the definition of employer, which broadly includes "any person acting as an agent of an employer, directly or indirectly."

This amendment was prompted the Board's decision in *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (Aug. 24, 2015) (returning to its pre-1984 construction of Section 2(2) and finding joint-employer status). Proponents of this bill view that decision as substantially revising the Board's definition joint employer in the franchise context. My testimony will address the following questions:

1. What is the Board's definition of joint-employer after *Browning-Ferris*? How does that definition compare with the plain language of the NLRA, the common law, and the Board's previous standards?

2. How does the Board's decision in *Browning-Ferris* impact franchisors?

3. What are the consequences of enacting this legislation in a period where contingent and fissured employment relationships are proliferating?

I. The Board's Joint-Employer Definition, as Articulated in *Browning-Ferris*, Is Consistent with the Plain Language of the NLRA and the Common Law

In *Browning-Ferris*, the Board concluded that it "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.'" Slip op. at 2

(quoting *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982), *enf'g*, 259 N.L.R.B. 148 (1981)). The Board divided this into a two-part inquiry (Slip op. at 2):

(1) Is there a common-law employment relationship between the putative joint employer and the employees in question?
(2) If so, does "the putative joint employer possess[] sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining"?

To further clarify its test, the Board noted that "control" is central to both inquiries. Relying on Supreme Court jurisprudence, the Board explained: "the question is whether one statutory employer 'possess[es] sufficient control over the work of the employees to qualify as a joint employer with' another employer." Slip op. at 2 (quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)).

The Board's definition of joint employer is consistent with the NLRA's plain language, which includes "any person acting as an agent of an employer, directly or indirectly." Given the breadth of this definition, it is significant that the Board's construction of the statute in the joint-employer context tracks the common law, as codified in the Restatement of Agency as early as 1933. *See* RESTATEMENT OF THE LAW OF AGENCY 1933[1]; *see also* RESTATEMENT (SECOND) OF AGENCY 1958.[2] Rather than creating a new definition for a new context, the Board has tethered its construction to a traditional construction of that term that is nearly universal in U.S. law.

It is incorrect to call this definition a radical departure of long-standing law. A more accurate characterization is that *Browning-Ferris* returns Board precedent to traditional common-law principles. To be sure, *Browning-Ferris* does overrule administrative precedent starting in 1984 with *Laerco Transp.*, 269 N.L.R.B. 324 (1984), and *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *enforced mem*. 772 F.2d 894 (3d Cir. 1985), and continuing with its progeny. But those cases are actually the radical departure from, at that point, over half a century of common law. *Browning-Ferris* merely removes the limiting language added by those cases, language which has no connection to the NLRA's plain language or to the common law. As the current Board pointed

[1] Section 1 defines agency as "the relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*, and consent by the other so to act." Section 2(1) defines master as "a principal who employs another to perform service in his affairs and *who controls or has the right to control* the physical conduct of the other in the performance of the service."

[2] Section 1 similarly defines agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*, and consent by the other so to act." Section 2(1) similarly defines master as "a principal who employs an agent to perform services in his affairs and *who controls or has the right to control* the physical conduct of the other in the performance of the service."

out, those cases mark "a 30-year period during which the Board – without any explanation or even acknowledgement and without overruling a single prior decision – imposed additional requirements that effectively narrowed the joint-employer standard." Slip op. at 10.

The difference between the two standards is the same as the difference between possessing and exercising power. Whereas the common law will hold a person to the duties of a joint employer if it possesses power, even if that person does not exercise those powers, the *Laerco* definition only permits a finding of joint-employer status where the putative joint employer actually exercises that power. The *Laerco* definition thereby runs counter to both the plain language of the act and the common law. The plain language expressly defines employer as "any person acting as an agent of an employer, *directly or indirectly*," 29 U.S.C. § 152(2), and does not limit the employment relationship to "the employees of a particular employer," 29 U.S.C. § 152(3). The common law reveals that "the control or right to control needed to establish the relation of master and servant may be very attenuated," RESTATEMENT OF AGENCY §220 cmt. d.

As a legal matter, there are no grounds upon which the Board's return to the common law is legally unsound. The definition harkens a return to the common law, which has been tested in all types of economies including the industrial-military complex of the early twentieth century to the service economy of the late twentieth century and the information economy of the early twenty-first century. The definition fulfills the purpose of the NLRA to "encourag[e] the practice and procedure of collective bargaining" by ordering to the bargaining table those who have control of mandatory bargaining subjects.

II. The Board's Decision in *Browning-Ferris* Says Little About How Other Franchisors Will Be Treated Because Under Any Standard the Board Would Have Found Joint-Employer Status

The Board's decision in *Browning-Ferris* does little to help us understand how franchisors will be treated for the following two reasons. First, *Browning-Ferris* is not a franchise case – employees of Leadpoint, the undisputed employer, and BFI, the putative joint employer, worked shoulder-to-shoulder at the same recycling plant. Second, under either the *Browning-Ferris* or the *Laerco* standard, BFI could have been a joint employer. This is so because BPI exercised so much control over the terms and conditions of the employees in

question in that case.[3] Third, both standards are highly fact-specific. This means that the nature of the relationship between the franchisor and franchisee is what determines liability.

Having said that, understanding that the difference between the two standards can be articulated as the difference between possessing and exercising control, we can make a few projections about how this might affect the franchise business model. Between 1984 and 2014, a franchisor might, without thinking, retain control over wages, hours, and other terms or conditions of employment of the franchisee's employees because such right of control, under the new *Laerco* standard, would not give rise to labor liability. It's a little hard to believe that a franchisor would be so unthinking because under the common law, that franchisor would still retain all the liability of a joint employer including tort liability – at least where the franchisor knew or should have known of the hazard resulting in injury. So, assuming that such a franchisor exists, that franchisor is more likely today to refuse to retain the right of control. In these circumstances, the franchisee is likely to become more autonomous. Accordingly, one unintended and perverse effect of the proposed legislation is that it could embolden franchisors to take more control over the franchisee's labor relations because it would have less liability concerns.

III. The Proposed Amendment Is Unnecessary To Retain the Franchise Business Model But Does Grave Harm to Employees By Rendering Bargaining Futile

As stated above, those who disfavor the Board's definition of joint employee have no legal grounds for dismantling that decision. Accordingly, in over-reactive hyperbole, proponents of the proposed amendment have searched for non-legal reasons for preserving the *Laerco* standard.

First, they claim that small franchisees will lose their businesses if the *Browning-Ferris* decision is left unchecked. This speculative argument is supported by no evidence. Indeed, the only evidence available – the U.S. economy during the pre-*Laerco* era, belies this bald assertion. There simply is no evidence that the franchise business model did not flourish prior to 1984.

[3] This, of course, begs the question why the Board simply did not decide this case under the *Laerco* standard. Unlike *Freshii,* Case 13-CA-134294 et al., Advice Memorandum, April 28, 2015, where the General Counsel's Division of Advice concluded that there was no joint-employer relationship, this case inhabits a more gray area. Indeed, in this case, the Board overturned a Regional Director's decision, holding that Leadpoint was the sole employer. See *Browning-Ferris Indus. of Cal., Inc.,* Case 32-RC-109684, Decision and Direction of Election, August 16, 2013. Second, the Board found increased fissuring of workforce, justifying a decision to revisit past precedent and reinstate the common law.

Second, some claim that the *Browning-Ferris* decision robs small businesses of the American dream. As a threshold matter, this argument assumes that only business owners have a right to the American dream. In reality, employees and employers must work together to realize that dream. That collaboration also means, at least in some cases, that employees are entitled to share in decisions affecting their working lives, which in turn sometimes means that small businesses will be brought to the bargaining table to discuss those decisions.

Third, some have argued that the proposed legislation is needed to bring stability to the law. That argument ignores two important facts: (1) the Board's *Browning-Ferris* standard has been the Board's standard for 50 of its 80 years and the common law standard since before 1933; and (2) the proposed legislation does nothing to alter the common law, under which all businesses currently operate.

Fourth, some have argued that the Board's decision interferes with business by upending the franchise business model. Yet, there is no evidence of this for at least two reasons: (1) franchisors concerned about joint-employer liability are more likely to give franchisees more autonomy rather than less autonomy over terms and conditions of their employees; and (2) the franchise business model flourished for many years under the very same standard articulated in *Browning-Ferris* prior to 1984. Simply put, Congress's proposed new standard is unnecessary to preserve the franchise business model.

By contrast, the proposed legislation does grave harm to – dare I say, kills the American dream of – the millions of employees who work for those small businesses by rendering bargaining futile in cases where a joint employer retains control, but which control is not "immediate" or "direct." Eighty years ago, while our country was in the midst of the Great Depression, Congress enacted to the National Labor Relations Act to "encourage[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. Congress found that labor unrest results from inequality of bargaining power between workers and those who control their terms and conditions of employment. As part of a package of laws designed to alleviate economic inequality and to enhance economic opportunity, Congress created the National Labor Relations Board and charged it with administering and applying the NLRA to the complexities of work life. Today, those complexities include an increasingly more fissured workforce, whose members stand witness to extraordinary periods of wage stagnation, proliferation of low-wage jobs through employee leasing, temp agencies and subcontractors, and may include the first

generation of Americans ever to face worse living conditions than their parents. This legislation renders bargaining futile for those workers who have two masters – the immediate master and the one who retains control but doesn't exercise it directly.

The Board's *Browning-Ferris* decision, like the common law of the past century, understands that the law plays a role in ensuring that those who control the plight of others are accountable for that control. The Board's *Laerco* decision, by contrast, allows some of those in control, namely those who retain the right of control, to dodge their duty to bargain in cases where employees, frustrated with working terms and conditions, have voted for union representation. This scenario serves to frustrate rather than encourage the practice and procedure of collective bargaining.