NOTE

Modern Accountability for a Modern Workplace: Reevaluating the National Labor Relations Board's Joint Employer Standard

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ABSTRACT

This Note examines whether the joint employer standard of the National Labor Relations Board ("NLRB" or "the Board") encompasses all the entities necessary to satisfy the legislative intent of the Board's governing statute, the National Labor Relations Act ("NLRA"). Under current NLRB jurisprudence, many franchisors escape liability for the unfair labor practices of their franchisee entities, leaving workers with little to no recourse when they seek enforcement of their rights under the NLRA. In examining recent struggles by workers seeking better conditions in many franchise workplaces, the history and evolution of the joint employer standard, and formulations of the joint employer standard in other legal contexts, this Note explains that there are current gaps in labor law enforcement that should be filled via a modification of the Board's standard. This Note outlines a reformulated joint employer standard that the NLRB should apply and walks through an example of how the standard would function. This Note then discusses critics' arguments against a new joint employer standard, relying on franchise industry members' facts and economic studies to identify the likely outcomes of a new standard. This Note concludes that the current joint employer standard before the

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NLRB must be modified to reach many franchisors, thereby moving closer to realizing the NLRA's legislative intent.

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INTRODUCTION

> *"They say the franchisee is just a small man in the middle . . . . If that's true, then who am I? I'm just a dot on the wall. I just want to be able to get an unlimited MetroCard. I can't afford* nothing.*"*[1]

In October 2012, in one Manhattan McDonald's Corporation ("McDonald's") franchise restaurant, managers threatened workers with unspecified reprisals for taking part in union activity, giving the impression that their activity was under surveillance.[2] In April 2013, in Chicago, managers at another McDonald's franchise restaurant took pictures and conducted other surveillance of workers engaging in concerted activities.[3] In March 2014, in Philadelphia, managers at another McDonald's franchise restaurant told a worker, "no third party can help you" and interrogated the worker about her union activities, blaming her for costing the restaurant money to combat the union.[4] These situations all took place at different worksites, but under the same corporate umbrella, forming a pattern of activity. Workers facing these and similar tactics took a multifaceted approach in an at-

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1 William Finnegan, *Dignity: Fast-Food Workers and a New Form of Labor Activism*, NEW YORKER (Sept. 15, 2014), http://www.newyorker.com/magazine/2014/09/15/dignity-4 (quoting Jorel Ware, a thirty-one-year-old Midtown Manhattan McDonald's worker).

2 Fast Food Workers Comm. v. Lewis Foods of 42nd Street, LLC, No. 02-CA-093893, at 8 (N.L.R.B. Dec. 19, 2014) (order consolidating cases).

3 Workers Org. Comm. of Chi. v. Karavites Rests. 11102, LLC, No. 13-CA-106490, at 12 (N.L.R.B. Dec. 19, 2014) (order consolidating cases). The National Labor Relations Act outlines an employee's right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157 (2012), where "concerted activity" includes activity by individual employees united in a common endeavor. *See* Meyers Indus. Inc., 281 N.L.R.B. 882, 885–86 (1986).

4 Pa. Workers Org. Comm. v. Jo-Dan Madalisse Ltd., LLC, No. 04-CA-125567, at 3–4 (N.L.R.B. Dec. 19, 2014) (order consolidating cases).

tempt to improve their situation: many of them organized to fight for better working conditions and they looked to federal labor law.[5] From late 2012 to late 2014, they filed over 300 unfair labor practices ("ULP" or "ULPs") complaints with the National Labor Relations Board ("NLRB" or "the Board") against McDonald's locations across the country.[6]

Although these workers were aware of their common struggle, an issue of which they may not have been aware was that most of them were technically working for different employers, despite all being under the McDonald's name.[7] This technicality arose from the carefully designed franchise system that McDonald's, and other employers like it, developed.[8] Under the National Labor Relations Act ("NLRA"),[9] claims of retaliation, threats, intimidation, or coercion such as those made by these workers can only be brought against the workers' "employer" or labor representative, should they have one.[10] Despite the NLRA's broad definition of "employer" as "any person acting as an agent of an employer, directly or indirectly,"[11] the Board's current jurisprudence allows franchisors like McDonald's, who control varying aspects of their franchisees' businesses, to be free from the responsibilities set forth in the Act.[12]

One author attributes the gap in enforcement of labor standards to the modern "fissured workplace." [13] The franchise industry's standard agreement blurs lines of authority, making negotiations to effect

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5 Among others, groups like the Workers Organizing Committee of Chicago began protesting in late 2012 to demand better wages and working conditions in their (mostly fast food) jobs. *See About Us*, FIGHT FOR $15, http://fightfor15.org/en/about-us/ (last visited Jan. 22, 2016).

6 *McDonald's Fact Sheet*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet [https://web.archive.org/web/20151017205049/https://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet] (last visited Oct. 19, 2015). For a brief overview of "unfair labor practices," including definitions and remedies, see *Unfair Labor Practices: An Overview*, CORNELL LEGAL INFO. INST., http://www.law.cornell.edu/wex/unfair_labor_practices_ulps (last visited Jan. 22, 2015).

7 *See infra* Part I. In its 2014 Form 10-K filings with the Security and Exchange Commission, McDonald's Corporation reported that, worldwide, it operates 6714 (nineteen percent) of its over 36,000 restaurants with the rest run by conventional franchisees under franchise arrangements and foreign affiliates and developmental licensees under license agreements. McDonald's Corp., Annual Report (Form 10-K) 34 (Feb. 24, 2015).

8 *See infra* Part II.

9 29 U.S.C. §§ 151–169 (2012).

10 *See id.*

11 *Id.* § 152(2).

12 *See infra* Section I.A.

13 David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. & LAB. REL. REV. 33, 34 (2011).

change difficult for both franchisees and workers.[14] Under the franchise structure, a worker's only option is to file a ULP complaint against the franchisee as the designated "employer" when, in reality, the franchisor often maintains strict protocols for presentation, packaging, methods, and other procedures at their franchise locations.[15] This means that many attempts to remedy meaningfully workplace issues between an employee and franchisee are futile because the franchisor often dictates a majority of the on-the-ground workplace conditions.[16] To combat this ineffective result, the NLRB developed the "joint employer" theory early on in its history, but recent cases have left workers, like those at McDonald's franchises, out of its reach.[17]

Although fast food franchisors may hope that tensions with workers will pass, a recent survey suggests otherwise; indeed, eighty-nine percent of fast food workers in the United States say they have suffered "wage theft."[18] These different occurrences of "wage theft" include instances where workers "have been forced to do off-the-books work, been denied breaks, been refused overtime pay or been placed

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14 *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 158 (2014). For example, a franchise owner of a McDonald's in California discussed how times were tough in her restaurant and, to alleviate the issues, the franchisor suggested that she "just pay [her] employees less" rather than have any strategic conversation about the price points of products she was being directed to sell. Lydia DePillis, *McDonald's Franchisee Says the Company Told Her "Just Pay Your Employees Less,"* WASH. POST (Aug. 4, 2014), http://www.washingtonpost.com/news/storyline/wp/2014/08/04/first-person-kathryn-slater-carter-the-franchise-owner-taking-on-mcdonalds/.

15 For example, Taco Bell's franchise agreement states,

> 'You must operate your facilities according to methods, standards, and procedures (the "System") that Taco Bell provides in minute detail' (Taco Bell 2009). Similarly, Pizza Hut's agreement . . . [states that franchisees must adhere to] 'standards, specifications, and procedures for operations; procedures for quality control; training and assistance programs; and advertising and advertising and promotional programs . . . (Pizza Hut 2009).'

Weil, *supra* note 13, at 40–41.

16 *See* Michael Hiltzik, *The NLRB-McDonald's Ruling Could Be the Beginning of a Franchise War*, L.A. TIMES (Aug. 4, 2014, 1:59 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-nlrb-mcdonalds-20140804-column.html ("[M]any . . . franchisors, exercise[ ] rigorous control over almost all aspects of a franchisee's operations—uniforms, food quality and preparation, store design, hours, prices. The branded company monitors these standards with secret shoppers, and backs them up with economic cudgels that can make indentured servitude look like a big party.").

17 *See infra* Part I.

18 *See* Tiffany Hsu, *Nearly 90% of Fast-Food Workers Allege Wage Theft, Survey Finds*, L.A. TIMES (Apr. 1, 2014), http://articles.latimes.com/2014/apr/01/business/la-fi-mo-wage-theft-survey-fast-food-20140331.

in similarly unsavory circumstances."[19] Further, organizing efforts in the sector continue to expand, with workers in more than 190 cities walking off the job in the round of fast food strikes in December 2014.[20] A combination of these efforts and public pressure is responsible, at least in part, for higher minimum wages in twenty-one states beginning in 2015.[21] The public and worker pressure also made the largest franchisor in question, McDonald's, raise wages for 90,000 of its workers in April 2015, but the move did not stop organizing efforts for the scheduled April 2015 protests nationwide.[22] In fact, an estimated 60,000 workers in over 200 cities participated in the marches and protests, which organizers claim was the "largest protest by low-wage workers in US history."[23] Amid these developments, the NLRB is attempting to ease the tension between franchise workers and employers by reevaluating its joint employer doctrine as it applies to franchises.[24] As an intermediate step, the NLRB has articulated a

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19 *Id.*

20 *See* Josh Eidelson, *Fast-Food Strikes Hit Record Numbers, Span 190 Cities*, BLOOMBERG BUSINESSWEEK (Dec. 5, 2014), http://www.businessweek.com/articles/2014-12-05/fast-food-strikes-hit-record-numbers-span-190-cities [http://web.archive.org/web/20150128042208/http://www.businessweek.com/articles/2014-12-05/fast-food-strikes-hit-record-numbers-span-190-cities]. Additionally, the largest fast food worker protests were organized for April 15, 2015, with organizers predicting that they "will draw more than 60,000 people in 200 cities nationwide." Rachel L. Swarns, *McDonald's Workers, Vowing a Fight, Say Raises Are Too Little for Too Few*, N.Y. TIMES (Apr. 5, 2015), http://www.nytimes.com/2015/04/06/nyregion/mcdonalds-pay-raises-are-too-little-for-too-few-workers-say.html.

21 *See* Paul Davidson, *Minimum Wage to Rise in 21 States This Week*, USA TODAY (Dec. 29, 2014, 6:05 PM), http://www.usatoday.com/story/money/business/2014/12/29/minimum-wage-increases-on-new-years-day/20880945/. In New York, where worker-organizing efforts are among the strongest in the nation, Governor Andrew Cuomo went so far as to instruct the Acting State Labor Commissioner to empanel a wage board to investigate and make recommendations on an increase of the minimum wage in the fast food industry on May 7, 2015. *See Fast Food Wage Board,* N.Y. STATE DEP'T OF LABOR, http://labor.ny.gov/workerprotection/laborstandards/wageboard2015.shtm (last visited Jan. 22, 2016). After multiple hearings that involved direct testimony from many of the workers demanding change in their jobs, the Fast Food Wage Board recommended "that the minimum wage be raised for employees of fast[ ]food chain restaurants throughout the state to $15 an hour over the next few years." Patrick McGeehan, *New York Plans $15-an-Hour Minimum Wage for Fast Food Workers*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/23/nyregion/new-york-minimum-wage-fast-food-workers.html.

22 *See* Swarns, *supra* note 20. Importantly, the increased wages only applied to McDonald's company-owned restaurants and not to the franchise locations. *See id.* Consequently, over 750,000 workers were unaffected by McDonald's decision and did not receive pay increases. *See id.*

23 Steven Greenhouse & Jana Kasperkevic, *Fight for $15 Swells into Largest Protest by Low-Wage Workers in US History*, GUARDIAN (Apr. 15, 2015, 5:40 PM), http://www.theguardian.com/us-news/2015/apr/15/fight-for-15-minimum-wage-protests-new-york-los-angeles-atlanta-boston.

24 *See* Press Release, Nat'l Labor Relations Bd., NLRB Office of the General Counsel

new joint employer standard for businesses in general, but it remains unclear whether this standard will apply to franchises.[25]

This Note argues that the NLRB should reformulate its joint employer standard to account for the current system of franchising, where a franchisor may not have direct and immediate control over day-to-day operations of a franchisee, but where it has significant impact on many other aspects of the franchisee's business. In formulating the new standard, this Note looks to other administrative agencies and federal statutes that have defined "employer" in today's workplace, including the Equal Employment Opportunity Commission ("EEOC")[26] and the Fair Labor Standards Act ("FLSA").[27] Evaluating the "employer" definitions of the EEOC and FLSA is instructive for a new proposed joint employer standard before the NLRB.

The FLSA—passed in 1938—was the first congressional attempt at defining minimum labor standards, specifically targeting wages.[28] President Franklin D. Roosevelt explicitly stated that the goal of the statute was to ensure that workers received a "fair day's pay for a fair day's work."[29] Compared to other labor legislation, the FLSA has developed a broader definition of "employer,"[30] and evaluating the reasoning behind this broader definition is instructive to a proposed new standard of joint employer before the NLRB.

Part I explores the history of the joint employer definition within the NLRB, ending with an examination of the current joint employer formula and the recently articulated standard in *Browning-Ferris Industries of California*.[31] This Part also discusses how other administrative agencies and federal statutes handle the issue of joint employers. Part II discusses the franchise model. This Part focuses on how the sophistication of the franchise model has made it regularly profitable, while also calling to reexamine the standard for joint employer liabil-

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Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer (July 29, 2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds.

25 *See* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186, at 1–2 (Aug. 27, 2015).

26 *See* 42 U.S.C. § 2000e(b) (2012) (defining "employer" for EEOC purposes).

27 Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012); *see also id.* § 203(d) (defining "employer").

28 *See* Richard J. Burch, *A Practitioner's Guide to Joint Employer Liability Under the FLSA*, 2 HOUS. BUS. & TAX L.J. 393, 394 (2002) (citing Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945)).

29 H.R. REP. NO. 101-260, at 8–9 (1989), *reprinted in* 1989 U.S.C.C.A.N. 696, 696–97; Burch, *supra* note 28, at 395–96.

30 *See* Burch, *supra* note 28, at 402.

31 Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015).

ity under the NLRA. Part III argues for a new formulation of joint employer status that includes the influence and structure of a franchisor in question. This Part also explains how the reformulation of joint employer status achieves the legislative intent of the NLRA, given the reality of the modern fissured workplace. Part IV addresses potential counterarguments, showing that the proposal to include many franchisors in a new definition of joint employer would not end the franchise system, nor would it result in mass layoffs or a freeze in hiring due to franchisors being more hesitant to take on new liability.

I. Legal Framework of Employer Status in the NLRB and Other Agencies

This Part first discusses the legislative motivation behind the NLRA, recognizing its potential to improve the economy by easing employer-worker tensions and advancing the actual and purchasing powers of workers. This Part then specifically looks to the evolution of the joint employer doctrine at the NLRB and its confrontation of the changing realities of the employer-worker relationship. This Part concludes with a discussion of joint employer determinations before other agencies and looks at the differences and similarities these standards have to the current and proposed NLRB joint employer standards.

A. Legislative Underpinnings of the NLRA and Defining Who Is an "Employer"

From its inception, the NLRA has recognized the "inequality of bargaining power between employees . . . and employers . . . ."[32] This legislation came out of the New Deal era with an eye toward promoting economic recovery and worker protection.[33] Further, the opening section of the NLRA illuminates one of the statute's chief purposes: improving the real "wage rates and the purchasing power of wage earners in industry . . . ."[34] Connecting this goal with the recognition of unequal bargaining power, the assumption was that workers with the ability to bargain collectively would achieve higher wages than if each worker were to bargain individually.[35]

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32 29 U.S.C. § 151 (2012).

33 *See* Robert P. Hunter, Mackinac Ctr. for Pub. Policy, Michigan Labor Law: What Every Citizen Should Know 9 (1999), http://www.mackinac.org/2286 (noting that even before the NLRA was passed, Congress attempted to pass the National Industrial Recovery Act in 1933).

34 29 U.S.C. § 151.

35 *See* Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective*

As the statute was interpreted, the definitions were parsed out, including the term "employer."[36] In one of the earliest decisions on the matter, the Supreme Court stated that "the term[ ] . . . 'employer' in th[e] statute . . . draw[s] substance from the *policy and purposes* of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life."[37] Among the policy and purposes of the NLRA was the acknowledgement that "protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest . . . ."[38] The right to bargain collectively—in substance, to form and join a union—was a chief purpose of the NLRA, and therefore determinations of who should be considered an "employer" included the idea that entities necessary for bargaining should be included.

As the twentieth century rolled on, however, and the modern workplace changed into a "fissured" collection of franchises, subcontractors, and staffing agencies, this right began to erode.[39] Union membership in the United States reached a seventy-year low in 2010.[40] Shortly thereafter, workers in the fast food industry—an almost entirely nonunionized segment of the workforce—began a movement to seek better wages and working conditions.[41] What these workers may not have been aware of was that their movement would lead to the reevaluation of NLRA law regarding the definition of joint employer.

Bargaining, 39 B.C. L. REV. 329, 331 (1998). Robert F. Wagner, a strong advocate for the NLRA, stated that the proposed legislation, "permit[s] workers, if they so desire, to choose their own organizations free from interference, coercion or intimidation of the employer. In other words, it simply makes the worker a free man." CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 103 (1985) (quoting Letter from Robert F. Wagner to Dorothy Straus (Mar. 21, 1934)).

36 29 U.S.C. § 152(2).

37 NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403 (1947) (emphasis added).

38 29 U.S.C. § 151.

39 *See generally* WEIL, *supra* note 14, at 36.

40 Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES (Jan. 21, 2011), http://www.nytimes.com/2011/01/22/business/22union.html.

41 Seth Freed Wessler, *'We're a Movement Now': Fast Food Workers Strike in 150 Cities*, NBC NEWS (Sept. 4, 2014, 3:14 PM), http://www.nbcnews.com/feature/in-plain-sight/were-movement-now-fast-food-workers-strike-150-cities-n195256; *see also Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry, 2013–2014 Annual Averages*, U.S. BUREAU OF LABOR STATISTICS (Jan. 28, 2016), http://www.bls.gov/news.release/union2.t03.htm [http://web.archive.org/web/20150228092942/http://www.bls.gov/news.release/union2.t03.htm] (showing that only a small percentage of food preparation and serving-related occupation employees are represented by unions).

B. Evolution of the NLRB's Joint Employer Doctrine

Early on, the NLRB recognized that more than one entity could be deemed an "employer" of the same employee under the NLRA.[42] This determination came to be known as the joint employer doctrine and was typically determined as a factual issue when unfair labor practices were brought forth against alleged joint employers to the Board.[43] In the earliest days of the joint employer doctrine, it was broadly construed.[44] Over time, the Board repeatedly held that joint employer liability would be found when an entity "exercised direct *or* indirect control over significant terms and conditions of employment of another entity's employees";[45] possessed the potential to control terms and conditions of employment;[46] or, due to "industrial realities," the entity must have been essential for true collective bargaining to occur.[47] The NLRB utilized these broad standards from its inception.[48]

After more than forty years of evaluating joint employer status under the previous regime, the Board switched courses in the cases of *Laerco Transportation & Warehouse*,[49] and *TLI, Inc.*[50] In these cases, the Board stated that it was following previous case law, including that of *NLRB v. Browning-Ferris Industries*.[51] In both of these cases, however, the Board found that the entities were not joint employers be-

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42 *See* Boire v. Greyhound Corp., 376 U.S. 473, 475 (1964) (noting that the NLRB recognized two entities as joint employers, which came to be known as the joint employer doctrine).

43 *See* Brief of the General Counsel as Amicus Curiae at 4, Browning-Ferris Indus. of Cal., 362 N.L.R.B. No. 186 (Aug. 27, 2015) [hereinafter GC NLRB Brief, *Browning-Ferris*].

44 *See* Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1540–41 (1996).

45 GC NLRB Brief, *Browning-Ferris*, *supra* note 43, at 4.

46 *See, e.g.*, Hoskins Ready-Mix Concrete, Inc., 161 N.L.R.B. 1492, 1493 n.2 (1966) (noting that actual exercise of control set forth in a contract and not-yet-exercised power retained in a contract are separate indicia of "coemployership").

47 *See* Jewell Smokeless Coal Corp., 170 N.L.R.B. 392, 393 (1968) (noting that "industrial realities" made coal company a "necessary party to meaningful collective bargaining," even though it played no role in hiring, firing, or directing employees, and retained no right under the parties' oral contract to affect those matters), *enforced*, 435 F.2d 1270 (4th Cir. 1970).

48 *See, e.g.*, Bethlehem-Fairfield Shipyard, Inc., 53 N.L.R.B. 1428, 1430–31 (1943) (finding that a separate entity was a joint employer where it had control over the supervision and operation of cafeterias, including the power to require the discharge of any employee therein and the power to approve the wage rates of such employees).

49 Laerco Transp. & Warehouse, 269 N.L.R.B. 324 (1984).

50 TLI, Inc., 271 N.L.R.B. 798 (1984).

51 NLRB v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117 (3d Cir. 1982); *see id.* at 1124 (stating that where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act); *Laerco*, 269 N.L.R.B. at 325 & n.10; *TLI, Inc.*, 271 N.L.R.B. at 802.

cause their supervision of the employees was insignificant and merely routine.[52] In doing so, the Board abandoned a long list of cases and factors that had served as indicators of joint employer status.[53] The culmination of this new standard came in *Airborne Freight Co.*,[54] where the Board pronounced, "[t]he essential element in [joint employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate."[55] In her concurring opinion, Board Member Wilma Liebman noted that the joint employer standard had "evolved without a full explanation of why it was chosen, without careful exploration of possible alternatives (including approaches that were silently abandoned), and without a clear acknowledgment of the consequences."[56] This questioning of the shift in joint employer interpretation did not go unnoticed and has brought intrigue to this long-term question of who should be included as a joint employer.

C. *The Future of the NLRB's Joint Employer Doctrine:* Browning-Ferris

In May 2014, the NLRB recognized that the standard for joint employer status had become narrower than ever before and invited parties to file briefs addressing the following question: "Should the Board adhere to its existing joint-employer standard or adopt a new standard?"[57] Shortly thereafter, the Board made another move by is-

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52 *Laerco*, 269 N.L.R.B. at 325–26 (finding that even though there was supervision by the entity, it was limited, and that even though it tried to resolve employee problems, it was not a joint employer); *TLI, Inc.*, 271 N.L.R.B. at 799 (finding that "the supervision and direction exercised by Crown on a day-to-day basis is both limited and routine, and considered with its lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint employer finding").

53 *See, e.g.*, Am. Air Filter Co., 258 N.L.R.B. 49, 50, 52 (1981) (considering that supplier firm's employees reported absences to user firm and scheduled vacations with user firm); Syufy Enters., 220 N.L.R.B. 738, 739–40 (1975) (considering that user firm required supplier firm's janitors to occasionally perform nonroutine work, nonjanitorial tasks when work was "heavy," and work not covered by the scope of the cleaning contract); Floyd Epperson, 202 N.L.R.B. 23, 23 (1973) (considering that user firm informed supplier firm that it knew a particular driver was consistently late to a transport station, and the supplier firm subsequently removed the driver from that run); Hamburg Indus., Inc., 193 N.L.R.B. 67, 67 (1971) (noting that entity required supplier firm's employees to follow its plant safety rules and regulations); Manpower, Inc., 164 N.L.R.B. 287, 288 (1967) (considering that user firm was entity that received supplied drivers' complaints); Jewel Tea Co., 162 N.L.R.B. 508, 509–10 (1966) (considering veto power over hiring as an indicator).

54 Airborne Freight Co., 338 N.L.R.B. 597 (2002).

55 *Id.* at 597 n.1.

56 *Id.* at 597.

57 Notice and Invitation to File Briefs, Browning-Ferris Indus. of Cal., Inc., No. 32-RC-

suing a press release stating that it would consider the franchisor, McDonald's USA, LLC,[58] a joint employer with its franchisees who had unfair labor practice complaints filed against them.[59] According to the NLRB in regard to the aforementioned complaints, McDonald's USA, LLC should be considered a joint employer because the franchisor sufficiently controls aspects of franchisees' operations beyond brand protection.[60] The NLRB also stated that the franchisor's nationwide response to the franchisee employees' protest activities to improve wages further evidenced sufficient joint employer control.[61] These inquiries into the joint employer doctrine were the culmination of questions by sitting Board members, a changing workplace structure, and worker dissatisfaction and protests.

Although the Board has yet to rule on the specific complaints against McDonald's USA, LLC, it recently revisited the issues regarding the joint employment doctrine. After much deliberation and speculation, on August 27, 2015, the NLRB reached a 3–2 decision in the pending *Browning-Ferris* case; the Board recognized the problems of the current joint employer doctrine and articulated a new standard.[62] The Board stated that it "may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."[63] The Board further rejected the developments that narrowed the joint employer standard in *Laerco* and *TLI*, stating that it will no longer require putative joint employers to *exercise* their possible authority over the other joint employers, but will instead look to whether they *possess* authority.[64] As support for its departure from the *Laerco* and *TLI* joint employer standard, the Board stated that it was merely following the mandate from the Supreme Court to apply "the general provisions of the Act to the complexities of industrial

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109864 (N.L.R.B. May 12, 2014), 2014 WL 1881169, at *1 [hereinafter Call for Briefs, *Browning-Ferris*].

58 McDonald's USA, LLC operates as a subsidiary of McDonald's Corp.; it serves as the direct franchisor for McDonald's restaurants in the United States. *See Company Overview of McDonald's USA, LLC*, BLOOMBERG BUS., http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=9069926 (last visited Jan. 23, 2016).

59 Nat'l Labor Relations Bd., *supra* note 24.

60 *See McDonald's Fact Sheet*, *supra* note 6.

61 *See id.*

62 Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186, at 1–2, 15 (Aug. 27, 2015).

63 *Id.* at 15.

64 *Id.* at 2.

life."[65] This new standard will not go into effect without challenge, however, as a spokeswoman for the company at the center of the *Browning-Ferris* decision stated that they are "currently evaluating [their] available options regarding this matter with the objective of not being unlawfully forced into collective bargaining negotiations with another employer's employees."[66]

One of the company's available options is to refuse to bargain with its employees and present its argument that the standard was invalid in the course of an unfair labor practice action. That being said, the *Browning-Ferris* standard is currently valid and will therefore be tested in the interim should any other cases discussing joint employer reach the Board. With the *Browning-Ferris* decision likely to be appealed, along with the McDonald's joint employer case moving forward, continued battles on the subject remain, with "ultimate review by the U.S. Supreme Court a real possibility."[67] While the NLRB has taken a seemingly big step in adjusting the joint employer standard, it did so based on extensive policy premises and with the hope of finding a worker's true "employer," so a reviewing Circuit Court may have difficulty overturning the decision.

D. Joint Employer Status Under Different Agencies and Statutes

The search for a worker's true "employer" is not unique to the NLRB context. Employment relationships are critical in determining liability for both the EEOC and under the FLSA.[68] The EEOC was created by the Civil Rights Act of 1964,[69] and the FLSA was passed in 1938, around the same time as the NLRA and with a similar effect of expanding the employer definition beyond common law characterizations.[70] With the development of various statutes and regulations

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65 *Id.* at 11 (quoting Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979)).

66 Lydia DePillis, *In Landmark Case, Labor Board Lets More Workers Bargain with Their Employer's Employer*, WASH. POST (Aug. 27, 2015), www.washingtonpost.com/news/wonkblog/wp/2015/08/27/labor-board-moves-to-make-businesses-accountable-for-their-subcontractors/.

67 Geoffrey A. Mort, *NLRB McDonald's Ruling and Franchisors*, LAW.COM (Nov. 1, 2014), http://www.law.com/sites/articles/2014/11/01/nlrb-mcdonalds-ruling-and-franchisors/. Recognizing that forthcoming litigation is likely, and that the NLRB's explanation for its joint employer determination will be at issue, the Office of the General Counsel recently released a more thorough Advice Memorandum determining that another franchise entity, Nutritionality, Inc., was not a joint employer with its franchise development agent. *See* Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, Nat'l Labor Relations Bd. to Peter Sung Ohr, Reg'l Dir., Region 13, Nat'l Labor Relations Bd. 1 (Apr. 28, 2015).

68 *See* 29 U.S.C. § 203(d) (2012); 42 U.S.C. § 2000e(b) (2012).

69 Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258 (codified as amended at 42 U.S.C. § 2000e–4 (2012)).

70 *See* 29 U.S.C. § 202 (2012).

around labor, courts and agencies became aware of the tangled webs that exist in the modern-day employer landscape, and a search for true culpability of violations ensued. The Supreme Court and lower courts have stated that it is important, necessary, and reasonable to look to other agencies and employment statutes that deal with questions of employer definitions for guidance.[71] This Section discusses the development of joint—or quasi—employer liability forms found in the aforementioned agencies and statutes. Evaluating joint employer determinations in other legal contexts is useful here because the proposed joint employer standard in this Note draws upon their standards.[72]

1. Joint Employer Status at the EEOC

The EEOC enforces federal law that makes it illegal to discriminate against employees because of their race, color, religion, sex, national origin, age, disability, or genetic information.[73] The EEOC was formed in 1965, after both the NLRA and FLSA were enacted.[74] Rather than being driven by pure economic issues, as the NLRA and FLSA were, the EEOC was created in response to the Civil Rights movement of the 1960s.[75] This added element forged a path for flexibility and a broader definition of who is an "employer" within the EEOC. The EEOC's governing statute defines the term "employer" differently than the NLRA, stating that "'employer' means 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 calendar year . . . ."[76] Like the NLRA, the EEOC also has a joint employer theory that defines "joint

71 *See, e.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947) (stating that the FLSA "is a part of the social legislation of the 1930[ ]s of the same general character as the [NLRA] . . . . [and] [d]ecisions that define the coverage of the employer-employee relationship under the[se] acts are persuasive in the consideration of . . . similar [employment acts]"); Dellinger v. Sci. Applications Int'l Corp., 649 F.3d 226, 232 (4th Cir. 2011) (King, J., dissenting) (stating that it is appropriate to interpret FLSA in the same manner as Supreme Court did under Title VII); Kirleis v. Dickie, McCamey & Chilcote, P.C., No. 06-CV-1495, 2009 WL 3602008, at *5–6 (W.D. Pa. Oct. 28, 2009) (stating that the court interprets the term "employee" in the same manner under Title VII, FLSA, and state human rights law), *aff'd*, No. 09-2298, 2010 WL 2780927 (3d Cir. July 15, 2010).

72 *See infra* Part III.

73 *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/ (last visited Jan. 23, 2016).

74 *See Pre 1965: Events Leading to the Creation of EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://eeoc.gov/eeoc/history/35th/pre1965/index.html (last visited Jan. 23, 2016)

75 *See id.*

76 42 U.S.C. § 2000e(b) (2012).

employer" as "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."[77] In determining "sufficient control," the EEOC looks to factors from common law agency.[78] The EEOC lists sixteen factors that could indicate an employer-employee relationship even when the entity involved is not the most obvious choice to bear responsibility.[79] Some of those factors include whether "the work does not require a high level of skill or expertise" and whether "the firm or the client rather than the worker furnishes the tools, materials, and equipment."[80] The EEOC also notes that in a determination, no one factor is decisive, nor do a majority of the factors have to be satisfied.[81]

The EEOC does, however, state that the joint employer theory frequently arises in the context of temporary staffing agencies.[82] While this Note does not evaluate staffing agencies, these agencies, in general, have less control over an employee's working conditions than franchisors in franchise arrangements.[83] An Enforcement Guide for the EEOC stated, in reference to temporary staffing agencies, "[w]hile the worker is on a temporary job assignment, the client typically controls the individual's working conditions, supervises the individual, and determines the length of the assignment."[84] Because the less-controlling temporary staffing agencies are considered joint employers under the EEOC, a proposal that franchisors be subject to the same responsibilities and liabilities would reasonably follow. Last, while the determination of who is a joint employer under the EEOC, as governed by Title VII, follows these guidelines, who is ultimately liable for the violation is a separate question.[85]

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77 EQUAL EMP. OPPORTUNITY COMM'N, COMPLIANCE MANUAL, § 2-III(B)(1)(a)(iii)(b) [hereinafter EEOC, COMPLIANCE MANUAL].

78 EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.992, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (Dec. 3, 1997), http://www.eeoc.gov/policy/docs/conting.html, 1997 WL 33159161, at *4–5 & n.10 [hereinafter EEOC, ENFORCEMENT].

79 *See id.* at *4.

80 *Id.* Other factors include whether "the work is performed on the premises of the firm or the client" and whether "the firm or the client has the right to assign additional projects to the worker." *Id.*

81 *Id.*

82 *See* EEOC, COMPLIANCE MANUAL, *supra* note 77, § 2-III(B)(1)(a)(iii)(b).

83 *See* EEOC, ENFORCEMENT, *supra* note 78 (describing and addressing temporary employment agencies).

84 *Id.* at *3. Notably, the client, and *not* the temporary staffing agency, exercises control. *See id.*

85 *See* EEOC v. Glob. Horizons, Inc., 860 F. Supp. 2d 1172, 1183–84 (D. Haw. 2012); Lima

Courts interpreting EEOC standards have largely agreed that discrimination determinations entail two distinct steps: the first step determines whether separate entities are actually joint employers, and the second step determines whether one or both of the entities should be held liable for the underlying discrimination.[86] Under EEOC standards, an entity may be deemed a joint employer—but is only liable for the underlying acts of discrimination if it knew or should have known about the Acts—followed by an analysis into what the joint employer did in reacting to the Acts.[87] Overall, determination of who qualifies as a joint employer under the EEOC standard is fairly broad, but does not necessarily impact liability outcomes. This Note's proposed joint employer standard under the NLRB will look to the EEOC for its flexibility, but will not incorporate the EEOC's two-step process that separates joint employer determinations from joint employer liability.

2. Joint Employer Status Under the FLSA

The FLSA, like the NLRA, was passed in the late 1930s during the difficult times of the Great Depression.[88] In this era, more than one quarter of the workforce of the United States was unemployed.[89] Workers who were fortunate enough to have jobs were subject to horrible working conditions, long hours, and substandard wages.[90] In response, Congress implemented the FLSA, which applied broadly to workers,[91] and provided a forceful remedy for workers whose condi-

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v. Addeco, 634 F. Supp. 2d 394, 400 (S.D.N.Y. 2009) ("Even where two companies are deemed a joint employer, however, it is not necessarily the case that both are liable for discriminatory conduct in violation of Title VII. . . . [T]he plaintiff must still show 'that the joint employer knew or should have known of the [discriminatory] conduct and failed to take corrective measures within its control.'" (quoting Watson v. Adecco Emp't Servs., Inc., 252 F. Supp. 2d 1347, 1357 (M.D. Fla. 2003))); Velez v. Roche, 335 F. Supp. 2d 1022, 1043 (N.D. Cal. 2004) ("[E]ven where defendants are joint employers, joint liability does not necessarily lie where liability turns, e.g., upon each employer's knowledge and action."). These cases are analogous to an attempt by the NLRB to affirm its decision in federal court, with the relationship of the NLRA (as the governing statute) and NLRB (as the adjudicative body deciding on violations of the governing statute) being parallel to the relationship between Title VII and the EEOC. This precedent is meant to show that, through adjudications, the EEOC itself is following the appropriate guidelines while the federal courts add another procedural step to liability determinations.

86 *See, e.g.*, *Glob. Horizons*, 860 F. Supp. 2d at 1183–84.

87 *See id.* at 1184.

88 *See* Burch, *supra* note 28, at 395.

89 *Id.*

90 *Id.*

91 *See* 29 U.S.C. § 203(d) (2012) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .").

tions and wages were indefensibly inadequate.[92] Congress recognized that if the FLSA did not have a broad application, some employers would have a competitive advantage by offering unfairly discounted prices compared to those employers following the law.[93] Due to this possibility, the FLSA protected workers by imposing liability outside the realm of standard employer-employee relationships, as had been the norm in industrial times.[94]

One legal theory that ensured proper liability and recourse for workers under the FLSA was the notion of joint employment.[95] The first iteration of this theory came in a July 1939 Interpretative Bulletin from the Department of Labor.[96] The Bulletin described joint employer status as it related to the overtime pay requirements of the FLSA.[97] The purpose of the bulletin was to prevent employers from avoiding the FLSA's overtime provision by having workers do their overtime hours for a separate, but functionally similar, employer.[98] Therefore, under the FLSA, the first notions of joint employment came about due to employer avoidance of paying overtime wages.[99] The joint employer doctrine was significant in keeping employers from circumventing the requirements of the FLSA because once-separate entities were being held liable "individually and jointly, for compliance with all of the applicable provisions of the [FLSA] . . . ."[100]

As seen, the joint employer test under the FLSA has been elaborated on by regulations, but it has also been discussed in the courts.[101] Courts have outlined an economic reality test in determining an entity's joint employer status, which is similar to that seen at the EEOC.[102] Also similar to the EEOC, the test under the FLSA does

92 *See* Burch, *supra* note 28, at 413.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.* at 404.

97 *See id.*

98 *Id.*

99 *Id.*

100 *See* 29 C.F.R. § 791.2(a) (2000); *id.* at 404, 414.

101 *See, e.g.*, Orozco v. Plackis, 757 F.3d 445, 448 (5th Cir. 2014); Martin v. Spring Break '83 Prods., 688 F.3d 247, 251 (5th Cir. 2012); Gray v. Powers, 673 F.3d 352, 354–55 (5th Cir. 2012); McLaughlin v. Seafood, Inc., 867 F.2d 875, 876–77 (5th Cir. 1989) (per curiam), *modifying* 861 F.2d 450 (5th Cir. 1988).

102 The test is an evaluation of "whether the alleged employer: '(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" *Gray*, 673 F.3d at 355 (quoting Williams v. Henagan, 595 F.3d 610, 620 (5th Cir. 2010)).

not require an entity to fulfill every element.[103] Harkening back to the purpose of the statute, the test is not meant to limit the employer definition; rather, it serves as an initial guideline.[104] In the end, "employer" must still be interpreted more broadly than in "traditional common law applications."[105] Multiple courts have elaborated on this issue and stated that joint employer determinations should be made on the reality of a given situation rather than any technical concepts.[106]

An important caveat from NLRB jurisprudence on this issue is that joint employer findings under the FLSA do not turn on whether an employer hires and fires its joint employees nor on whether the employer directly determines employee hours or pays the employee.[107] Further, there is no requirement that joint employers continuously monitor workers, have near absolute control over the workers, or be constantly "looking over" the workers' shoulder.[108] Lastly, "[c]ontrol may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA."[109] The FLSA's joint employer standard shows that employers are moving further away from a traditional employment model and, to be useful, remedial legislation like the FLSA and NLRA need to adjust to the current workplace realities.

3. Joint Employer Standard in Today's Changing Workplace

Both the EEOC and the FLSA provide valuable insight into how employers are truly functioning in today's modern workplace. The EEOC has directly addressed temporary staffing agencies as one set of employers that should be included in a joint employer standard,[110] and it also submitted a brief to the NLRB supporting a broader stan-

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103 *Id.* at 357; *see* EEOC, ENFORCEMENT, *supra* note 78, at *4.

104 *See* Burch, *supra*, note 28, at 400–02.

105 *McLaughlin*, 867 F.2d at 877. *Compare id.*, *with Orozco*, 757 F.3d at 451–52 (holding that a provision of a franchise agreement providing that franchisee had to comply with franchisor's policies and procedures did not establish that franchisor was employer of franchisee's worker for purposes of worker's FLSA claims for overtime and minimum wages).

106 *See* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 141 (2d Cir. 2008) (citing Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961)); Cano v. DPNY, Inc., 287 F.R.D. 251, 258 (S.D.N.Y. 2012).

107 *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 70 (2d Cir. 2003).

108 Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999).

109 *Id.*

110 *See* EEOC, COMPLIANCE MANUAL, *supra* note 77, § 2-III(B)(1)(a)(iii)(b).

dard of "joint employer" for the Board to adopt.[111] Likewise, the FLSA's joint employer standard has reached entities that have not been covered under the NLRB's because it uses a standard based in economic reality that is instructive for a proposed new standard. Specifically, like the FLSA standard, this Note's proposed NLRB joint employer standard will not look to whether an employer hires and fires the employees, nor will it turn on whether an employer directly pays the employees.[112]

These factors of direct control have never been incorporated into the franchise model, but general control has continuously been integrated into the model from its beginning.[113] The modern workplace model of franchising has gained the Board's and other actors' attention, and a thorough examination of the model can illuminate whether franchisors should be considered in an updated joint employer standard.

II. The Franchise Model: Past and Present

The franchising model falls somewhere between the ordinary, traditional business model where an employer opens up shop and directly sells products and the contractual hire business model where someone contracts out a job to be done, completely relinquishing ownership and control.[114] Further, contracts that outline the franchisor-franchisee relationship, although broad in scope, are typically short on details of how exactly each party can exercise its respective powers.[115] The incompleteness of these contracts raises unique questions of liability in the employment and labor law context because the franchisor largely controls the assets in the relationship (e.g., the brand, the model, and the product) and the franchisee largely owns its particular assets because it pays fees to the franchisor and covers all of the operating costs of the franchise unit.[116] Despite the initial, and continuing, questions this model raised, it first began to flourish in the United States in the 1950s and 1960s.[117] It was in these decades that franchises like McDonald's, Kentucky Fried Chicken, laundry ser-

111 *See* Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 10, Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015) (No. 32-RC-109684).

112 *See supra* note 107 and accompanying text.

113 *See* Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 991 (1990).

114 *See id.* at 931–32.

115 *See id.* at 991.

116 *See id.*

117 *See* Kerry Pipes, *History of Franchising: Franchising in the Modern Age*, Franchising

vices, hotels, and other franchises emerged in the marketplace.[118] For instance, McDonald's opened 1000 units, "Holiday Inn grew to 1,000 locations, and Budget Rental Car topped 500," all in about ten years.[119] With rapid growth came new sets of problems—in particular, many franchisors were only focusing on getting more locations established, rather than ensuring quality operation, and others were making misrepresentations to recruit prospective franchisees.[120]

This Part first discusses one of the classic franchise models at the center of the joint employer debate, McDonald's, and its early design of control and consistency. Thereafter, it discusses the current franchise model and the liability issues that have arisen. Last, this Part discusses the issues the current franchise model faces, including the rising wave of employee dissatisfaction at many franchise entities across the nation.

A. Evaluating a Classic Franchise Model: Early Signs of Control

Exploring an early franchise model will help to fully demonstrate how the current model came to exist. The franchise that finds itself at the center of the joint employer question today, McDonald's, serves as a useful example. Founded by Raymond Kroc, McDonald's, since its establishment, has been an example of a franchisor combating problems of quality protection by maintaining a high level of control over its franchisees.[121] Kroc started his most famous business by visiting the McDonald brothers' San Bernardino, California hamburger stand.[122] Kroc thought the business had extreme possibilities for growth as a franchise and obtained the exclusive license to market the name and methods, founding McDonald's.[123] Kroc bought land to build new franchise locations and rented the property to franchisees on long-term leases.[124] By 1987, there were 10,000 McDonald's franchise locations, and McDonald's was estimated to have sold billions of hamburgers to customers across the country.[125] From this point forward, Kroc ensured that the product would be as consistent

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.COM, http://www.franchising.com/howtofranchiseguide/history_of_franchising_part_two.html#sthash.dHRLBPXo.dpuf (last visited Jan. 23, 2016).

118 *See id.*

119 *See id.*

120 *See id.*

121 *See* Mario L. Herman, *A Brief History of Franchising*, FRANCHISE-LAW.COM, http://www.franchise-law.com/PracticeAreas/Brief-History-of-Franchising.asp (last visited Jan. 23, 2016).

122 *See id.*

123 *See id.*

124 *See id.*

125 *See id.*

as possible; he believed that "a Big Mac should taste the same in Tokyo as it does in New York."[126] This desire to create a reliable and consistent product led Kroc to control franchisees' dealings, setting "strict rules on portion sizes, cooking methods[,] and packaging, even promising a refund if people waited more than five minutes for their food."[127]

The system Kroc set out was used by other franchisors as well and came to be known as the "business-format" franchise: under the system, franchisees followed a proven formula and sought to achieve consistency in product, price, and brand to meet the demand of consumers.[128]

B. The Current Franchise Model and How It Distributes Liability

In modern day franchising, and specifically within the fast food industry, many franchisors directly own or operate some of their restaurants, but continue to license their operations through business-format franchise agreements like those that Kroc developed in the 1960s.[129] This business-format model has continued to make its way into new industries, and there are now more than eight million workers employed at franchise establishments in the United States.[130] The business model is still largely the same as the one Kroc established in the 1960s—the franchisor makes an agreement with franchisees to allow them to use the franchisor's system, brand, and other practices.[131]

The Federal Trade Commission, which oversees registration of all franchises in the United States, produces a Consumer Guide to buying a franchise, proclaiming that "[w]hen you buy a franchise, you may be

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126 *See* Adam Bannister, *From Singer to Subway: The History of Franchising*, ELITE FRANCHISE MAG. (Sept. 18, 2012), http://elitefranchisemagazine.co.uk/analysis/item/from-singer-to-subway-the-history-of-franchising.

127 *Id.*

128 *Id.*

129 In their respective 2014 Form 10-K filings with the Securities and Exchange Commission, each of these companies reports that worldwide: McDonald's operates 6714 (19%) of its 36,258 restaurants; Domino's Pizza operates 377 (3.2%) of its 11,629 restaurants; and Wendy's operates 957 (15%) of its 6515 restaurants; in its 2013 Form 10-K filing Burger King reported that it operates 52 (0.38%) of its 13,667 restaurants. *See* McDonald's Corp., Annual Report (Form 10-K) 34 (Feb. 24, 2015); Domino's Pizza, Inc., Annual Report (Form 10-K) 23 (Feb. 24, 2015); The Wendy's Co., Annual Report (Form 10-K) 38 (Feb. 26, 2015); Burger King Worldwide, Inc., Annual Report (Form 10-K) 5 (Feb. 21, 2014).

130 Matt Haller, *Slow, Steady Growth to Continue for Franchise Businesses in 2013*, INT'L FRANCHISE ASS'N (Dec. 20, 2012), http://www.franchise.org/slow-steady-growth-to-continue-for-franchise-businesses-in-2013.

131 *See* FED. TRADE COMM'N, A CONSUMER'S GUIDE TO BUYING A FRANCHISE 1 (2015), https://www.ftc.gov/system/files/documents/plain-language/pdf-0127_buying-a-franchise.pdf.

able to sell goods and services that have instant name recognition, and get training and support that can help you succeed."[132] Essentially, the "brand" is critical to franchise companies' goals to maximize profit, efficiency, and productivity.[133] The Consumer Guide elaborates on the uniformity-in-brand idea by noting, "franchisors usually control how franchisees conduct business. These controls may significantly restrict your ability to exercise your own business judgment."[134] Among these restrictions lies the fact that the franchisor teaches the franchisee an entire business format and provides training, operating manuals, and other communications; for the use of this format, the franchisee agrees to abide by the system and pay an initial fee and, sometimes, royalties to the franchisor.[135] One business aspect that is not restricted, however, is the franchisee's liability for wrongdoing to its employees, as ULP complaints have historically only successfully been filed against franchisee-employers.[136] The franchisor maintains constraints on how a franchisee operates, while the franchisees are liable for labor violations.[137] On the whole, the modern day franchising structure combines elements of common control, delegation, and independence.[138]

C. Growing Labor Relations Issues for Franchises

In reviewing the current franchise model, there is evidence that, although not necessarily direct or immediate, franchisors have certain controls that directly and indirectly affect workers' conditions at franchisee locations. If labor relations were uniformly smooth, there would be no need for guiding labor law, but as seen by worker dissatisfaction and waves of strikes, the situation in many franchise workplaces is consistently troublesome.[139] Although continuous work stoppages and protests present a problem for the free flow of commerce as outlined in the NLRA,[140] another issue will arise if workers

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132 *See id.*

133 *See* Brief of Service Employees International Union as Amicus Curiae at 14, Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015) (No. 32-RC-109684).

134 *See* FED. TRADE COMM'N, *supra* note 131, at 1.

135 *See* Hadfield, *supra* note 113, at 933–36.

136 *See e.g.*, Finnegan, *supra* note 1 ("McDonald's, throughout its history, has denied responsibility for the labor practices of its franchisees . . . ."). *But see* Nat'l Labor Relations Bd., *supra* note 24 (noting that McDonald's USA, LLC may be named as a joint employer respondent along with franchisees).

137 *See generally supra* Part I.

138 *See* Hadfield, *supra* note 113, at 928.

139 *See* Eidelson, *supra* note 20; Hsu, *supra* note 18.

140 *See* 29 U.S.C. § 151 (2012).

ever succeed in demanding negotiations over their employment terms in a franchised workplace; their bargaining efforts may prove ineffective because the franchisor often controls workplace policies.[141] This issue runs counter to the other foundational right the NLRA sought to protect: a worker's right to actual liberty of contract through a worker's ability to bargain truly over her work conditions. [142] Facing these issues, the NLRB has a timely opportunity to achieve its governing statute's legislative intent by reformulating its joint employer standard to cover these connected entities.[143]

III. The NLRB Should Adopt a Joint Employer Standard that Holds Franchisors Responsible for Their Franchisees' Unfair Labor Practices

To close the gap of labor enforcement affecting many franchise workers, the NLRB should adopt a new joint employer standard that holds franchisors that contract with franchisees facing ULP charges at multiple locations across regions of the country jointly responsible for those charges and allows workers to adequately exercise their NLRA rights with the ability to seek adequate remedy when those rights are being affected, either directly or indirectly, by entities other than, but connected to, their direct employer.[144]

First, this Note's proposed new joint employer standard evaluates the contractual and actual relationships between supposed joint employers. This evaluation is especially critical for franchise entities because their contracts are incomplete in nature and the effects of those contracts are actually greater than they may initially appear.[145] Second, this proposed joint employer standard evaluates the supposed joint employer's experience in a particular industry, weighing in favor of a joint employer finding if it is larger and has a longer history of working jointly with other entities. In the franchise context, entities

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141 *See* Hadfield, *supra* note 113, at 991.

142 See 29 U.S.C. § 151.

143 It is again important to note the NLRB's call for briefs on the subject of reformulating a joint employer standard on May 12, 2014 concerning the *Browning-Ferris* case. *See* Call for Briefs*, Browning-Ferris*, *supra* note 57. Separately, the General Counsel of the NLRB issued a series of consolidated complaints against McDonald's USA, LLC as a joint employer with multiple locations of its franchisees. *See* Nat'l Labor Relations Bd., *supra* note 24.

144 Although the NLRB articulated a new joint employer standard in *Browning-Ferris*, it explicitly stated it was not basing the standard on the "particularized features of franchisor/franchisee relationships," so the proposed standard here focuses on those relationships specifically, rather than general employer relationships. *See* Browning-Ferris Indus. of Cal., 362 N.L.R.B. No. 186, at 17 n.94 (Aug. 27, 2015).

145 *See infra* note 149 and accompanying text.

will have been working jointly, presumably, since their inception. Their size often provides stability and uniformity in operations—in turn meaning control—which weighs in favor of a joint employer finding. Last, the new standard harkens back to the Board's previous rulings of control, whether direct or indirect, as indicators of a joint employer relationship.[146]

A. The Proposed Joint Employer Standard for the NLRB

A reformulated standard should look to both the formal and practical relationship between a direct and indirect employer. First, the standard proposed by this Note focuses on determining the relationship between a direct and indirect employer, requiring an explicit connection between the two entities *without* looking to how, or if, the indirect employer affects a worker's conditions. Acknowledging that this first step includes a large segment of American employers, this standard would specifically narrow down to those indirect employers with the ability to cancel a contract with a direct employer on short notice, which is a common feature of franchise agreements.[147] When franchisors retain this cancellation power, they inherently gain control over compliance with whatever terms may be included in a franchisee's contract, and many of those terms directly and indirectly affect a petitioner worker's conditions.[148] As mentioned before, the typical franchise contract is largely incomplete, containing a broad scope of power with fewer details on daily activities.[149] Under this portion of the joint employer evaluation, the contract required for the joint employer threshold should not turn on the details. Instead, the evaluation should look to the scope of powers, with the aforementioned cancellation power being central. Thus, to ensure that franchisors are being held accountable for unfair labor practices committed by their franchisees, the first portion of the reformulated joint employer standard looks to the contractual relationship between the two entities.

The second step examines the stability of the franchisor: how long has the franchisor been in business and how many franchise locations

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146 *See supra* notes 45–46 and accompanying text.

147 *See, e.g.*, Hadfield, *supra* note 113, at 953 n.98 (discussing the franchisor's power to cancel or terminate a contract at-will for the franchisee's failure to comply with quality standards).

148 *See supra* Part II.B.

149 *See* Hadfield, *supra* note 113, at 991. For comparison, Hadfield notes that franchise agreements follow a similar pattern to a constitution, where a structure is developed for a long-term plan and each party's basic functions are delineated. *See id.* at 946.

does it have. The longer the franchisor has been in business and the more locations the franchisor has, the more likely it will be found a joint employer. This is a critical piece to the standard because a longer life span and a higher number of franchise locations indicate success and proven replication by the franchisor, something achieved by consistent operating standards and procedures. As previously discussed, consistency is the touchstone of a successful franchise model, and through tight operating procedures and standards, the franchisor has a greater ability to aid the franchisee in its business and *control* the outcome of different employment aspects.[150] Because the new joint employer standard articulated in *Browning-Ferris* explicitly stated that the "particularized features of franchisor/franchisee relationships" were not included, this step of the proposed new standard more suitably anticipates Board disputes regarding franchises.[151]

The third step of the reformulated standard provides that an entity is a joint employer if it controls, regulates, or monitors practices and actions of a direct employer's business activity that can be reasonably perceived to affect an employee's working conditions. This portion of the standard incorporates aspects from multiple briefs that followed the General Counsel of the NLRB's request for input on a new joint employer standard.[152] In the franchise context, the franchisor could be deemed a joint employer if it engages in any inspections of the franchisee's premises, provides technological support in the area of staffing, benefits, scheduling, or other workplace activity, provides any support or training related to the workplace, or if it has standard protocols for the maintenance of franchisee locations.[153] The effect of this new standard would be to allow workers at fran-

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150 *See supra* Part II.

151 *See supra* note 144.

152 *See* Call for Briefs, *Browning-Ferris*, *supra* note 57; *see also, e.g.*, GC NLRB Brief, *Browning-Ferris*, *supra* note 43, at 16, 17.

153 The General Counsel of the NLRB's proposed standard would find joint-employer status where in the "totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence." GC NLRB Brief, *Browning-Ferris*, *supra* note 43, at 16–17. The Service Employees International Union's proposed standard would:

> return to the standard in . . . *Browning-Ferris* . . . which asks whether the alleged joint employer "has retained for itself sufficient control o[ver] the terms and conditions of employment of the [affected] employees" to enable it to "share or co-determine . . . matters governing the essential terms and conditions of [those employees'] employment."

Brief of Service Employees International Union as Amicus Curiae, *supra* note 133, at 18 (citation omitted).

chisee locations to exercise their NLRA rights against the franchisor entity who has some meaningful effect, either directly or indirectly, on their working conditions. This change would help to alleviate industrial tensions in the sector.

B. The New Joint Employer Standard in Practice

A walk through of how the new joint employer standard would function illuminates its practicality and ability to achieve the NLRA's intended goals. The example to analyze will be a franchise agreement for Buffalo Wild Wings.[154] In the first part, the standard focuses on the formal relationship between the purported joint employers.[155] In the agreement, as applicable to Wisconsin and Minnesota, for example, the franchisor provides a cancellation term that, in part, gives the franchisee ninety days written notice of cancellation of the agreement, with sixty days to rectify the situation that caused the notice, leading to revocation of the cancellation if resolved.[156] Although this cancellation clause is not as harsh as some other franchise agreements,[157] it still yields the potential to allow the franchisor to handcuff the franchisee by forced compliance with minute aspects of the complex agreement. This compliance is "forced" in the sense that, although the franchise agreement contains hundreds of provisions, if the franchisee fails to comply with even one of those provisions, the agreement as a whole can be easily cancelled. This is a significant indicator of control, leading to a finding in favor of a joint employer determination.

In the second part, this Note's new joint employer standard calls for an evaluation of the stability and size of the franchise in question.[158] Here, the franchisor, Buffalo Wild Wings, began franchising in 1991 and has a total of 562 U.S. franchises.[159] Although the franchisor has only been in operation for twenty-five years,[160] the rapid growth

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154 *See Franchise Agreement—Buffalo Wild Wings International, Inc.*, ONECLE, http://contracts.onecle.com/buffalo-wild-wings/franchise-2006.shtml (last visited Jan. 24, 2016).

155 *See supra* Part III.A.

156 *See Franchise Agreement—Buffalo Wild Wings International, Inc.*, *supra* note 154, Minnesota Addendum at 3; Wisconsin Addendum at 1. The broader agreement allows termination for default after notice and a period of 30 days without rectification. *Id.* at 27–28.

157 *See Church's Chicken Franchise Agreement*, ONECLE, http://contracts.onecle.com/afc/churchs.franchise.shtml (last visited Jan. 24, 2016) (including provision of cancellation without opportunity to cure the default in specific circumstances).

158 *See supra* Part III.A.

159 *See About Buffalo Wild Wings*, ENTREPRENEUR, http://www.entrepreneur.com/franchises/buffalowildwings/282167-0.html (last visited Mar. 21, 2016).

160 *See id.*

evidences a successful model that has remained consistent, indicating a high level of control by the franchisor as seen in the business-format method of franchising. This portion of the standard, while not determinative, weighs in favor of a joint employer determination and allows for the evaluation to proceed to the highly substantive portion.

The third part of the new joint employer standard looks to the actual on-the-ground situation, with a simultaneous look to the underlying agreement.[161] Here, the franchise agreement outlines both initial and ongoing training conducted by the franchisor that managers and other employees of the franchisee must complete to avoid cancellation of the agreement.[162] Further, the agreement states that the franchisee must have a sufficient number of employees to ensure efficient customer service.[163] Although this clause may appear insignificant, it indicates that workers will be asked to work at varying and inconsistent times to cover the seven day schedule the restaurant holds, directly affecting worker schedules and terms of their employment. This category of indirect control through the contractual agreement should be evaluated in conjunction with worker or other petitioner testimony of how the policies affected their working conditions, but it is likely that this franchisor would be held liable as a joint employer under the new standard.

1. *Amending the NLRB's Joint Employer Standard for Franchises Will Achieve the NLRA's Purpose of Balancing the Unequal Bargaining Power Between Employees and Employers*

Congress implemented the NLRA during the worst economic time in American history to ensure that wages would not be unfairly depressed.[164] This goal, however, relied on workers' abilities to use their collective voices to balance the unequal power between businesses and workers.[165] At the time of the NLRA's enactment, it may not have been foreseeable that sophisticated and complex models of businesses, such as franchises, would allow employers to control workplace issues from afar without having to answer for unfair labor practices that arose.[166] Moreover, instead of the idealistic vision of rising

161 *See supra* Part III.A.

162 *See Franchise Agreement—Buffalo Wild Wings International Inc.*, *supra* note 154, at 15–16.

163 *See id.* at 16.

164 *See* 29 U.S.C. § 151 (2012).

165 *See id.*

166 *See supra* Part II.B.

wages and economic power for workers, franchise workers (particularly in fast food businesses) have seen their economic statuses decline, with many workers in the industry seeking aid from public assistance programs to meet their daily needs.[167] A new joint employer standard that includes many franchisors that actually or potentially control, either directly or indirectly, an employee's working conditions will cover these unanticipated developments that have weakened the NLRA's ability to achieve its intended purposes.

2. *Giving Franchisee Workers the Ability to Hold the Franchisor Jointly Liable for ULPs Will Give Them the Ability to Truly Affect Their Workplace Terms and Conditions*

Concurrent with its economic goals for workers, the NLRA purposefully seeks protection of workers' rights to "bargain collectively through representatives of their own choosing . . . ."[168] With the changing structure of employer-employee relations seen in the franchise model,[169] a member of the Board recognized that the *Laerco* and *TLI* joint employer doctrine was too narrow, leaving workers with extreme obstacles to "engag[ing] in meaningful collective bargaining . . . ."[170] In an attempt to alter these obstacles, the *Browning-Ferris* joint employer standard gives workers hope, but the Board failed to announce whether this advance would apply for franchise workers.[171] Without clear application to franchise entities, for example, in a case where workers at a franchisee restaurant feel they are not getting regular enough schedules, workers may seek to organize in an attempt to discuss the issue collectively with their direct employer (franchisee), but because the franchise model entails "operating procedures both designed and controlled at the franchisor headquarters," any debate over these terms would likely prove futile.[172] Because of this franchise employment reality, the legislative intent of the NLRA is not being fulfilled. The proposed modification of the joint employer standard will rectify this break. Moreover, even as the Board's joint employer

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167 *See* SYLVIA ALLEGRETTO ET AL., FAST FOOD, POVERTY WAGES: THE PUBLIC COST OF LOW-WAGE JOBS IN THE FAST FOOD INDUSTRY 1 (2013) ("The cost of public assistance to families of workers in the fast[ ]food industry is nearly $7 billion per year.").

168 29 U.S.C. § 157.

169 *See, e.g.*, Peter Cappelli & Monika Hamori, *Are Franchises Bad Employers?*, 61 INDUS. & LAB. REL. REV. 147, 147 (2008) (noting that "[t]he management of employees and work organization issues is central to most franchise operating procedures . . . especially common in services where labor content is the crucial component").

170 Airborne Freight Co., 338 N.L.R.B. 597, 597, 599 (2002).

171 *See supra* note 144.

172 *See* Cappelli & Hamori, *supra* note 169, at 148.

standard is formulated, the protection of the right to bargain is neither fully protected nor unprotected. To further protect the right to bargain, the ability to bargain with the true controller of the terms, including in franchise arrangements, must first be available, a result this new joint employer standard will achieve.[173]

IV. Fears About Modifying the Joint Employer Standard in Relation to Franchise Employers Are Unfounded

The General Counsel of the NLRB's recent actions around franchises and the joint employer standard[174] have drawn criticism and sparked fear from trade groups and members of Congress alike about the possible collapse of the franchising model.[175] Most critics of changing the joint employer standard begin by emphatically declaring that franchisees are entrepreneurs with a great level of independence from their franchisors.[176] Based on this assertion, these critics believe that a joint employer standard that encompasses many franchisors will give franchisees "less independence and control, [making them expect] lower profits. [And] [i]f profits are lower, there will be less demand from entrepreneurs to start franchised businesses."[177] As further fallout from these fears, critics conclude that with less demand

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173 Systematic issues in low-wage, franchise jobs further evidence this reality that franchisors must be included in any real bargaining. Specifically, workers have reported wage theft across the board and, in 2012, more than $933 million was recovered in civil litigation from wage theft. *See* Brady Meixell & Ross Eisenbrey, Econ. Policy Inst., An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year 2 (2014).

174 *See supra* note 143.

175 *See* Melanie Trottman, *Trade Group Sees Threat from NLRB Approach to Franchise Relationships*, Wall Street J. (Oct. 30, 2014, 8:18 PM) http://www.wsj.com/articles/trade-group-sees-threat-from-nlrb-approach-to-franchise-relationships-1414714696 (noting the International Franchise Association's concerns over the recent order by the NLRB General Counsel to consolidate complaints against McDonald's as a joint employer); Press Release, Educ. and the Workforce Comm., Witnesses Warn: NLRB Assault on Franchise Businesses Will Destroy Jobs (Sept. 9, 2014), http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=392860 [hereinafter Witnesses Warn] (quoting Rep. Phil Roe (R-TN) who stated that changing the joint employer standard will "force small businesses to close their doors, or at the very least, discourage new small businesses from being created").

176 *See* Witnesses Warn, *supra* note 175. This idea that franchisees are "entrepreneurs" has been noted as one of the most frequently debated questions in the business world; one franchise consultant known as the "Franchise King" says: "No. The person who came up with the concept, and invented the franchise system for that concept, is the entrepreneur." *See* Rieva Lesonsky, *Are Franchisees 'Really' Entrepreneurs?*, AllBusiness.com, http://www.allbusiness.com/company-activities-management/company-structures/12357164-1.html (last visited Jan. 24, 2016).

177 Witnesses Warn, *supra* note 175 (quoting Clint Ehlers, a FASTSIGNS franchisee).

for franchise businesses, "millions of jobs will be lost."[178] These fears are unfounded because a new joint employer standard will affect similarly situated franchisors evenly and allow clearer boundaries to be drawn between franchisor and franchisee responsibility for creating a successful business.

In addition to general industry fears, the two dissenting members of the Board in the recent *Browning-Ferris* decision altering the joint employer standard outlined their concerns with modifying the standard.[179] Their fears will be allayed by the proposal in this Note because this proposed modification focuses on franchises, effectively narrowing the number of entities that could be liable for ULPs and clarifying any leftover ambiguity in the *Browning-Ferris* standard.

A. Amending the NLRB's Joint Employer Standard Will Not Decrease the Demand for Franchised Businesses

Critics of reformulating the joint employer standard claim that doing so will lower demand from franchisees to start franchises because franchisors will need to exert greater control over the labor force and possibly raise royalty rates and fees to accommodate this increased control.[180] Andrew F. Puzder ("Puzder"), CEO of CKE Restaurant Holdings, Inc., claims that a new joint employer standard would force "[f]ranchisors . . . to review job applicants, review hiring decisions before offers were made, review compensation structure and bonus plans, and so forth."[181] According to Puzder, franchisors would need to take these steps because franchisors would be liable for the employment decisions of franchisees.[182]

This reasoning, however, overlooks critical aspects of the franchisor-franchisee relationship that already evidence significant control by the franchisor over the franchisee's labor force. Specifi-

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178 *Id.* (quoting Catherine Monson, chief executive officer of FASTSIGNS International).

179 *See* Browning-Ferris Indus. of Cal., 362 N.L.R.B. No. 186, at 21–49 (Aug. 27, 2015) (Miscimarra and Johnson, Members, dissenting).

180 *See Why the NLRB Adopting a New Joint Employer Standard Would Be Bad for Workers, Employers, Franchising and the Economy: Hearing Before the Subcomm. on Health, Emp't, Labor, & Pensions of the H. Comm. on Educ. & the Workforce*, 113th Cong. 11 (2014) (statement of Andrew F. Puzder, CEO, CKE Restaurants Holdings, Inc.), http://edworkforce.house.gov/uploadedfiles/puzder_testimony_revised.pdf [hereinafter Puzder]; *Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?: Hearing Before the Subcomm. on Health, Emp't, Labor, & Pensions of the H. Comm. on Educ. & the Workforce*, 113th Cong. 4 (2014) (statement of Clint Ehlers, President, FASTSIGNS of Lancaster, Pa. and Willow Grove, Pa.), http://edworkforce.house.gov/uploadedfiles/testimony_ehlers.pdf.

181 Puzder, *supra* note 180, at 10.

182 *See id.* at 10–11.

cally, Puzder notes that the franchisor sets the format of guest service and also has "the right to approve or disapprove the closure of a restaurant before expiration of the franchise term, or the transfer of the franchise rights to another individual or business entity."[183] This right to approve or disapprove closure of a franchise is perhaps the greatest exertion of control possible—the franchisor can entirely dismantle a workforce if the franchisee is not living up to the franchisor's standards.[184] There is no greater control of labor than the ability to rid workers of their jobs at will; this is more true in a low-wage context because—although at-will employment may go both ways—the worker who quits will likely have a small impact on a large profitable company,[185] while the worker who gets fired may lose her main source of income. A new joint employer standard may lead franchisors to monitor more closely the activities of its franchisees, but this change would have no bearing on the true amount of control the franchisor has over the franchisee.[186] If franchisors are continuously being brought into ULP hearings for their franchisees' unlawful behavior, they will likely adapt by either developing a system to remedy the problems or being more instructive during various phases of the franchise relationship, a not-too-great change from the current format.

Moreover, economic reports claim that franchise demand will continue to grow in the near future and that this growth will be largely impacted by the availability of lending to franchisees, as opposed to the NLRB's joint employer standard.[187] In the words of Jonathan

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183 *Id.* at 7.

184 *See* David Hess, Comment, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 IOWA L. REV. 333, 340–41 (1995) ("[T]he contract may give the franchisor a unilateral right—with or without cause—to terminate or to refuse to renew the agreement[and] require franchisor approval before a sale or transfer of the franchise . . . .").

185 *See* Van Thompson, *The Turnover Rates in the Fast Food Industry*, AZCENTRAL, http://yourbusiness.azcentral.com/turnover-rates-fast-food-industry-25648.html (last visited Jan. 24, 2016) (noting that employers in the fast food industry "spend an average of $500 to replace lost staff").

186 Tangentially, many state and local governments are taking matters into their own hands for many low wage franchise workers by raising the minimum wage, and franchisees are still operating in these jurisdictions. *See* Davidson, *supra* note 21. Additionally, a concession on the NLRB joint employer question may halt this governmental behavior, letting the market play out to determine whether workers truly want their own representation, something the NLRA calls for. *See* 29 U.S.C. § 151 (2012).

187 *See* 5 FRANDATA, SMALL BUS. LENDING MATRIX AND ANALYSIS: THE IMPACT OF THE CREDIT CRISIS ON THE FRANCHISE SECTOR 5, 8 (2013), http://emarket.franchise.org/SBLM_Vol5%5B1%5D.pdf ("FRANdata project[ed] that the demand for franchise transactions w[ould] increase to 65,600 in 2013, a 5.7 percent increase . . . ."); Jonathan Maze, *Franchise*

Maze: "As lending goes, so goes franchising."[188] This is true because most franchisees open new locations with the help of loans, and the inability to obtain those loans is what reduces demand for franchises.[189] In total, there are an estimated 6000 franchise companies operating in the U.S., generating almost $1 trillion in sales each year.[190] Given the proven success of franchises over time, a strong economic outlook, and no substantial change in franchisor control, a new joint employer standard is not likely to decrease demand for franchised businesses.

B. Amending the NLRB's Joint Employer Standard Will Not Cause Massive Layoffs or Halt Hiring, but Will Aid the Flow of Commerce

Critics of reforming the joint employer standard also fear that existing franchises will lose opportunities for growth, and that millions of potential jobs will be lost.[191] Modifying the joint employer standard to include franchisors may eventually allow workers to seek higher wages, which, according to Steve Caldeira, former President and CEO of the International Franchise Association, would lead to "higher prices for consumers, lower foot traffic and sales for franchise owners, and ultimately, lost jobs and opportunities . . . ."[192] Caldeira correctly observes that workers in many franchises are seeking higher wages, as demonstrated by the increase in fast food worker organizing and strikes across the country;[193] however, he fails to recognize that this nationwide strife evidences an impairment in the free flow of commerce, as the NLRA cautions.[194] Allowing workers to bargain with franchisors as joint employers will reduce this discord and may indeed improve worker wages, but this will prove to be an overall gain for franchises.

Growth Expected to Accelerate, FRANCHISE TIMES (June 2014), http://www.franchisetimes.com/news/June-July-2014/Franchise-Growth-Expected-to-Accelerate/ (citing two studies that found that, in 2014, franchising was expected to grow at its fastest rate in five years, largely due to an improvement in lending).

188 Maze, *supra* note 187.

189 *See id.*

190 Pipes, *supra* note 117.

191 *See* Witnesses Warn, *supra* note 175.

192 Ned Resnikoff, *Report: Fast Food Industry Could Survive $15 Minimum Wage*, AL-JAZEERA AM. (January 23, 2015, 12:39 PM), http://america.aljazeera.com/articles/2015/1/23/report-fast-food-industry-could-survive-15-minimum-wage.html.

193 *See* Eidelson, *supra* note 20.

194 *See* 29 U.S.C. § 151 (2012).

Further supporting his fear, Caldeira incorrectly accepts the myth that an increase in wages leads to a decrease in jobs. [195] This myth has been repeatedly debunked by multiple organizations, including the Department of Labor. [196] Moreover, as of February 2015, a total of twenty-nine states and the District of Columbia had minimum wages above the federal minimum wage and all twenty-nine of those states, along with the District of Columbia, saw unemployment levels drop from December 2011 to December 2014.[197] Although this relationship is not necessarily a causal one, the fact remains that a concurrent and regular increase in franchise employment occurred nationwide, in spite of mandated higher wages for franchise employees.[198] With statistics exposing the wage myth and to aid in the free flow of commerce, a new joint employer standard will allow workers to properly bargain for their working conditions, including wages, with collective representation if they so choose, balancing the bargaining power with employers as the NLRA intends.[199]

C. Amending the NLRB's Joint Employer Standard Will Not Force an Immeasurable Amount of Entities to the Bargaining Table and Will Not Leave Franchisors with Unpredictable Liability

The two dissenting Board members in the recently decided *Browning-Ferris* case outlined a number of concerns for a modified joint employer standard.[200] In their dissent, the members first declared, "no bargaining table is big enough to seat all of the entities

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195 *See Minimum Wage Mythbusters*, U.S. DEP'T OF LABOR, http://www.dol.gov/minwage/mythbuster.htm (last visited Jan. 24, 2016) (reviewing studies on minimum wage increases and finding no discernable effect on employment).

196 *See id.*; *see also* ROBERT POLLIN & JEANNETTE WICKS-LIM, A $15 U.S. MINIMUM WAGE: HOW THE FAST-FOOD INDUSTRY COULD ADJUST WITHOUT SHEDDING JOBS (2015), http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_351-400/WP373.pdf (noting that the fast food industry could absorb increased labor costs by reducing turnover and slightly increasing prices).

197 *See* U.S. CONG. JOINT ECON. COMM. DEMOCRATIC STAFF, STATE ECONOMIC SNAPSHOTS: AUGUST 24, 2015 (2015), http://www.jec.senate.gov/public/_cache/files/2e749169-1ca5-4033-a4bc-d1e7f802cd2c/combined-august-sbs.pdf; *State Minimum Wages*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 30, 2015), http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx [http://web.archive.org/web/20150703053017/http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx].

198 *See ADP National Franchise Report*, ADP RESEARCH INST. (Dec. 2014), http://www.adpemploymentreport.com/2014/December/NFR/NFR-December-2014.aspx (download "Historical Data (Excel) document) (showing historical data of franchise employment increasing from 2011 to 2015).

199 *See* 29 U.S.C. § 151 (2012).

200 *See* Browning-Ferris Indus. of Cal., 362 N.L.R.B. No. 186, at 21–49 (Aug. 27, 2015) (Miscimarra and Johnson, Members, dissenting).

that will be potential joint employers under the majority's new standards."[201] Because the *Browning-Ferris* decision did not address the particularities of franchises,[202] these dissenting members did not consider how clearly the lines of liability could be drawn in franchise situations; in a new standard considering franchises, there are only two possible joint employers, the franchisor and the franchisee. There is no doubt that a bargaining table could accommodate two entities, and with this proposed standard, that would be the maximum at any time.

The dissenting members also state, "the majority abandons a longstanding test that provided certainty and predictability . . . ."[203] The "longstanding test" the dissenting members allude to from *Laerco* and *TLI* was developed in 1984, and only later clarified in *Airborne Freight Co.* in 2002.[204] Although this test may have provided certainty and predictability, it has done so at the expense of usefulness in the modern workplace context.[205] Moreover, as the new joint employer standard is litigated, it will gain the same, if not more, certainty and predictability as the current standard. Finally, the dissenting Board members' fears hold much less weight because they fail to account for the changing "complexities of industrial life," a task the Supreme Court has stated is essential to the NLRB.[206]

Conclusion

The NLRB joint employer standard, as articulated in *Browning-Ferris*, does not account for many of the important characteristics of franchise relationships. This misguided standard may continue to allow businesses that have an impact on the decisions of franchisees to act negligently, and sometimes recklessly, without having to live up to the responsibilities outlined by the NLRA. With the NLRB's new joint employer standard, it is unclear whether workers like those in McDonald's franchises across the country facing coercion, threats, intimidation, and surveillance will remain voiceless on the job or whether any progress made for average Americans by the passage of the NLRA will be destroyed. The NLRB can solve this issue and achieve the original purposes of the NLRA by modifying its joint employer standard to reach those employers, many of whom own

201 *Id.* at 21.

202 *Id.* at 17 n.94.

203 *Id.* at 22.

204 *See supra* Part I.B.

205 *See* Weil, *supra* note 13, at 34 (noting that employment relationships have changed and become fissured).

206 *See* Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979).

franchises, who retain varying controls over the ultimate employers' workers.