

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES
OF CALIFORNIA, INC., D/B/A NEWBY
ISLAND RECYCLERY
Employer

and

Case No. 32-RC-109684

FPR-II, LLC, D/B/A LEADPOINT
BUSINESS SERVICES
Employer

and

SANITARY TRUCK DRIVERS AND
HELPERS LOCAL 350, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
Petitioner

**BRIEF *AMICI CURIAE* OF NATIONAL EMPLOYMENT LAW PROJECT, ALLIANCE
FOR A GREATER NEW YORK, CALIFORNIA RURAL LEGAL ASSISTANCE
FOUNDATION, EAST BAY ALLIANCE FOR A SUSTAINABLE ECONOMY, EQUAL
JUSTICE CENTER, FUERZA DEL VALLE, GLOBAL ALLIANCE FOR
INCINERATOR ALTERNATIVES, NATIONAL STAFFING WORKERS ALLIANCE,
NEIGHBORHOOD LEGAL SERVICES OF LOS ANGELES COUNTY, PARTNERSHIP
FOR WORKING FAMILIES**

Catherine K. Ruckelshaus
Laurence E. Norton
Sarah Leberstein
Anthony Mischel
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025 x 306
Attorneys for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIESiii

STATEMENTS OF INTEREST OF *AMICI*1

INTRODUCTION AND SUMMARY OF ARGUMENT4

ARGUMENT5

 I. Employers increasingly outsource their labor, which too often diminishes workers’ opportunity for organizing and collective bargaining and degrades working conditions.....5

 A. Outsourcing is on the rise throughout the economy5

 1. The number of workers and the percentage of workforce employed by temporary and staffing agencies such as Leadpoint have risen sharply in recent years.6

 2. The occupations that have gained the most jobs since the end of the Recession are ones where outsourcing is prevalent.7

 3. Employers’ insertion of intermediaries between themselves and workers too often leads to evasion of responsibilities under labor and employment laws.....8

 4. In many fast-growing industries subcontracting has become a deeply entrenched practice that has allowed employers to avoid their legal duties to workers, degrade labor conditions, and limit workers’ ability to bargain12

 i. Construction.....12

 ii. Warehouse and Logistics14

 iii. Janitorial.....15

 iv. Recycling/Waste Management17

 II. The Board’s joint employment standard and its application should be clarified to ensure that the growing number of workers in subcontracted work structures are able to assert their rights to organize and collectively bargain as guaranteed by the NLRA..19

A. The NLRA has long contemplated joint employment and in controlling Supreme Court and Board decisions construed the doctrine broadly to find joint employment in a variety of subcontracting situations	19
B. The Regional Director and the Board continue to over-emphasize certain factors in determining employer status and fail to center on the key consideration of the ability of the purported employers to control or codetermine the terms and conditions of employment.....	22
1. The ability to control and not the exercise of control over the conditions of employment is decisive.....	22
2. Indirect and direct control by the putative employers should be considered.....	24
3. The motive or purpose of a putative employer’s behavior is not relevant: it does not matter why a party has the ability to control the working conditions; the only consideration should be whether such ability to control exists.....	25
4. A written contract is evidence of the employment relationship, and its terms, are not a substitute for a review of what actually happens in the workplace between the parties.....	27
C. The Board’s joint employer principles are important to uphold the Act’s emphasis on collective bargaining.....	27
CONCLUSION.....	29
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

Cases

<i>Ace Doran Hauling & Rigging Co. v. NLRB</i> , 462 F.2d 190 (6th Cir. 1972).....	27
<i>Airborne Freight Co.</i> , 338 NLRB 597 (2002)	22
<i>Awuah v. Coverall No. Amer.</i> , 554 F.3d 7 (1 st Cir. 2006).....	16
<i>Boire v. Greyhound Corporation</i> , 376 U.S. 473 (1965)	20, 21
<i>Breaux & Daigle, Inc. v. U.S.</i> , 900 F.2d 49 (5 th Cir. 1990)	25
<i>Community for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989).....	21
<i>Greyhound</i> , 153 NLRB 1488 (1965)	23
<i>Hodgson v. Griffin & Brand</i> , 471 F.2d 235 (5 th Cir. 1973)	24
<i>Holyoke Visiting Nurses Ass’n v. NLRB</i> , 11 F.3d 302 (1 st Cir. 1993)	25
<i>Merchants Home Delivery Service, Inc. v. NLRB</i> , 580 F.2d 966 (9th Cir. 1978).....	26
<i>Mitchell Bros.</i> , 249 NLRB 476 (1980)	26
<i>NLRB v. Browning-Ferris Indus.</i> , 691 F.2d 1117 (3d Cir. 1982).....	27
<i>NLRB v. Deaton, Inc.</i> , 502 F.2d 1221 (5th Cir. 1974)	27
<i>NLRB v. Hearst Pub.</i> , 322 U.S. 111 (1944).....	28
<i>NLRB v. Town & Country Electric, Inc.</i> , 516 U.S. 85 (1995)	21
<i>NLRB v. United Ins. Co. of America</i> , 390 U.S. 254 (1968).	21
<i>NLRB v. A. Duie Pyle</i> , 660 F.2d 379 (3rd Cir. 1979)	26
<i>Rediehs Interstate, Inc.</i> , 255 NLRB 1073 (1980)	26
<i>Sun-Maid Growers of California v. NLRB</i> , 618 F. 2d 56 (9 th Cir. 1980)	28
<i>Tanforan Park Food Purveyors Council v. NLRB</i> , 656 F. 2d 1358 (9 th Cir. 1981).....	28
<i>Taylor’s Oak Ridge Corp.</i> , 74 NLRB 930 (1947).	22

<i>Thriftown, Inc.</i> , 161 NLRB 603 (1966)	26
<i>West Tex. Utils. Co.</i> , 108 NLRB 407 (1954)	26
<i>Zheng v. Liberty Apparel Co., Inc.</i> , 355 F.3d. 61 (2d Cir. 2003).....	9

Statutes and Treatises

29 U.S.C. §151	28
Restatement (Second) of Agency § 220(2) (1958).	21

Other Authorities

Alison, Davis-Blake <i>Happy Together? How Using Nonstandard workers affects exit, voice and loyalty among standard employees</i> , 46(4) ACADEMY OF MANAGEMENT JOURNAL, 475-484 (2003)	9
---	---

Soon Ang & Sandra Slaughter, <i>Work Outcomes and Job Design for Contract versus Permanent Information Systems Professional on a Software Development Teams</i> 25(3) MIS QUARTERLY (2001)	9
--	---

Azari-Rad, Peter Philips and Wendine Thompson-Dawson, <i>Subcontracting and Injury Rates in Construction</i> , Eaton, Adriene E., 252 Ed. 55 th Annual Meeting of the Industrial Relations Research Association Series, 2003.....	11
--	----

David Bacon, “Invisible No More,” SAN FRANCISCO BAY GUARDIAN (June 10, 2014) .	17
--	----

David Bacon, <i>Christina Lopez, East Bay Recycler</i> , SAN FRANCISCO BAY GUARDIAN (June 10, 2014).....	18
--	----

Rosemary Batt & Hiroatsu Nohara, <i>How Institutions and Business Strategies Affect Wages: A Cross-National Study of Call Centers</i> , 64 (4) INDUSTRIAL AND LABOR RELATIONS REVIEW, 533-522 (2009).....	9
---	---

Michael Belzer, <i>Technological Innovation and the Trucking Industry: Information Revolution and the Effect on the Work Process</i> , 23 JOURNAL OF LABOR RESEARCH 375 (2002). ..	14
--	----

Annette Bernhardt et al., <i>Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities</i> (2009)	<i>passim</i>
---	---------------

Annette Bernhardt, <i>Labor Standards and the Reorganization of Work: Gaps in Data and Research</i> (Univ. of Cal. Berkeley: Inst. for Research on Labor and Emp't, Working Paper No. 100-12, 2014)	8
Bureau of Labor Statistics, <i>Occupational Employment and Wages, May 2013: Food Preparation and Serving Related Occupations</i> (2013).....	10
Bureau of Labor Statistics, U.S. Department of Labor, <i>Occupational Outlook Handbook, 2012-13 Edition, Janitors and Building Cleaners</i>	17
Kenneth G. Dau-Schmidt, <i>The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force</i> , 52 WASHINGTON AND LEE LAW REVIEW 879 (1995)	8
Michael Dey, Susan Houseman & Anne Polivka, <i>Manufacturings' Outsourcing Staffing Services</i> , INDUS. & LAB. REL. REV., July 2012	7
Peter Downs, "Past Experience of Many Cities Suggests Privatizing Sanitation Services Wasn't a Panacea," (The Commercial Appeal, July 10, 2011),	17, 18
Arindarajit Dube & Ethan Kaplan, <i>Does Outsourcing Reduce Wages in the Wage Service Occupations? Evidence from Janitors and Guards</i> , 63 INDUS. & LAB. REL. REV. at 287 (2010)	<i>passim</i>
Cynthia Estlund, <i>Rebuilding the Law of the Workplace in an Era of Self-Regulation</i> , 105 Colum. L. Rev. 319 (2005).	17
Michael Grabell, <i>The Expendables: How the Temps Who Power Corporate Giants are Getting Crushed</i> , PRO PUBLICA (June 27, 2013),	6
Steven Greenhouse, <i>Among Janitors, Labor Violations Go with the Job</i> , NY TIMES, July 13, 2005.....	16
Steven Greenhouse, <i>C.J.'s Seafood Fined for Labor Abuses</i> , N.Y. TIMES, July 24, 2012	15
Tom Gorman, <i>How to Manage an Outsourced Workforce</i> , MATERIAL HANDLING MANAGEMENT (2009).	14
Erin Johansson, <i>Fed Up with FedEx: How FedEx Ground Tramples Workers Rights and Civil Rights</i> , (Am. Rights at Work, 2007)	9
Clark Kauffman, <i>Register Investigation: Millions in fines, but will Henry's Turkey Service ever pay?</i> , Des Moines Register, Mar. 7 2014	9
Allison Kilkenny, <i>Riot Police Arrest Peaceful Protestors at Rally for striking Walmart Workers</i> , THE NATION, Oct. 2, 2012	15

Knutson, Ryan and Liz Day, <i>Built for a Simpler Era, OSHA Struggles When Tower Climbers Die</i> , PROPUBLICA AND PBS FRONTLINE, (May 24 2012)	11
Thomas A. Kochan, <i>Human Resources Strategies and Contingent Workers: The Case of Safety and Health in the Petrochemical Industry</i> 33 HUMAN RESOURCE MANAGEMENT, 55-77 (1994).	11
Mary S. Logan et al., <i>Outsourcing a satisfied and committed workforce: a trucking industry case study</i> , 15 (1) INTERNATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT, 147-162 (2004).	9
Mary McCain, <i>Serving Students: A Survey of Contracted Food Service Work in New Jersey’s K-12 Public Schools</i> (Rutgers Center for Women and Work, 2009)	10
National Safety Council, <i>Cleaning Up Safely: Janitors and Cleaners Face Multiple Hazards</i> ,	17
Nat'l Empl. Law Proj., <i>State SUTA Dumping Proposals</i> , Mar. 2005	11
New York Department of Labor, <i>Annual Report of the Joint Enforcement Task Force on Employee Misclassification</i> (February 1, 2010).....	14
Paraprofessional Healthcare Institute, <i>Home Care Aides at a Glance</i> (2014).....	10
Scott W. Prudham, <i>Downsizing nature: managing risk and knowledge economies through production subcontracting in the Oregon logging sector</i> , 34 ENVIRONMENT AND PLANNING, 145-166 (2002).	8
JB Rebitzer, <i>Job Safety and contract workers in the petrochemical industry</i> , 34(1) INDUSTRIAL RELATIONS, 40 – 57 (1995)	11
Restaurant Opportunities Centers United, <i>Serving While Sick: High Risks & Low Benefits for the Nation’s Restaurant Workforce, and Their Impact on Consumers</i> (2010),	11
Jason Rowe, <i>New Jersey’s Supply Chain Pain: Warehouses and Logistics Work Under Wal-Mart and Other Big Box Retailers</i> 8 – 9, note 51 (New Labor 2012).....	11, 14, 15
Catherine K. Ruckelshaus et al, <i>Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work</i> , (NELP May 2014).....	<i>passim</i>
Deonata Smith, <i>Low rise: More way of homeownership, more consumers are choosing to rent or buy condos</i> , IBISWORLD INDUSTRY REPORT at 23611b. (June 2012).....	12

Rebecca Smith et al., <i>The Big Rig: Poverty, Pollution and the Misclassification of Truck Drivers at America’s Ports</i> , (Nat’l Emp’t Law Project & Change to Win, 2010).....	10
Sandy Smith, <i>OSHA Fines Company \$84,500 Following Temp Worker’s Death</i> , EHS TODAY (Jan. 23, 2003).....	19
Jason Struna et. al., <i>Unsafe and Unfair: Labor Conditions in the Warehouse Industry</i> , POLICY MATTERS: A QUARTERLY PUBLICATION OF THE UNIVERSITY OF CALIFORNIA, Summer 2012	<i>passim</i>
U.S. Bureau of Labor Statistics, <i>Occupational Employment and Wages, May 2013: Janitors and Cleaners, Except Maids and Housekeeping Cleaners</i> (2013	10
U.S. Department of Labor, <i>Strategic Plan 2011-2016</i>	14
Abel Valenzuela Jr. and Edwin Melendez, <i>Additional Findings from the New York Day Labor Survey</i> (2004)	13
Abel Valenzuela Jr. and Edwin Melendez, <i>Day Labor in New York: Findings from the New York Day Labor Survey</i> , at 10 (Community Development Research Center and Center for the Study of Urban Poverty 2003).....	13
Abel Valenzuela Jr., et al., <i>On the Corner: Day Labor in the United States</i> (January 2006)	13
David Weil, <i>Market Structure and Compliance: Why Janitorial Franchising Leads to Labor Standards Problems</i> (2011).....	16
Workers Defense Project, <i>Building Austin, Building Injustice: Working Conditions in Austin’s Construction Industry</i> , at 11 (June 2009).....	12,13
Roland Zullo & Immanuel Ness, <i>Privatization and the Working Conditions of Health Care Support Staff</i> , 32(2) INTERNATIONAL JOURNAL OF PUBLIC ADMINISTRATION (2009).....	9

Statements of Interest of *Amici*

The National Employment Law Project (NELP) is a non-profit organization with 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees receive the full protection of labor and employment laws and that employers are not rewarded for skirting those basic rights. NELP has litigated and participated as *amicus* in numerous cases addressing multiple employer responsibility under labor and employment laws.

The Alliance for a Greater New York's mission is to create good jobs, vibrant communities, and an accountable democracy for all New Yorkers. ALIGN has over 20 years of experience working to increase protections for low-wage and jointly-employed workers, including those in the home care, retail, waste management and transportation sectors.

California Rural Legal Assistance Foundation (CRLAF) is a non-profit legal services agency that since 1986 has advocated for the rural poor in California, particularly farm and other low-wage workers. CRLAF focuses on agriculture, where growers often seek to use labor contractors as a shield against liability for violations of minimum labor standards. Although agricultural workers are exempt under the National Labor Relations Act ("NLRA"), CRLAF is vitally concerned with protecting the concept of joint employment to protect all workers vulnerable to abuse through the use of intermediary employers.

The East Bay Alliance for a Sustainable Economy is a non-profit organization that advances economic, racial and social justice by building a just economy in the East

Bay region of California. EBASE has 20 years of experience collaborating with unions and independent groups of recycling and warehouse and logistics workers to challenge labor abuse and exploitation resulting from abuse of joint employer arrangements.

The Equal Justice Center (EJC) is a non-profit employment rights organization with over fourteen years of experience representing low-wage workers throughout Texas in industries which rely heavily on low-wage and subcontracted labor, such as construction, landscaping, janitorial, food service, hospitality, health care, and manufacturing. EJC has sought to remedy violations of the NLRA caused by under-capitalized and irresponsible subcontractors acting on behalf of and controlled by larger businesses that seek to evade legal responsibility.

Fuerza Del Valle operates in the Rio Grande Valley of South Texas, and its mission is to help low-income workers discover their power and create solutions to the problems they experience at work, including wage theft, safety issues, unjust firings, and employer abuse. Most of the workers with whom it works are employed in contingent jobs in the construction, restaurant, and domestic service industries, where the workers' attempts to organize are often frustrated by temporary staffing arrangements and by misclassification as independent contractors.

The Global Alliance for Incinerator Alternatives is a non-profit organization and network of community groups working for comprehensive zero waste systems, including recycling. GAIA has worked with a number of unions representing recycling workers in the United States and in other countries, advocating together for recognition of the important role that recycling workers play in waste systems, and for safe and just working conditions.

The National Staffing Workers Alliance (NSWA) brings together worker centers, civil rights organizations, and legal advocates from across the country to coordinate their efforts to organize temporary staffing workers. NSWA advocates have witnessed first hand how a narrow construction of joint employment can be used to strip workers of their right to organize. NSWA urges the Board to apply a joint employment standard that reflects the economic reality of non-traditional employment relationships.

Neighborhood Legal Services of Los Angeles County (NLSLA) represents hundreds of low-wage workers in claims for unpaid wages and other labor law violations before the State Labor Commissioner and in state court, and NLSLA's Workers' Rights Project operates three workers' rights self-help centers that assists hundreds of low-wage workers annually in filing and pursuing claims on their own with the Labor Commissioner. Many of these workers are janitorial and construction workers whose employers outsource or subcontract aspects of their employment to avoid liability under employment laws.

The Partnership for Working Families is a national network of local and regional advocacy organizations that specialize in improving wages and working conditions, as well as creating community and environmental benefits in targeted sectors of the economy. The Partnership and its affiliates have worked extensively on law and policy addressing working conditions and the employment relationship in the construction, waste management, port trucking and warehousing/logistics sectors.

Amici submit this brief in response to the National Labor Relations Board's ("the Board") Notice and Invitation to File Briefs in *Browning-Ferris Indust. of Cal. & Leadpoint Bus. Servs.*, Case 32-RC-109684 dated May 12, 2014. *Amici* urge the Board to

clarify its joint employment standard to align it with the purposes of the NLRA. This realignment is made all the more urgent as employer subcontracting and use of labor intermediaries such as the staffing firm used in this case is on the rise and has resulted in degraded working conditions and reduced worker access to collective bargaining.

Introduction and Summary of Argument

The Browning-Ferris Industries (BFI) recycling facility has since 2009 used staffing company Leadpoint Business Services (Leadpoint) to do its in-house sorting and cleaning work.¹ Approximately 240 Leadpoint employees work alongside the 60 BFI employees at the plant. Tr. 188:12-189:11.² The staffing agreement between the two companies runs indefinitely but is terminable on 30 days' notice. This arrangement, an increasingly common one in many industries, is classic joint employment under the NLRA because the companies codetermine the work's essential terms and conditions.

The use of outsourcing and use of staffing firms is on the rise, and working conditions under many of these arrangements has degraded. Many employers such as BFI bring in workers, often unskilled manual laborers, using staffing agencies such as Leadpoint to supply, and in some cases supervise, workers on site. This change has disaggregated the traditional employment relationship that was characterized by one corporate entity having unambiguous control of all conditions of employment. These fractured arrangements leave workers vulnerable in two ways. First, workers have less control over their wages, hours, and working conditions because their direct employer is beholden to the worksite employer. Under current Board interpretations they are rarely able to bargain with the worksite employer. To ensure that workers seeking to organize

¹ *Amici* agree with the statement of facts advanced by the Petitioner in its brief.

² Tr_ refers to the Transcript, page number and line.

collectively can bargain with those able to implement any negotiated changes in the workplace, *amici* argue that the Board should identify and apply joint employment concepts that accurately capture the true economic relationships in the workplace.

Second, the Regional Director applied the joint employer test so narrowly and unrealistically as to defeat the purposes of the Act, which has long recognized that more than one employer may be required to bargain collectively with a group of employees. The Board should clarify that its joint employment test is meant to answer the question of whether the purported employer has the ability to control or codetermine the terms and conditions of employment, and the Board should specify which aspects of the employment relationship are useful in answering that determinative question, with an eye to the economic reality of those relationships. Effective collective bargaining can only occur where the parties at the bargaining table have the ability to control the workplace.

Argument

I. Employers increasingly outsource their labor, which too often diminishes workers' opportunity for organizing and collective bargaining and degrades working conditions.

A. Outsourcing is on the rise throughout the economy.

Outsourcing--whether through layers of contracting, hosting staffing firms on-site, franchising, or misclassifying employees as independent contractors--is on the rise.

1. **The number of workers and the percentage of workforce employed by temporary and staffing agencies such as Leadpoint have risen sharply in recent years.**

In 2013, there were approximately 3.4 million jobs in the staffing sector, accounting for 2.5 percent of U.S. employment.³ The industry-backed American Staffing Association states that even more employees get their jobs through the staffing sector, saying that each year, a tenth of all U.S. workers finds a job through a staffing agency.⁴

While staffing industry employment still represents a relatively small share of the labor market, the sector plays an important role during recessions and recoveries, rising and falling more sharply than total employment.⁵ The growth in employer use of these firms has possibly continued beyond the traditionally cyclical blips following an economic recovery, however. Since August 2009, the sector has grown by 41 percent, compared with just 6 percent for total employment, and 11 percent of jobs gained since employment hit its low point in February 2010 have been in the staffing sector.⁶ The strong growth of the sector, along with its position among recovered jobs, suggests it may hold a greater share of employment in the future.⁷

In addition, more employers are using temp and staffing firms to source workers in traditionally “blue-collar” jobs, as temp and staffing placements have shifted from

³ Catherine K. Ruckelshaus et al, *Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, (NELP May 2014), available at <http://www.nelp.org/page/-/Justice/2014/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf?nocdn=1> [hereafter *Who’s the Boss*].

⁴ Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants are Getting Crushed*, PRO PUBLICA (June 27, 2013), available at <http://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushed>.

⁵ *Who’s the Boss*, at 19, table 7.

⁶ *Id.* at 21, table 8.

⁷ *Id.* at 20.

clerical and other white-collar work to more hazardous construction and manufacturing work.⁸ These temp and staffing workers, in the most hazardous, and in many cases, lower-paying jobs, especially need the protections of labor and employment laws.

2. The occupations that have gained the most jobs since the end of the Recession are ones where outsourcing is prevalent.

Subcontracted and other nonstandard work structures are prevalent in the industries experiencing the greatest job growth during the recovery from the 2008 Recession.⁹ Administrative and support services, including temporary help, health services, construction, manufacturing, transportation, and warehousing are among the sectors that have added the most new jobs in the recent past.¹⁰ Many of these occupations are projected to expand rapidly from 2012 to 2022. Personal care and home health aides, food preparation and service workers, including fast food, janitors and cleaners, and construction laborers are all within the top ten occupations by growth rate, with freight, stock and materials movers, and carpenters ranking in the 12th and 13th positions.¹¹

These fast-growing industries are marked by high rates of outsourcing. For example, outsourcing of janitorial services has grown dramatically over the past two decades, with the result that an estimated 37 percent of janitorial workers are now hired by staffing firms or labor contractors rather than directly by the company for whom they

⁸ Michael Dey, Susan Houseman & Anne Polivka, *Manufacturings' Outsourcing Staffing Services*, INDUS. & LAB. REL. REV., July 2012.

⁹ *The Low-Wage Recovery: Industry Employment and Wages Four Years into the Recovery* NELP (April 2014), available at <http://www.nelp.org/page/-/Reports/Low-Wage-Recovery-Industry-Employment-Wages-2014-Report.pdf?nocdn=1>.

¹⁰ *Id.* at 5.

¹¹ *Occupations with the most job growth*, BUREAU OF LABOR STATISTICS (Dec. 9, 2013), http://www.bls.gov/emp/ep_table_104.htm.

clean.¹² 76.3 percent of fast food workers are employed by a franchisee rather than the fast food corporation itself.¹³

3. Employers' insertion of intermediaries between themselves and workers too often leads to evasion of responsibilities under labor and employment laws.

By inserting subcontractors or labor brokers between themselves and workers, contracting companies can more successfully avoid liability for violations of workplace laws that apply only to their “employees,” even as they benefit from, and have the right to control the work itself. Lead companies are in an especially strong position to retain authority over workers when they engage labor-only subcontractors whose workers perform work on the lead company’s premises, and who can only pay the workers after receiving payment from the lead company. The workers brought into a job by thinly-capitalized subcontractors are vulnerable to violations of labor laws as the subcontractors yield to the lead company’s controls or illegally cut labor costs to keep their contract.¹⁴ Outsourced workers face additional burdens in asserting labor rights against the lead company that has the authority to remedy and prevent those violations in the first place.¹⁵

¹² Arindarajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. & LAB. REL. REV. at 287 (2010); Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research* (Univ. of Cal. Berkeley: Inst. for Research on Labor and Emp’t, Working Paper No. 100-12, 2014).

¹³ *Who’s the Boss*, note 31.

¹⁴ Scott W. Prudham, *Downsizing nature: managing risk and knowledge economies through production subcontracting in the Oregon logging sector*, 34 ENVIRONMENT AND PLANNING, 145-166 (2002).

¹⁵ Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASHINGTON AND LEE LAW REVIEW 879 (1995); Jason Struna et. al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, POLICY MATTERS: A QUARTERLY PUBLICATION OF THE UNIVERSITY OF CALIFORNIA, Summer 2012, at 1.

Workers hired by a subcontractor often believe that they have no rights against the lead employer. Similarly, workers who sign “independent contractor” or individual “franchise” agreements as a condition of getting a job are led to believe that they have no right to claim the protection of any workplace laws and rarely take action to do so.¹⁶

Even when workers do attempt to enforce their rights against a lead employer, they bear the burden of proving the existence of an employment relationship with the company. *See, e.g., Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d. 61 (2d Cir. 2003). Courts and enforcement agencies too often fail to seek additional responsible parties even where the employment definitions are broad enough to encompass a lead employer.¹⁷ Where the lead company has inserted layers of subcontractors between it and the workers, legal proceedings are likely to be even more complicated and lengthy.

These structural impediments result in degraded working conditions and a lack of organizing and successful collective bargaining.¹⁸ Lead companies that outsource

¹⁶ *See, e.g.,* Erin Johansson, *Fed Up with FedEx: How FedEx Ground Tramples Workers Rights and Civil Rights*, (Am. Rights at Work, 2007), available at <http://www.civilrights.org/publications/fedex/fedupwithfedex.pdf>.

¹⁷ *See, e.g.,* Clark Kauffman, *Register Investigation: Millions in fines, but will Henry's Turkey Service ever pay?*, Des Moines Register, Mar. 7 2014, available at: <http://archive.desmoinesregister.com/article/20140309/NEWS14/303090023/Register-Investigation-Millions-in-fines-but-will-Henry-s-Turkey-Service-ever-pay-?ATALISSA>. (USDOL and EEOC failed to name lead company and cannot collect from undercapitalized staffing company in disabled workers case).

¹⁸ Roland Zullo & Immanuel Ness, *Privatization and the Working Conditions of Health Care Support Staff*, 32(2) INTERNATIONAL JOURNAL OF PUBLIC ADMINISTRATION, 152-165 (2009); Alison, Davis-Blake *Happy Together? How Using Nonstandard workers affects exit, voice and loyalty among standard employees*, 46(4) ACADEMY OF MANAGEMENT JOURNAL, 475-484 (2003); Rosemary Batt & Hiroatsu Nohara, *How Institutions and Business Strategies Affect Wages: A Cross-National Study of Call Centers*, 64 (4) INDUSTRIAL AND LABOR RELATIONS REVIEW, 533-522 (2009); Soon Ang & Sandra Slaughter, *Work Outcomes and Job Design for Contract versus Permanent Information Systems Professional on a Software Development Teams* 25(3) MIS QUARTERLY, 321-350 (2001); Mary S. Logan et al., *Outsourcing a satisfied and*

distance themselves from the labor-intensive parts of their businesses and their responsibilities to those workers. In this case, for example, BFI employed 60 workers directly at its recycling facility, but 240 through the staffing agency.¹⁹

The ambiguous legal status of many workers in contracted jobs is one of the central factors driving lower wages and poor working conditions. Median hourly wages are \$10 or less for workers in janitorial, fast food, home care and food service, all sectors characterized by extensive contracting and franchising.²⁰ Once outsourced, workers' wages suffer as compared to their non-contracted peers, ranging from a 7 percent dip in janitorial wages, to \$6 an hour in food service, to 30 percent in port trucking, to 40 percent in agriculture.²¹ These same jobs routinely see wage theft: 25 percent of workers report minimum wage violations, more than 70 percent are not paid overtime;²² and

committed workforce: a trucking industry case study, 15 (1) INTERNATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT, 147-162 (2004).

¹⁹ Tr. 14:14-20; 32:21-22; Tr. 14:14-20; 32:21-22.

²⁰ U.S. Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013: Janitors and Cleaners, Except Maids and Housekeeping Cleaners* (2013) note 9, available at <http://www.bls.gov/oes/current/oes372011.htm#ind>; Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013: Food Preparation and Serving Related Occupations* (2013) note 43, available at <http://www.bls.gov/oes/current/oes350000.htm>; The Paraprofessional Healthcare Institute, *Home Care Aides at a Glance* (2014), available at <http://phinational.org/sites/phinational.org/files/phi-facts-5.pdf>.

²¹ Arindarijt Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Wage Service Occupation? Evidence from Janitors and Guards*, 63 INDUS. & LAB REL. REV. 287 (2010); Mary McCain, *Serving Students: A Survey of Contracted Food Service Work in New Jersey's K-12 Public Schools* (Rutgers Center for Women and Work, 2009), available at <http://www.seiu.org/images/pdfs/seiuRutgersReport.pdf>; Rebecca Smith et al., *The Big Rig: Poverty, Pollution and the Misclassification of Truck Drivers at America's Ports*, (Nat'l Emp't Law Project & Change to Win, 2010), available at <http://www.nelp.org/page/-/Justice/PovertyPollutionandMisclassification.pdg?nocdn=1>.

²² Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 29 – 39 (2009), available at <http://nelp.org/page/-/BrokenLawsReport2009.pdf?nocdn=1>.

construction, warehouse, fast food and home care workers suffer increased job accidents.²³

Companies may outsource to avoid mounting unemployment insurance and workers compensation premiums based upon experience ratings.²⁴ Temporary workers can be excluded from unemployment insurance benefits.²⁵ Because temporary and staffing employees typically have shorter tenure, insufficient training, and lack of safety gear, their jobs have high workplace injury rates and fatalities.²⁶

Under the Board's narrow application of its joint employment standard, businesses can easily restructure their employment structure to avoid their legal duty to

²³ Azari-Rad, Peter Philips and Wendine Thompson-Dawson, *Subcontracting and Injury Rates in Construction*, Eaton, Adriene E., 252 Ed. 55th Annual Meeting of the Industrial Relations Research Association Series, 2003; Jason Rowe, *New Jersey's Supply Chain Pain: Warehouses and Logistics Work Under Wal-Mart and Other Big Box Retailers* 8 – 9, note 51 (New Labor 2012); Jason Sturna et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, 5 POLICY MATTERS: A QUARTERLY PUB. OF THE UNIV. OF CAL., RIVERSIDE 1 (2012); The Restaurant Opportunities Centers United, *Serving While Sick: High Risks & Low Benefits for the Nation's Restaurant Workforce, and Their Impact on Consumers* (2010), available at http://rocunited.org/wp-content/uploads/2013/04/reports_serving-while-sick_full.pdf.

²⁴ NELP, *State SUTA Dumping Proposals*, Mar. 2005, available at http://nelp.3cdn.net/4800e032c5014592ad_aqm6bn3e6.pdf.

²⁵ NELP, *Eligibility Rules that Discriminate Against Workers Employed in Temporary Help Industry*, available at http://nelp.bluestatedigital.com/page/-/UI/cwce_book/EligibilityRules.pdf; Department of Labor Employment & Training Administration, *Unemployment Insurance – Nonmonetary Eligibility*, available at <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2013/nonmonetary.pdf>.

²⁶ Jason Sturna et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, 5 POLICY MATTERS: A QUARTERLY PUB. OF THE UNIV. OF CAL., RIVERSIDE note 51, at 4 – 5 (2012); Knutson, Ryan and Liz Day, *Built for a Simpler Era, OSHA Struggles When Tower Climbers Die*, PROPUBLICA AND PBS FRONTLINE, (May 24 2012); JB Rebitzer, *Job Safety and contract workers in the petrochemical industry*, 34(1) INDUSTRIAL RELATIONS, 40 – 57 (1995); Thomas A. Kochan, *Human Resources Strategies and Contingent Workers: The Case of Safety and Health in the Petrochemical Industry* 33 HUMAN RESOURCE MANAGEMENT, 55-77 (1994).

recognize and bargain with the workers whose wages and working conditions they determine.

4. In many fast-growing industries subcontracting has become a deeply entrenched practice that has allowed employers to avoid their legal duties to workers, degrade labor conditions, and limit workers' ability to bargain.

i. *Construction*

Outsourcing to the lowest bidder, and its attendant abusive employment practices, is prevalent in the construction industry. General contractors are responsible for overseeing the completion of a construction project, but they generally hire a series of subcontractors who specialize in a specific trade to perform the discrete components of the work on their site. In turn, the subcontractors and sub-subcontractors typically hire the individual construction workers to do the job. The end result is often a complicated web of dozens of subcontractors engaged on one construction site.²⁷ General contractors interviewed for one study reported that as much as 95 percent of workers on their worksites were employed by subcontractors.²⁸

The industry is described in one recent report as “a fiercely competitive contract industry, characterized by slim profit margins, high injury and comp rates, comprised largely of numerous small to medium-sized companies whose numbers and size may make them more likely to operate beyond the view of state regulators.”²⁹ In this labor-intensive industry, general contractors place enormous pressure on subcontractors to

²⁷ Deonata Smith, *Low rise: More way of homeownership, more consumers are choosing to rent or buy condos*, IBISWORLD INDUSTRY REPORT at 23611b. (June 2012).

²⁸ Workers Defense Project, *Building Austin, Building Injustice: Working Conditions in Austin's Construction Industry*, at 11 (June 2009), available at http://www.buildaustin.org/Building%20Austin_Report.pdf (“*Building Austin*”).

²⁹ *Id.*

reduce labor costs, sometimes so that they cannot meet basic labor standards.³⁰ While a competitive bidding process solely based on price may drive down short-term costs for developers, the practice also creates a race-to-the-bottom among subcontractors who cut costs at the expense of their employees' safety and wages.³¹

Numerous studies of wage theft in the construction industry show high rates of labor standards violations. A leading survey of low-wage workers in New York, Chicago and Los Angeles found that 12.7 percent of workers in the residential construction industry experienced a minimum wage violation; 70.5 percent suffered an overtime violation; and 72.2 percent worked off-the-clock without receiving pay.³² Similarly, a study of the construction industry in Austin, Texas found one in five workers was denied payment for their work, and 50 percent were not paid overtime, while only 11 percent of workers reported that they were able to recover their unpaid wages.³³ Violations are even higher among day laborers, whose lack of a stable worksite and community of coworkers has been cited by academics as a primary cause for the high incidence of wage theft.³⁴

Consistent with these findings, the reports of the New York Joint Enforcement Task Force cite numerous cases of construction workers who experience wage theft and

³⁰ See e.g. *Building Austin*.

³¹ *Id.* at 37.

³² Annette Bernhardt et al., *Broken Laws, Unprotected Workers* (2009) at 32, 34, 35, available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.

³³ *Building Austin* at 17.

³⁴ Abel Valenzuela Jr. and Edwin Melendez, *Day Labor in New York: Findings from the New York Day Labor Survey*, at 10 (Community Development Research Center and Center for the Study of Urban Poverty 2003) (finding that 50 percent of day laborers experienced non-payment of wages and 60 percent were paid less than agreed. The study's authors attributed the high rates of violations in large part to industry structures).

have difficulty locating a responsible employer.³⁵ The United States Department of Labor's (DOL) Wage & Hour Division has named construction one of its top priority industries,³⁶ citing its high violation levels and use of subcontracting structures.

ii. *Warehouse and logistics*

Outsourcing has reshaped the warehouse and logistics industry with the use of “third party logistics” firms, highly integrated companies with the capacity to handle goods at several different points in a supply chain. A reported 77 percent of Fortune 500 companies use third-party logistics firms.³⁷ These third-party logistics companies, in turn, contract with staffing agencies, which hire temporary workers to unpack, load, and ship goods to retail facilities across the country.³⁸

Third party logistics firms encourage bidding wars among motor carriers and staffing firms, placing continual pressure on contractors to provide cheaper services. These lower rates are passed on in the form of decreased prices for truck drivers (who are often misclassified as independent contractors) or decreased wages for warehouse workers.³⁹ Workers employed at the bottom of this supply chain face deteriorated

³⁵ New York Department of Labor, *Annual Report of the Joint Enforcement Task Force on Employee Misclassification*, at 21 (February 1, 2010) available at <http://www.labor.ny.gov/ui/PDFs/2010Febreport%20with%20Cover%20to%20Paterson%20and%20Index.pdf>.

³⁶ US Department of Labor, *Strategic Plan 2011-2016*, at 30, available at http://www.dol.gov/_sec/stratplan/StrategicPlan.pdf.

³⁷ Tom Gorman, *How to Manage an Outsourced Workforce*, MATERIAL HANDLING MANAGEMENT (2009).

³⁸ Jason Rowe, *New Jersey's Supply Chain Pain: Warehouse and Logistics Work Under Wal-Mart and Other Big Box Retailers* (2012); Jason Sturna, et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, POLICY MATTERS: A QUARTERLY PUBLICATION OF THE UNIVERSITY OF CALIFORNIA, RIVERSIDE (2012).

³⁹ Michael Belzer, *Technological Innovation and the Trucking Industry: Information Revolution and the Effect on the Work Process*, 23 JOURNAL OF LABOR RESEARCH 375 (2002).

working conditions, with significant increases in wage and hour and health and safety violations as staffing agencies cut corners. As one study of subcontracted and temporary logistics workers in New Jersey found, more than one in five workers earned incomes below the federal poverty level; more than one in ten had reported an injury on the job, and over 40 percent had not received necessary safety equipment.⁴⁰ A judge in a recently-settled wage and hour class action suit against Walmart, Schneider Logistics and several staffing firms involving working conditions in California warehouses has found that Schneider jointly employed warehouse workers under federal and state wage and hour laws, along with the direct lower-level subcontractors, and denied Walmart's motion to dismiss it as a responsible employer from the case. *See, e.g., Carrillo v. Schneider Logistics, Inc.*, 823 F. Supp.2d 1040 (C.D. Cal. 2011).

Extensive subcontracting by some giant corporations, most notably Walmart, in their supply chains, has eroded working conditions by putting competitive pressure on labor costs. By aggressively outsourcing many labor-intensive parts of its business to the lowest bidders and taking advantage of its huge size and market dominance, Walmart has engendered workers' rights violations throughout its vast network of subcontractors - from the workers who process seafood⁴¹ sold in its stores to the warehouse workers⁴² who ferry Walmart goods from suppliers to customers.

iii. *Janitorial*

⁴⁰ Rowe, note 39, *supra*.

⁴¹ Steven Greenhouse, *C.J.'s Seafood Fined for Labor Abuses*, N.Y. TIMES, July 24, 2012, available at http://www.nytimes.com/2012/07/25/business/cjs-seafood-fined-for-labor-abuses.html?_r=4&.

⁴² Allison Kilkenny, *Riot Police Arrest Peaceful Protestors at Rally for striking Walmart Workers*, THE NATION, Oct. 2, 2012, <http://www.thenation.com/blog/170274/riot-police-arrest-peaceful-protesters-rally-striking-walmart-workers>

Outsourcing of janitorial services has exploded in recent years, along with the growth of other contingent work such as franchising and independent contractor misclassification.⁴³ Under a typical model of outsourced labor in the janitorial industry, a lead company contracts with a janitorial company to provide maintenance services at the lead company's facilities.⁴⁴ The janitorial company generally hires a second-tier subcontractor to supply workers to clean the facilities. Often, these subcontractors can make a profit only by engaging in cost-savings strategies, including misclassifying janitors as independent contractors or selling "franchise" licenses to unwitting workers. *See, e.g., Awuah v. Coverall No. Amer.*, 554 F.3d 7 (1st Cir. 2006). Second-tier subcontractors shave labor costs by evading payroll taxes and workers' compensation, minimum wage, and overtime requirements at the workers' expense.⁴⁵

Job quality has decreased significantly since the emergence of these contracting and franchising models, and violations of basic labor law protections are now endemic in the janitorial industry. One study found that janitorial workers suffered a seven percent wage penalty from 1983 to 2000 as a result of outsourcing in the industry.⁴⁶

In 2010, the national median hourly wage for janitors and building cleaners was \$10.68 per hour; these low wage rates force many janitorial workers to work lengthy hours to make ends meet.⁴⁷ The janitorial industry, moreover, is a "chronically low-wage sector that, in many parts of the country, relies heavily upon undocumented immigrant

⁴³ *Who's the Boss, supra* at 9-10.

⁴⁴ *Who's the Boss, supra* at 9.

⁴⁵ David Weil, *Market Structure and Compliance: Why Janitorial Franchising Leads to Labor Standards Problems* (2011)(unpublished manuscript)(on file with (Boston Univ. School of Mgmt); Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, NY TIMES, July 13, 2005, at A19.

⁴⁶ Dube, *supra*, note 22.

⁴⁷ Bureau of Labor Statistics, *supra* note 3.

labor and operates as a virtual outlaw in violation of immigration laws, tax laws, wage and hour laws, and other labor protections.”⁴⁸ A recent academic survey of low-wage workers found that at least 26 percent of building service and ground service workers had not received minimum wage payments, and 71 percent had not received overtime pay. Over half did not receive required meal breaks.⁴⁹

Janitorial workers are also particularly vulnerable to dangerous working conditions and high workplace injury rates. As the DOL has noted, “[j]anitors and building cleaners have one of the highest work-related injury rates,” where workers are susceptible to cuts, bruises, and burns from occupational hazards such as machinery, tools, and dangerous chemicals. Janitorial workers also face high exposure to infectious diseases, and suffer from musculoskeletal injuries, slips, and falls on the job.⁵⁰

iv. *Recycling/waste management*

Subcontracting in the recycling and waste management sector rose sharply in the past several decades as cities and counties privatized this traditionally municipal service, performed by public sector workers, to cut costs.⁵¹ By 2002, 53 percent of cities relied on

⁴⁸ Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 352 (2005).

⁴⁹ Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 31, 34, 37 (2009), available at http://www.unprotectedworkers.org/index.php/broken_laws/index.

⁵⁰ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, Janitors and Building Cleaners* (2013), available at <http://www.bls.gov/ooh/building-and-grounds-cleaning/janitors-and-building-cleaners.htm>; National Safety Council, *Cleaning Up Safely: Janitors and Cleaners Face Multiple Hazards* (2013), available at <http://www.nsc.org/safetyhealth/Pages/312JanitorSafety.aspx#.UPeyJzkayfQ>.

⁵¹ See Peter Downs, “Past Experience of Many Cities Suggests Privatizing Sanitation Services Wasn’t a Panacea,” (The Commercial Appeal, July 10, 2011), available at <http://www.commercialappeal.com/news/2011/jul/10/no-quick-fix/> [hereinafter, Downs].

private companies to collect private trash.⁵² Many of these private contractors, in turn, engage staffing agencies to perform part or all of the necessary labor. One of the nation's largest providers of waste and environmental services, for example, relies on a staffing agency network to supply workers to 90% of its recycling centers in the U.S.⁵³

Jobs at waste and recycling facilities present a unique set of health and safety dangers beyond those required for manual labor generally, but both waste management companies that operate the job sites and the staffing agencies with which they contract often fail to provide the appropriate warnings, training and equipment to workers.⁵⁴

Workers are exposed to sharp objects and infectious materials while collecting and sorting waste on fast-moving conveyor belts;⁵⁵ face vehicular injuries riding on the back of garbage trucks, and operating forklifts at busy landfills and transfer stations;⁵⁶ and are

See also David Bacon, "Invisible No More," SAN FRANCISCO BAY GUARDIAN (June 10, 2014), available at <http://www.sfbg.com/2014/06/10/invisible-no-more> (Only one city in the Bay Area does not contract-out garbage collection).

⁵² Downs, *supra* (citing academic research by noting that some cities that privatized waste management subsequently brought it back into the public sphere).

⁵³ *Waste Services Provider: Staffing Case Study*, ELITE STAFFING WEBSITE, <http://www.elitestaffinginc.com/waste-services-case-study> (last visited June 23, 2014).

⁵⁴ *See e.g., The Challenge of Temporary Work in Twenty-First Century Labor Markets, supra.*

⁵⁵ David Bacon, *Christina Lopez, East Bay Recycler*, SAN FRANCISCO BAY GUARDIAN (June 10, 2014), available at [http://www.sfbg.com/2014/06/10/cristina-lopez-east-bay-recycler?page=0,0\(recycling](http://www.sfbg.com/2014/06/10/cristina-lopez-east-bay-recycler?page=0,0(recycling) plant worker was punctured twice by hypodermic needles, injured by falling equipment, and slipped and fell at job) [hereinafter, "East Bay Recycler"]; David Bacon, *Invisible No More*, SAN FRANCISCO BAY GUARDIAN (June 10, 2014), available at <http://www.sfbg.com/2014/06/10/invisible-no-more>

⁵⁶ *See, Deadly Accident at Recycling Center* WTHR CHANNEL 13, (Nov. 11, 2013) <http://www.wthr.com/story/23932221/2013/11/11/emergency-crews-at-recycling-center> (Forklift operator crushed to death at a recycling facility dependent on formerly incarcerated workers employed on a temporary basis).

exposed to dangerous chemicals used to treat waste.⁵⁷ Through investigations into accidents at waste management facilities, OSHA has repeatedly found that employers failed to provide temporary workers with the same equipment and training as regular full-time employees even though they performed the same work and were exposed to the same hazards, including fatalities that might have been avoided had the workers simply been issued reflective vests.⁵⁸ Workers hired by staffing agencies have also reported that they were not told that they needed vaccinations to prevent the infections and illnesses associated with handling hazardous materials.⁵⁹

Labor abuses will persist and worsen if workplace laws are not vigorously upheld in subcontracted work structures.

II. The Board's joint employment standard and its application should be clarified to ensure that the growing number of workers in subcontracted work structures are able to assert their rights to organize and collectively bargain as guaranteed by the NLRA.

A. The NLRA has long contemplated joint employment and in controlling Supreme Court and Board decisions construed the doctrine broadly to find joint employment in a variety of subcontracting situations.

Since at least 1965, the Supreme Court and the Board have recognized that a group of workers may have more than one employer and that in such instances both employers must bargain collectively with the workers over the terms and conditions of

⁵⁷ See, Staffing Industry Analysts, *Buyer Gets Brunt of OSHA Penalties*, (February 5, 2014) (OSHA cited staffing agency Sizemore for failing to provide temporary workers with training regarding formaldehyde).

⁵⁸ Sandy Smith, *OSHA Fines Company \$84,500 Following Temp Worker's Death*, EHS TODAY (Jan. 23, 2003), [http://ehstoday.com/news/ehs_imp_36098](http://ehstoday.com/news/ehs_imp_36098;); *OSHA Fines Waste Hauling Company Following Fatality*, OSHA (Nov. 1, 2000), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=350

⁵⁹ *The Challenge of Temporary Work in Twenty-First Century Labor Markets* at 6; EAST BAY RECYCLER, note *supra*.

employment. Such “joint employment” often exists where, as here, an employer brings in unskilled labor to work at the company to perform part of the company’s normal production process. So, for example, in *Boire v. Greyhound Corporation*, 376 U.S. 473 (1965), the Supreme Court reversed the lower courts’ rejection of the Board’s determination that Greyhound was a joint employer of porters, janitors and maids who worked in Greyhound’s bus terminals for a contractor. The Board had found that:

[W]hile [the contractor] hired, paid, disciplined, transferred, promoted and discharged the employees, Greyhound took part in setting up work schedules, in determining the number of employees required to meet those schedules, and in directing the work of the employees in question. The Board also found that [the contractors’] supervisors visited the terminals only irregularly—on occasion not appearing for as much as two days at a time—and that... Greyhound had prompted the discharge of an employee whom it regarded as unsatisfactory.

Boire v. Greyhound Corp., 376 U.S. at 475.

In remanding for a determination of the joint employer status of Greyhound, the Court rejected the notion that Greyhound could not be required to bargain jointly with its contractor if the contractor were found to be a viable independent business, saying

[w]hether Greyhound...possessed sufficient control over the work of the employees to qualify as a joint employer with [the contractor] is a question which is unaffected by any possible determination as to [the contractor’s] status as an independent contractor. . . . And whether Greyhound possessed sufficient indicia of control to be an ‘employer’ is essentially a factual issue. . . .

Id at 481.⁶⁰ Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate, but they share or codetermine those matters governing the

⁶⁰ On remand, the Board and the 5th Circuit found that Greyhound was indeed a joint employer of the maintenance and service workers in the terminals. *NLRB v. Greyhound Corp.*, 368 F.2d 778, 781 (5th Cir. 1966) (holding that “[e]nforcement of the Board’s order does not prevent [the contractor] and Greyhound from continuing their contractual arrangement. As stated in the Board’s reply brief, they ‘may retain their present relationship in every respect except one- they may not finally establish the wages, hours,

essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries* 691 F.2d 1117, 1123 (3d. Cir. 1982).

In a later case, the Supreme Court explained that under the common-law agency doctrine, servants could have two accountable masters, so that allowing for joint employment under the NLRA does not expand common-law principles. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995). Therefore, in this case, both Leadpoint and BFI can be required by the Board to bargain with the agency's workers, if the Board finds "sufficient control [by BFI] over the work of the employees" seeking to bargain for terms and conditions of their employment. *Boire v. Greyhound Corp.*, 376 U.S. at 481.

Common-law agency principles may be used to determine whether sufficient right to control resides in BFI. These principles were referenced in a non-exhaustive list in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989):

We consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

The Restatement (Second) of Agency includes many considerations that are much broader and less formalistic than the current Board test, and includes such factors as whether or not the one employed is engaged in a distinct occupation or business and whether or not the work is a part of the regular business of the putative employer.

and other conditions of employment of unit employees by contract..., although they may take a common position and, in good faith, bargain to impasse with the Union.”

Restatement (Second) of Agency § 220(2) (1958). The common law test for employment thus has no “shorthand formula or magic phrase” to arrive easily at a result, and, instead, “... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

B. The Regional Director and the Board continue to over-emphasize certain factors in determining employer status and fail to center on the key consideration of the *ability* of the purported employers to control or codetermine the terms and conditions of employment.

To carry out the intended purposes of the NLRA, the Board should objectively and realistically view the facts illustrate what entity or entities have the ability to control the terms and conditions of employment.⁶¹ The Board should review the key facts with an eye towards the economic reality of the employment relationships. The joint employer standard should be applied broadly as a totality of the circumstances inquiry; all relevant factors should be assessed in order to permit workers to bargain with the entity or entities that have the power to determine the terms and conditions of their employment, and no one factor should be considered dispositive in finding joint employment.

1. The ability to control and not the exercise of control over the conditions of employment is decisive.

The right or ability to control the work, rather than the actual exercise of that right, is the primary consideration in determinations of an employment relationship. *See, e.g., Taylor’s Oak Ridge Corp.*, 74 NLRB 930, 932 (1947).

For instance, BFI has the ability to control or codetermine the wages of the workers, and the Regional Director should have considered the economics of the

⁶¹ Member Liebman noted "the sharp limits of the Board's joint-employer doctrine, which may prevent employees from bargaining with the company that, as a practical matter, determines the terms and conditions of employment." *Airborne Freight Co.*, 338 NLRB 597, 598 (2002).

circumstances presented when the workers seek a negotiated increase in their hourly wages. Under the contract between BFI and Leadpoint, BFI pays the agency an agreed-upon wage for the workers plus a percentage to cover the other labor-related costs -- a cost-plus contract. Decision at 5. The reimbursable cost, hourly wages times hours worked, is based on what the agency pays, but only if the pay rates are approved in advance by BFI. Tr. 176:9; 226:1-6. While in theory Leadpoint is free to pay the workers a higher hourly wage than it can get reimbursed by BFI,⁶² if it does so, the increase plus the added payroll taxes will either cause it to suffer losses on this contract or cut into the profit it has negotiated into its contract with BFI. Under this extreme form of cost-plus contract, the agency employees need BFI at the table to negotiate wage increases.

BFI also controls the production line speed, which determines how fast the workers must work. BFI did not dispute that it had exclusive control over the speed of its line, because that work was completely integrated into the overall production process at its facility: BFI's direct employees brought in the refuse going on the line and BFI's employees also handled the product at the end of the line. Tr. 40:14-21; *see Greyhound*, 153 NLRB 1488, 1495 (1965)(contract employees work is integral part of Greyhound's transportation services, and Greyhound thereby exercises control over their work). Because of its exclusive control over line speed, BFI must be at the table for effective collective bargaining on this condition of employment to occur.

The record shows many aspects of mandatory bargaining were under the exclusive control of BFI, including the days worked, the schedule of work hours each

⁶² The contract also prohibits the agency from paying its employees "in excess of the pay rate for full-time employees of [BFI] who perform similar tasks." Tr. 179:11-17.

day, break times, safety rules in the facility, overtime hours for each line, the number of workers assigned to work on each line, and their placement on the lines.⁶³

While Leadpoint could alleviate the effect of BFI's exclusive control over these working conditions by substituting other temp workers for those normally scheduled to work, as a matter of economic and practical reality, such control by the agency is very limited. Though BFI sets the days of work and the hours the line runs, the temp agency could in theory schedule individual workers on fewer days or for fewer hours than the days and hours the line runs. Similarly, when BFI decides to run the line longer on certain days, resulting in overtime work, Leadpoint could allow workers to go home at the end of the regular shift and call in other temp workers for the overtime hours. However, unless it can be shown that such actions are regularly taken by Leadpoint to mitigate the effect of BFI's control over the days and hours worked, the Board should find that the control over these line operations by BFI shows joint employment.

2. Indirect and direct control by the putative employers should be considered.

Even if the control is entirely indirect, as in when it is exercised through a contractor as an intermediary, if the control exists and the contractor is as a matter of economic reality unable to impose its own control in lieu of that of the contracting company, joint employment should be found because the contractor alone is unable to bargain with the union over such working conditions. *See, e.g., Hodgson v. Griffin & Brand*, 471 F.2d 235, 238 (5th Cir. 1973)(control exercised by a grower through a supervisor of another company does not negate a finding of control by the grower).

⁶³ Tr. 51:18-25; 179:4-10; Tr. 39:18-20; 140-19; 148:6-11; Union Exh. 2; Tr. 58:14-25; Tr. 87:8-23; 107:19; 108:3; 274:21; 275:20; Union Exh. 1; Tr. 45:5-11; Tr. 36:4-12; 105:17-21; 36:13-19; 165:1-6; Union Exh. 1; Tr: 54:12-15; 149:8-10.

This kind of control is illustrated by the testimony of BFI's Operations Manager, Paul Keck. He testified that BFI wanted the agency employees to clean up around their work areas before they took breaks when BFI stopped the line, and that he communicated this to Leadpoint supervisors to no avail. Tr. 296:10-297:5. Keck then went directly to the workers to instruct them that the work areas needed to be cleaned. Because he communicated directly with the workers, he exercised direct control over the requirements imposed on workers taking breaks. But had Leadpoint effectively implemented Keck's instructions, the control over the break time requirements would have been only indirect. Because the joint employment determination looks to the ability of BFI to control conditions of employment, like break time requirements, it makes no difference whether the control is exercised directly or indirectly, if in fact BFI has the ability to control the conditions under which agency personnel take their breaks.

This control should also be analyzed in the context of the nature of the employee's work; in jobs where employees are rarely directly supervised in their day-to-day tasks, the lead employer's level of actual supervision is less relevant. *See, e.g., Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302 (1st Cir. 1993)(right to control requires only such supervision as the nature of the work requires); *Breaux & Daigle, Inc. v. U.S.*, 900 F.2d 49, 52 (5th Cir. 1990)(crab picking is a simple task that does not require much supervision in Federal Insurance Contributions Act independent contractor case).

3. The motive or purpose of a putative employer's behavior is not relevant: it does not matter *why* a party has the ability to control the working conditions; the only consideration should be *whether* such ability to control exists.

The reasons behind a putative employer's behavior are not relevant to a determination of employer status. The Board should look to the economic and industrial

reality in a workplace to see whether the putative employer has the ability to control or codetermine terms and conditions of employment. The Regional Director mistakenly discounted clear exercise of control by BFI when it determined that BFI's behavior was due to some benign purpose, like protecting its premises, or complying with government controls. Decision at 14, 17. The purpose or motive behind an employer's acts is not important; what matters is whether the putative employer has the ability to exercise control that properly makes it a joint employer. *Rediehs Interstate, Inc.*, 255 NLRB 1073 (1980); *accord Mitchell Bros.*, 249 NLRB 476 (1980).

If an employer such as BFI asks a worker to leave its premises, for instance, that is clear evidence of BFI's ability to control that employee's job completely by firing him, and shows that BFI is a joint employer. *See West Tex. Utils. Co.*, 108 NLRB 407, 414 (1954) (property owner's authority to exclude employees from the premises evidence of joint employment). Other premises-related controls such as security procedures, access controls, drug screens, and safety requirements are important indicia of a putative employer's ability to control and codetermine the workplace and aspects of the job and cannot be dismissed because of some benign purpose or motive. *See, e.g., Thriftown, Inc.*, 161 NLRB 603 (1966) (stores' licensees requirement to comply with the premises rules were relevant to a finding of joint employment).

An employer's exercise or right to exercise control over a job based on its obligations under government or public regulations such as safety rules likewise should be directly relevant to a finding of joint employment because they are important evidence of a company's ability to control the workplace. The Board has held that controls imposed by government regulation, while not sufficient in themselves to create an

employment relationship, are nevertheless evidence that “may be considered in conjunction with other elements of the relationship in determining the status of an individual worker.” *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d 966, 974 (9th Cir. 1978). *See also, NLRB v. A. Duie Pyle*, 660 F.2d 379, 385 (3rd Cir. 1979) (same); *NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1225 (5th 1974) (same); *Ace Doran Hauling & Rigging Co. v. NLRB*, 462 F.2d 190, 194 (6th Cir. 1972) (finding truck drivers were employees based on “both additional controls” and the control and supervision exercised pursuant to ICC requirements).

4. A written contract is evidence of the employment relationship, and its terms, are not a substitute for a review of what actually happens in the workplace between the parties.

The Regional Director did not give sufficient credence to the limitations on Leadpoint that arose from its contract with BFI. Repeatedly, the Regional Director rejected this contract as a basis for finding joint employment because no one provision “alone create[d] a level of control” or “alone . . . warrant[ed] a finding that BFI actually controlled.” Decision at 17. First, because the inquiry should look to the totality of the circumstances showing the ability to control, the Regional Director’s insistence on one element alone to show it is misplaced. In addition, the Regional Director failed to recognize that contract provisions that limit wages paid to Leadpoint employees and that control the speed of the line, for example, make up a piece of the joint control exercised by BFI and Leadpoint. In fashioning a joint employer test, the Board should be state that control can at least in part be created by contract. *See NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117 (3d Cir. 1982). A contract shows the ability to control, whether it is exercised or not. If the contract realistically limits Leadpoint’s ability to make

independent decisions on mandatory subjects of bargaining, the contract is evidence that the two employers have agreed to share control.

C. The Board’s joint employer principles are important to uphold the Act’s emphasis on collective bargaining.

The joint employer principles most useful for the Board’s determination should align with the statutory purposes for finding a joint employment relationship under the NLRA, because they identify the employers with the ability to control or codetermine working conditions over which bargaining is likely to occur. Effective collective bargaining can only occur where the parties at the table have the ability to control the disputed issues. *Tanforan Park Food Purveyors Council v. NLRB*, 656 F. 2d 1358, 1361 (9th Cir. 1981) (“Indeed, the breadth of Hapsmith’s control over fundamental areas of mandatory collective bargaining makes its position as a joint employer emerge *a fortiori* from *Boire, Sun-Maid, and Gallenkamp*”); *Sun-Maid Growers of California v. NLRB*, 618 F. 2d 56, 59 (9th Cir. 1980) (“Here, Sun-Maid controlled the electricians’ work schedules, assigned the work and decided when additional electricians were needed. These actions amply support the Board’s finding that Sun-Maid was the joint employer of the electricians.”)

In enacting the NLRA, Congress noted the importance of collective bargaining over “wages, hours, [and] other working conditions” as a means of “friendly adjustment of industrial disputes” that without “friendly” resolution could lead to “industrial strife and unrest” jeopardizing the “free flow of commerce.” 29 U.S.C. §151. The importance of effective collective bargaining in reducing industrial strife and protecting the flow of commerce was recognized by the Supreme Court soon after the NLRA was passed:

It (the NLRA) is premised on explicit findings that strikes and industrial strife themselves result in large measure from the refusal of employers to bargain collectively and the inability of individual workers to bargain successfully for improvements in their 'wages, hours, or other working conditions' with employers who are 'organized in the corporate or other forms of ownership association.' Hence the avowed and interrelated purposes of the Act are to encourage collective bargaining . . .

NLRB v. Hearst Pub., 322 U.S. 111, 126 (1944).

Conclusion

The Board should clarify its joint employment standard to align the considerations more tightly with the statutory purposes of the NLRA to promote labor peace and effective collective bargaining, and with an eye to the underlying economic reality of today's increasingly disaggregated workplaces.

Respectfully submitted,



Catherine K. Ruckelshaus
Laurence E. Norton
Sarah Leberstein
Anthony Mischel
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025 x 306
Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2014, I caused a copy of this *amicus* brief to be served upon the following parties and counsel of record by electronic delivery via the Clerk of the National Labor Relations Board:

Adrian Barnes, legal representative for Petitioner
Beeson Tayer & Bodine

Elizabeth Townsend, legal representative for Employer
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,

Mark Kisicki, legal representative for Employer
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,

Michael Pedhirney, legal representative for Employer
Littler Mendelson, P.C.

Thomas Stanek, legal representative for Employer
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery, Employer

FPR-II, LLC, d/b/a Leadpoint Business Services, Employer

Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters,
Petitioner



Catherine Ruckelshaus
Attorney for *Amici Curiae*