Written Testimony
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REDEFINING "EMPLOYER" AND THE IMPACT ON GEORGIA'S WORKERS AND SMALL BUSINESS OWNERS

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I. Executive Summary

Under current and well-established legal precedent, two employers are deemed "joint employers" when the two entities share the ability to control or co-determine employees' essential terms and conditions of employment. To establish a joint employer relationship under this test, there must be evidence that one employer meaningfully affects matters central to the employment relationship of the other. Relevant factors include the right to hire, terminate, discipline, supervise and direct the employees. In applying this test, administrative agencies and courts generally have found that the control exercised by the putative joint employer must be actual, direct, and substantial—not simply theoretical, possible, limited or routine.

Recently, the National Labor Relations Board ("Board" or "NLRB") indicated a willingness to amend the current standard for determining that two employers are joint employers in favor of the standard advocated by the Board's General Counsel, Richard Griffin. Under the General Counsel's proposed standard for re-defining joint employer status, the Board would consider not only the direct ability to control and determine terms and conditions of employment as is now required, but apply a much broader test which examines the "totality of the circumstances." This would include an employer's indirect or potential ability to exercise authority in these areas. For example, under such a test, the Board likely would find joint employer status based upon a contractual—but unexercised—authority to discipline or effectively recommend discipline of another employer's employees.

General Counsel Griffin's proposed standard has been widely criticized. The business community has expressed legitimate concerns about the practical application of such a change in the legal test. The business community is concerned that were the Board to adopt this proposed standard, more employers would qualify as joint employers, putting them at risk for alleged labor and employment law violations of a separate employer and potentially burdening them with collective bargaining responsibilities and obligations under the NLRA. In addition, recently a group of six state attorneys general urged the Board not to adopt the proposed standard, citing the harm it would cause to franchises and other businesses.

Generally, concerns regarding the adoption of the proposed, revised standard focus on the lack of clarity it would provide businesses, leaving them open to significant labor liability as a potential joint employer despite their lack of direct and meaningful control over the employment relationship of the other employer. The "totality of the circumstances" looks to whether one business exercises financial control over the other company such that it implicates employment terms and conditions of the other's employees. If the Board were to find that one business exercised such financial control, then both employers could be liable for violations committed by one of them. Furthermore, under the proposed standard, one employer could be embroiled in a potential union effort to organize the workforce of the other—again, without any real responsibility for or control over the working conditions or environment affecting those employed directly and who are the target of the drive.

The proposed standard certainly create a great deal of uncertainty as to the legal status and scope of employer-employee relationships which now exist and are working effectively, including many franchise structures. An adoption of the proposed standard likely would require the franchise industry to rethink its business model, particularly with regard to how businesses address and respond to concerted activity and labor organizing efforts by its employees and the employees of those with which it has a business relationship. From a labor relations standpoint, were the Board to adopt the proposed standard, it is likely that many businesses would revisit their current relationships and explore substantial changes with regard to the business and which would have employment implications. This may include severing current business relationships so as to eliminate the risk of being found a joint employer under the NLRA and the potential legal implications that would trigger. Alternatively, it may lead to a greater degree of unwarranted and unwanted influence by one employer upon the terms and conditions of employment another has elected to provide.

Congress should be aware that the change encouraged by the Board's General Counsel would be a significant one. Disturbing the well-established standard applied to determine whether a joint employer relationship exists and, more particularly, opting for a broader, ambiguous standard, would require many employers to revisit, analyze and likely revise their current business practices which could negatively impact many other businesses and their employees.

II. Introduction

The NLRB's current General Counsel, Richard Griffin — one of the controversial Board recess appointments later found improper — has urged the Board to significantly revise established precedent regarding the definition of joint employer which employers have used to guide their employment and business relationships for many years. On April 30, 2014, the NLRB invited amicus briefs on whether it should adopt a new joint employer standard in a matter before it. In *Browning-Ferris Industries of California Inc*., the question before the Board is whether Browning-Ferris should be considered a joint employer with Leadpoint, a staffing services company with which it has a contractual relationship, in a union representation election filed with respect to Leadpoint's employees. Mr. Griffin has advocated adopting a new standard under which an entity

would be a joint employer "if it exercised direct or indirect control over working conditions, had the unexercised potential to control working conditions, or where 'industrial realities' otherwise made it essential to meaningful bargaining."

The Board is expected to issue its decision in *Browning-Ferris* any day. In the meantime, businesses have continued to rely on the established Board precedent regarding joint employer status, while looking forward and preparing for the possibility of a change in the Board's interpretation of the statute that would require a new analysis of—and likely major changes to—how many businesses are run.

III. Background

For over 30 years, the Board has followed the same standard to determine whether two distinct business entities are joint employers under the National Labor Relations Act ("NLRA"). Under that approach, the Board assesses whether the businesses exert such direct and significant control over the same employees such that they share or co-determine those matters governing the essential terms and conditions of employment…." *TLI, Inc.*, 271 NLRB 798, 798 (1984). According to the U.S. Supreme Court, the NLRB's joint employment test is designed to determine whether a putative joint employer "possesses sufficient control over the work of the employees to qualify as a 'joint employer' with [the actual employer]." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). Joint employment occurs when "one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." *NLRB v. Browning-Ferris Industries of Pa., Inc.*, 691 F.2d 1117, 1123 (3rd Cir. 1982). Absolute control over the employees of another employer is not required. Rather, the test "recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment." *Id.* (emphasis in original) citing *Cr. Adams Trucking, Inc*., 262 NLRB No. 67 (1982); *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969); *NLRB v. Greyhound Corp*., 368 F.2d 778, 780 (5th Cir. 1966).

Prior to 1984, the Board applied a standard that, by many measures, was unclear. The Board itself noted that prior to the *Browning Ferris* decision, the Board's definition of a joint employer relationship was somewhat ambiguous. *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993). In one case, joint employer status was found where the business exerted only "indirect control" over the discipline and wages of the other entity's employees, *Floyd Epperson*, 202 NLRB 23 (1973), whereas in another case, the Board agreed with the administrative law judge that "indirect control over wages and hours" is "insufficient to establish a joint-employer relationship," *Walter B. Cooke, Inc.*, 262 NLRB 626, 641 n.70 (1982). Other cases conflated the joint employer doctrine with the separate "single employer" or "common enterprise" theory, and looked to "industrial realities" even where the entity found to be the joint employer played no role in hiring, firing or directing the employees. *Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968).

The Board's conflicting standards made it difficult for businesses to develop the scope of their business relationships in a manner compliant with legal precedent. When

the Board decided *TLI* and then *Laerco Transp.*, 269 NLRB 324 (1984), the business community was provided with some needed and well-founded clarity.

In *Laerco*, a group of drivers from CTL worked as suppliers to Laerco under a contract. *Id* at 325. CTL made all of the decisions regarding hiring, firing, discipline and discharge. *Id*. CTL handled all of the compensation-related contributions and deductions from the drivers' salaries. *Id*. CTL provided the drivers with all of their benefits. *Id*. Even after drivers were assigned to a Laerco facility, CTL sometimes continued to provide the drivers with job instructions. *Id*.

Laerco supplied the drivers with vehicles and imposed safety regulations on their activities. *Id.* at 324. Laerco established and enforced driver qualifications. *Id*. Laerco occasionally identified issues in the drivers' performance, which were relayed to CTL which ultimately decided upon and oversaw any necessary discipline. *Id*. Laerco did provide the drivers' with daily operational supervision and direction. *Id*. Laerco sometimes corrected minor problems that arose in the workplace, but issues of any significance were relayed to and resolved by CTL. *Id.* at 326.

The Board reviewed the facts of the case and articulated the standard for joint employer status, relying on the *NLRB v. Browning-Ferris Industries* decision:

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment. *[Citing Boire v. Greyhound Corp.,* 376 U.S. 473 (1964) and *NLRB v. Browning-Ferris Industries,* 691 F.2d 1117 (3d Cir. 1982)] Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

The Board held that the level of control over the drivers exercised by Laerco was not sufficient to establish that Laerco and CTL functioned as joint employers. *Id*. The decision emphasized that to be considered a joint employer, the business needed to exercise supervision beyond that of the "routine" supervision of daily activities that Laerco was providing. In *TLI*, one business, TLI, also provided drivers to a separate business, Crown. *TLI, Inc.* 27 NLRB 798 (1984). Crown directed the drivers regarding delivery assignments. *Id.* at 799. While accidents were reported to Crown, TLI investigated and made findings on the cause of the accident. *Id*. TLI was also responsible for determining and issuing any disciplinary action.

Similar to and relying on the Board's decision in *Laerco*, the Board determined that a business would not be deemed a joint employer unless it exercised "meaningful" supervision and hiring, firing and disciplinary authority. The Board went on to point to the *Browning-Ferris* decision, finding that "[a]lthough Crown may have exercised some control over the drivers, Crown did not affect their terms and conditions of employment to such a degree that it may be deemed a joint employer." *Id*. Because of Crown's lack of "meaningful" daily supervision as well as their lack of influence and authority over hiring, firing, and disciplinary decisions, Crown lacked the sufficient control to support a joint employer finding.

Following the *Laerco* and *TLI* decisions, the Board has continued to apply a consistent and clear test to determine whether an employer meets the status of joint employer. However, in 2014, the NLRB's General Counsel proposed to abandon the current standard and revert back to the ambiguous standard applied by the Board prior to 1984. Below, the current and proposed standards are set forth in further detail, along with the likely effects of a change in the Board's approach.

IV. The Current Standard

The current NLRB standard to determine an employer's status as a joint employer ties employer status to the employer's direct and immediate control over central aspects of the employment relationship. This ensures that joint employer status is only assigned to businesses with actual authority to impact the employment relationship. In further refining and applying the current test, the Board has stated that the control exercised by the putative joint employer must be direct and immediate, actual, not simply theoretical or possible, and substantial rather than limited and routine. *See Id.*; *Airborne Express*, 338 NLRB 597 n.1 (2002); *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 677-78, 687-90 (1993). The question of joint-employer status turns on the facts of each particular case. *Southern California Gas Co.*, 302 NLRB 456, 461 (1991).

To establish joint employer status under this test, the focus is upon the following evidentiary factors as to whether an employer has the ability to directly and immediately control employment terms: hiring, firing, discipline, supervision and direction of the other employer's employees. *Am. Prop. Holding Corp.*, 330 NLRB 1000 (2000). Typically, the Board looks to the actual practice of the parties rather than relying solely on contractual provisions. *Id*. Accordingly, a contractual provision giving the alleged joint employer the authority to approve the second employer's hiring and firing, standing alone, would be insufficient to show the existence of a joint employer relationship under the current test. *TLI, Inc.*, at 798-99.

Additionally, under the current standard, the mere suggestion by one employer to the other to hire individuals is not indicative of a joint employer relationship. *Martiki Coal Corp.*, 315 NLRB 476, 478 (1994) (employer's role in providing employment forms to applicants and making recommendations is insufficient). Similarly, under its current approach, the Board has declined to find a joint employer relationship where the putative joint employer reports misconduct that leads the other employer to terminate an employee. *See Southern California Gas Co.*, 302 NLRB at 462 (affirming ALJ finding

that alleged joint employer did not terminate employee in question but instead indicated that it no longer wanted employee at its facility. The Board concluded that the other employer chose to terminate the employee, noting that the other employer had sole responsibility for resolving any challenge under collective bargaining agreement).

The types of discipline suggestive of a joint employer relationship under the current standard include "issuing written and verbal warnings, and suspending employees." *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1302 (2000), *overruled* on other grounds in *Oakwood Care Ctr.*, 343 NLRB 659 (2004). In *M.B. Sturgis*, the alleged joint employer had the authority to discipline the supplied employees, and supervisors from both employers jointly issued a disciplinary warning to the second employer's employees. The Board concluded that this discipline meaningfully changed the "essential terms and conditions of employment" enough to create a joint employer relationship. *Id*. In contrast, where a supervisor of one employer casually or informally reprimands an employee of another employer without any formal written or verbal discipline, it will not serve to establish a joint employer relationship. *Rawson Contractors*, 302 NLRB 782, 783 (1991) (finding no joint employer relationship where employer's officials could "yell at" drivers and "get on them," but could not issue warnings to drivers or impose any other discipline).

When analyzing whether a joint employment relationship exists under the current test, the Board looks for significant evidence of supervision and direction of another employer's employees. Under this test, evidence of supervision that is "limited and routine" does not support a joint employer finding. *Am. Prop. Holding Corp.*, 330 NLRB at 1001. The Board generally considers supervision to be "limited and routine" where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work. *Id.*; *Island Creek Coal Co.*, 279 NLRB 858, 864 (1986); *see, e.g.*, *Teamsters Local 776*, 313 NLRB 1148, 1162 (1994) (holding that two companies were not joint employers where the alleged joint employer exercised only minimal and routine supervision of the other employer's employees and had only limited dispute resolution authority due to the routine nature of the assignments it made).

In contrast, where one employer specifically trains or instructs the employees of another employer regarding how to perform their work, this can be sufficient evidence of a joint employer. *See Am. Prop. Holding Corp.*, at 1001; *Continental Winding Co.*, 305 NLRB 122, 123 (1991) (finding joint employer relationship even though supplier employer alone hired employees supplied to a user employer and set and paid their wages, because user employer exercised sole authority to assign, schedule, and supervise the workplace conditions, and the supervision was significant and more than "routine").

The Board currently considers evidence of administrative control over employees, such as the determination of wage rates, work hours, work assignments and employment tenure as suggestive of joint employer status, even where an employer may not have discretion in supervision, direction or hiring. *CNN America, Inc.*, 361 NLRB No. 47, n.7 (2014). *See e.g. D&F Industries*, 339 NLRB 618, 640 (2003) (basing joint employer status on authority over filling vacancies, wages, and overtime even in the absence of

evidence of control over hiring, discipline and supervision); *Quantum Res. Corp.*, 305 NLRB 759, 760-61 (1991) (finding a joint employer relationship where the employer designated wage rates, pushed through raises, and exercised authority over work hours for employees of second employer).

V. The Proposed, Revised Standard

In the *Browning-Ferris* case currently pending before the Board, the General Counsel has endorsed a broader theory of joint employer status and attendant responsibility. Many expect the Board to issue its decision before Member Harry I. Johnson's term expires on August 27, 2015.

In his *amicus* brief in this case, the General Counsel asserted that companies may effectively control wages by controlling other variables in the business. *See Amicus* Brief at pp. 11-13 (referencing David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 THE ECON. & L. REV. 33, 36-37 (2011)). The General Counsel has proposed a move from the day-to-day control over employment conditions to operational control at the system-wide level. The General Counsel would find joint employment based on direct control, or indirect control or potential control, and when "industrial realities" would render the company a "necessary party to meaningful collective bargaining."

This standard endorsed by the General Counsel would be a significant departure from the one currently applied and is likely to have far-reaching effects. In the franchisee/franchisor context, for example, franchisors have no direct control over a franchisee's employees. However, the General Counsel believes the franchisor can exert significant control over the day-to-day operations of their franchisees simply by dictating the terms of the franchise agreement. *Amicus* Brief at p. 14. In addition to franchise businesses, a revised standard would affect relationships and have potential economic consequence within supply chains, dealer networks and staffing companies.

Under the current standard, an employer's authority to make hiring, firing and disciplinary decisions is a primary factor the Board would consider in the determination as to whether the business is a joint employer. Under the standard advocated by the General Counsel, the Board would make no distinction between actual, exercised control over employees and potential/indirect control over employees. Thus, having the authority to participate in hiring, firing and disciplinary decisions—whether or not the putative joint employer actually utilizes such discretion—would be sufficient to make that employer a necessary party for meaningful bargaining, and therefore a joint employer. *See e.g. Manpower, Inc.*, 164 NLRB 287 (1967) (noting that putative joint employer could request certain specific employees and refuse others even though ultimate hiring and firing decisions were outside their authority); *Jewel Tea Co.*, 162 NLRB 508 (1966) (holding that the right to effectively hire and discharge was sufficient to find joint-employer status even though the power had never been exercised); *Spartan Department Stores*, 140 NLRB 608, 610 (1963) (taking into consideration one employer's contractual right to terminate employees, without looking to actual practice). In addition, the General Counsel has argued that this type of potential control over

employees' working conditions can be based not only on specific contractual provisions but also through the "industrial realities" of the relationship.

Under the current standard, the Board looks to evidence that a business exercised supervision over the employee in determining whether the employer was a joint employer. The level of supervision and direction necessary for a finding of joint employer status under the General Counsel's proposed test would likely include supervision that would be considered limited and routine—and thus not determinative—under the current test. *See e.g. Hamburg Industries*, 193 NLRB 67 (1971) (relying in part on superintendents' supervision and work instructions in joint employer finding); *Greyhound Corp.*, 153 NLRB 1488 (1965), enfd., 368 F.2d 778 (5th Cir. 1966) (looking to detailed instructions in service agreements for performance of tasks as evidence of joint-employer status); *Moderate Income Mgmt. Co.*, 256 NLRB 1193, 1194 (1981) (finding joint employers where property-management company trained the housing project's superintendent).

VI. Potential Effects of Changing the Standard

If the Board changes its existing joint employer standard in *Browning Ferris* endorsed by its General Counsel as most predict it will, the new standard would broaden the application of the joint employer doctrine, rendering a greater number of employers subject to a duty to bargain and liable for unfair labor practices committed by its new "joint employer". This potential for new or increased liability certainly will lead to an evaluation of the value of existing and otherwise mutually beneficial business relationships by many employers.

For example, when joint employer status exists between two entities, both entities may be liable for unfair labor practices related to the unlawful discharge or discipline of an employee under the NLRA. The Board has stated that it will find joint liability for an unfair labor practice where: (1) the non-acting employer knew or should have known that the other employer acted against an employee in violation of the NLRA; and (2) the non-acting employer acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist the unlawful action. *Capitol EMI Music*, 311 NLRB 997 (1993). In such cases, the Board allocates the burden of proof as follows:

> The [NLRB] General Counsel must first show (1) the two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, or should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action.

> Id. at 1000. In addition to unfair labor practice liability, a joint employer can be held jointly and severally liable for other statutory violations committed by the other employer (e.g., claims under Title VII of the Civil Rights Act, the Fair Labor Standards Act, the Family and Medical Leave Act and the Americans with Disabilities Act).

A more broadly applied standard for joint employer status would be expected to result in increased liability for failing to honor terms of a collective bargaining agreement. Joint employer status requires both parties to honor the collective bargaining agreement of the jointly employed staff and bargain with the union over matters impacting their terms and conditions of employment. This duty has been found to specifically encompass the decision to terminate a contract with a service provider who jointly employs the unionized employees, as well as the effects of that decision on the employees. *See, e.g., American Air Filter Co.*, 258 NLRB 49, 53 (1981). Additionally, joint employers are subject to and must respond to relevant information requests from the union.

A business not previously exposed to labor disputes involving the employees of a business with which they engage could become embroiled under the proposed standard. The NLRA generally permits unions to use economic weapons such as strikes, pickets and boycotts at an employer's facilities if it has a labor dispute with the employer. However, the NLRA prohibits unions from using such economic weapons against "neutral" third parties. Where, however, a joint employer relationship exists between the employer directly involved in the labor dispute and a secondary employer, the joint employer is considered an "ally" of the primary employer, and consequently, loses the NLRA protection against union pressure. *See, e.g., Teamsters Local 557*, 338 NLRB 896 (2003) (noting that third party loses its neutrality where it exercises substantial control over the picketers' terms of employment).

VII. Conclusion

Recent agency moves beyond the NLRB endorsed by the Obama administration appear aligned with the Board General Counsel's proposed expansion of joint employer status. The Department of Labor's wage and hour administrator, David Weil, has for years attributed an increase in employment law violations to the "fissuring" of the workforce, which includes franchising and the use of independent contractors. Similarly, the Equal Employment Opportunity Commission submitted an amicus brief in *Browning-Ferris* supporting an expanded definition of joint employer. The EEOC's position is joint employers are "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." The EEOC urged the Board to adopt that definition.

Regardless of whether proposed standard is "better" or "worse" than the current one, it is clear that a change to the well-established precedent which has governed employer/employer relations across the country certainly would be disruptive and could have significant economic consequence. A standard that makes it more likely the Board

would find a business to be a joint employer will force many prudent employers to analyze their relationships with third party employers and weigh the new risks. There would be significant costs to businesses that, under the proposed standard, would be liable for unfair labor practice violations and labor organization violations for a larger – sometimes exponentially larger – labor pool. And like any departure from a widely accepted and relied upon standard, a significant change would also result in confusion and uncertainty during expected requests for review and legal challenges as employers navigate the new terrain.