Written Statement of Marcel Debruge[1]
Labor Attorney, Burr & Forman LLP

House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor, and Pensions

Hearing on "Redefining 'Employer' and the Impact on Alabama's Workers and Small Business Owners"

August 25, 2015

I would like to thank the Chairman of the subcommittee, Congressman Roe, Ranking Member, Congressman Polis, and the other members of the subcommittee for this opportunity. My testimony will focus on the potential economic consequences of the NLRB's recent effort to redefine "employer."

United States manufacturing is in the midst of a potential resurgence, and Alabama is a state leading the recovery. Indeed, Alabama manufacturing output has increased almost 40% since 2009.[2] Manufacturing in Alabama now accounts for 17.77 percent of the total output in the state (ranking Alabama 8th as a percentage of gross state product) and 13.23 percent of the employment (ranking Alabama 5th as a percentage of nonfarm employment).[3]

However, past success does not guarantee continued success, particularly in a competitive global environment. Alabama has created an economic climate conducive to manufacturing investment by supplying talented workers and infrastructure, and demonstrating a strong appreciation of business needs. However, recent actions by the federal government, most notably redefining the definition of "employer", create impediments to the state's

[1] Mr. Debruge is a partner in the law firm of Burr & Forman, LLP. Mr. Debruge represents management in all aspects of Labor & Employment law, including litigation before the federal and state courts and administrative agencies. Mr. Debruge engages in a significant amount of employment law counseling regarding policies and procedures, hiring decisions, workplace diversity, and reduction in force. He often conducts training seminars for supervisors and human resource managers. Mr. Debruge routinely handles labor organizing campaigns and NLRB issues for clients, and assists clients with all aspects of employee relations and management training matters. Mr. Debruge has lectured extensively throughout the Southeast in the areas of procedure, labor relations, case assessment, employment law, occupational safety and health law, alternative dispute resolution and employment torts, including restrictive covenant issues. He has written several articles in the areas of litigation and employment law.

The author wishes to thank Matthew Scully and Sharonda Childs for their help in preparing this statement. Matt Scully and Sharonda Childs are associates at Burr & Forman, LLP, where they represent management in the area of labor and employment law.

[2] http://www.nam.org/Data-and-Reports/State-Manufacturing-Data/2014-State-Manufacturing-Data/Manufacturing-Facts--Alabama/

[3] http://www.nam.org/Data-and-Reports/State-Manufacturing-Data/2014-State-Manufacturing-Data/2014-State-Manufacturing-Data-Table/

competitiveness.[4] Specifically, the National Labor Relations Board has taken actions which we anticipate will diminish the distinction between employers and temporary workers and franchisors and franchisees. These actions will result in artificial employment relationships, less flexibility for employers, increased costs and, ultimately, serious consequences for Alabama's economic development and workforce.

I. Redefining Joint Employer Status

It's no secret that the Government has been actively expanding the definition of "employer." The Equal Employment Opportunity Commission has long advocated a fairly broad standard for determining whether two entities are joint employers, looking only to whether two or more employers that are unrelated, or that are not sufficiently related to qualify as an integrated enterprise, each exercise sufficient control of an individual to qualify as his or her employer.[5]

The Department of Labor has also recently clarified its stance on independent contractors, unequivocally stating that "most workers are employees" under the FLSA.[6] Not surprisingly, the National Labor Relations Board followed suit by actively redefining the term "employer" under the National Labor Relations Act. In its recent efforts, the Labor Board has focused on expanding joint employment to include franchisors and employers utilizing temp agencies. The Labor Board's actions are particularly troubling given that numerous American manufacturers incorporate franchising, temporary employees, and/or contractors into their business practices. The practical effect of these changes is clear: employers stand to acquire costs and liability for their participation in franchise relationships or use of temporary employees.

A. The NLRB's Effort to Redefine Joint Employment

In May 2014, the NLRB took up a case to determine whether the Board's current joint-employer standard should be modified -- most likely, with a view toward making it easier to establish a joint-employer relationship. Of note, in Browning-Ferris, the General Counsel for the NLRB filed an amicus brief arguing that "[t]he term 'employer' in the Act was intended to be construed broadly."[7] In CNN America, Inc. (Sept. 15, 2014), the Board confirmed that the standard it applies to determine joint employment is sufficiently broad to capture a majority of primary employer/temp agency relationships. There, the Board noted that it considers two entities joint employers "if the evidence shows that they share or codetermine those matters governing the essential terms and conditions of employment." The Board advised that the factors to consider in making this determination are the employers' authority over hiring, firing,

[4] http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Manufacturing/gx_2013%20Global%20Manufacturing%20Competitiveness%20Index_11_15_12.pdf

[5] Special Issues Regarding Multiple Entities: Joint Employers, 2 EEOC Compliance Manual § 2-III(B)(1)(a)(iii)(b) (2009), 2009 WL 2966755, at text accompanying n.109.

[6] U.S. Department of Labor, Administrator's Interpretation No. 2015-1 (July 15, 2015).

[7] Amicus Brief of the General Counsel, Browning-Ferris Industries, Case 32-RC-109684 (2014).

discipline, supervision, direction, work assignments, compensation, among other factors.[8] In CNN, even though the CNN's contract with its contractor established that the contractors were not employees of CNN, the Board determined that CNN was still a joint employer of the contractors and was bound by the union contract between the contractor and the local union.

Seeking to expand "joint employer" to include even more employment relationships, in December 2014, the NLRB issued charges against McDonald's franchisees and their franchisor, McDonald's USA, LLC, as joint employers. The Labor Board has taken the position that McDonald's USA has utilized its franchise relationship, tools, resources and technology to engage in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of the National Labor Relations Act.[9]

The practical effect of an expanded joint-employer doctrine is to impose additional legal restrictions on the employers who use contingent workers supplied by a staffing agency or participate in franchises, such as limiting an employer's ability to terminate its contract with the staffing agency or make changes that impact the contingent workers' terms and conditions of employment. The Board's actions have potentially massive consequences for the U.S. economy wherein 770,000 businesses are franchises employing 8.5 million people and temporary staffing agencies place an average of 3.15 million workers per week.[10]

B. The NLRB's Effort to Include Temporary Employees in Bargaining Units

Refusing to stop at making employers liable for franchisee and temporary employees, the Labor Board also may be poised to require employers to bargain with employees of their temporary staffing agencies. On May 18, 2015, the Board granted a petition for review in Miller & Anderson, Inc., Case 05-RC-079249, threatening to overturn precedent governing the inclusion of temporary employees in bargaining units. Currently, under H.S. Care, LLC (Oakwood Care Center), 343 NLRB 659 (2004), contingent workers are not included in a bargaining unit with regular company employees unless both the regular employer and the staffing agency consent to include both groups in the same unit.

However, prior to deciding Oakwood, the Board followed the test laid out in M.B. Sturgis, 331 N.L.R.B. at 1308, in which it determined that regular employees and temporary employees could legally organize together without employer consent. It is widely anticipated that the Board will soon reverse Oakwood Care Center, and return to its prior precedent in M.B. Sturgis. Reversal of Oakwood Care Center and a return to Sturgis would have drastic consequences for employers that use contingent workers. This action, in addition to the change to

[8] CNN America, Inc., 2014 WL 4545618 (NLRB Sept. 15, 2014).

[9] National Labor Relations Board, McDonald's Fact Sheet, available at https://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet.

[10] Aloysius Hogan, "The NLRB Joint Employer Cases: An Attack on American Business," Competitive Enterprise Institute (June 2015).

the joint employment test, will not only overrule Board precedent, but will undoubtedly complicate employment relationships.

II. The Effect of the Redefinition of "Employer"

President Obama has made clear that reinvigorating our manufacturing sector is a vital path to restoring the American middle class.[11] In a global economy any manufacturing operation must be lean, flexible and competitive, but the NLRB's recent activity has the potential to significantly increase costs while simultaneously reducing flexibility. Such a path will only hinder the recovery of our manufacturing sector.

One natural consequence of the effort to redefine joint employment is that employers will be more hesitant to utilize temporary employees. But, the ability to utilize temporary employees provides significant benefits, without which employers will be restricted. The Board's recent activity has the potential to trigger four serious consequences for Alabama and U.S. employers.

First, the redefinition of "employer" may restrict employers' ability to utilize temporary employees as a source of flexibility during financially-stressed times. Consider the 2008 economic downturn, which signaled the near collapse of several large auto manufacturers as auto sales decreased by 40 percent and the industry lost 400,000 jobs.[12] Not surprisingly, well-prepared auto manufacturers were able to cut back on temporary employees without having to reduce their full-time staff, cost-cutting measures that helped to weather the crisis. For instance, although BMW's U.S. sales decreased 30.5% in the first five months of 2009, that decrease was less than the rest of the industry's 36.5% drop. Moreover, BMW manufacturing did not lay off any of its 5,000 full-time employees in 2009. Josef Kerscher, president of BMW Manufacturing Company in Spartanburg, South Carolina, attributed BMW's success to flexibility allowing BMW to match production to customer demands.[13]

General Motors, however, cut 107,357 jobs in the two years after the recession, cutting 50,000 jobs (almost 20% of its workforce) in February 2008 alone.[14] In the year leading up to the economic downturn, the United Autoworkers persuaded GM to give more than 4,000 temporary workers permanent jobs and implement a two-tier wage and benefits scale for "non-core" production jobs. The inability to remain flexible in its use of temporary employees no-doubt restricted GM's capacity to respond to the 2008 crisis. Moreover, the blurring of the lines between full-time employees and temps also begs the question of if and when contract workers will also be considered joint employees. The CNN case and the DOL's recent Administrator's Interpretation signal that the distinction between contract workers and employees is steadily

[11] Chris Arnold, "Obama Unveils New Plans to Encourage Manufacturing Jobs," NPR (Jan. 15, 2014).

[12] Whitehouse.gov, "The Resurgence of the American Automotive Industry" (June 2011).

[13] David Barkholz, "Exports, flexibility help BMW's U.S. plant avoid layoffs," Automotive News (June 15, 2009).

[14] Douglas McIntyre, "The Layoff Kings: The 25 Companies Responsible for 700,000 Lost Jobs," Investor Center (Aug. 18, 2010).

fading. This shift could also carry significant consequences given that since 2009 the sector of contract workers has grown by 41 percent, compared with just 6 percent for total employment.[15]

Second, the Board's actions may limit employers' ability to rely on the pool of temporary employees in hiring new full-time employees. Importantly, in this process, employers can outsource recruiting to localized businesses which are in a better position to identify quality local talent. Additionally, temporary employees have received training and have a better understanding of the company's business model and philosophy than employees pulled off the street. Further, time spent as a temporary employee often serves as a sort of probationary period, allowing employers to observe a putative employee's work habits and performance. Thus, being able to hire from the temporary employee pool saves employers untold costs in turnover and retraining. Moreover, many temporary jobs are low-skilled, and employers have little incentive to pay temporary employees the same as full-time employees. But, this would be the likely result of requiring temporary employees and full-time employees to be a part of the same bargaining unit.

Third, designating employers as joint employers of temporary and franchisee employees unwisely seeks to impose a "one-size fits all" model on entities with varying interests. Undoubtedly, full-time employees, temporary employees, temporary agencies, primary employers, franchisors, and franchisees all have different business goals, interests, and needs. Contingent workers are extremely susceptible to union organizing campaigns and union promises - their wages, hours, and other terms of employment are typically substantially different from the employer's regular employees, and they have less job security, less loyalty to the company, often suffer from morale issues, etc. - and unions would immediately target such employees. The new group of voter eligible pro-union supporters could be devastating to an employer opposing unionization. Further, employers are all-but-guaranteed to incur greater legal costs because they would share liability for a temporary employee or franchisee's actions.

Finally, the Board's recent activity threatens our ability to compete globally. As the auto industry continues to globalize, we must ensure that U.S. manufacturers remain competitive. Alabama currently has an environment conducive to manufacturing; we are a right-to-work state with a deep understanding of employers' interests. However, U.S. auto manufacturing jobs are being lost to Mexico at alarming rates. Mexican exports are anticipated to rise to a record 2.9 million in 2015, with more than 70 percent of Mexican-made cars and trucks heading into the U.S.[16] What's more, Mexico is set to increase its output of small cars by 50% through 2019.

Car companies can expect to spend an average of $8/hour, including wages and benefits, on a Mexican worker, whereas General Motors spends an average of $58/hour on American workers and Volkswagen spends approximately $38/hour on workers at its Tennessee factory (the lowest hourly cost in the U.S.).[17] Not surprisingly, car sales in China increased by 6.86% in

[15] National Employment Law Project, et al. *Browning-Ferris Amicus Brief*, at 9.

[16] Ben Bain, "Mexico auto exports forecast to hit record in 2015," Automotive News (Feb. 6, 2015).

[17] CBSNews.com, "Why your next car could be made in Mexico" (Apr. 21, 2015).

2014.[18] President Obama has stated it is his goal to grow manufacturing jobs in America, announcing that he wants "to act, to help make . . . America a magnet for the good high tech manufacturing jobs that a growing middle class requires . . . ."[19] It is simply unrealistic to expect manufacturing jobs to grow if costs keep increasing. We must continue to incentivize companies to manufacture here.

[18] The Statistics Portal

[19] Chris Arnold, "Obama Unveils New Plans to Encourage Manufacturing Jobs," NPR (Jan. 15, 2014).