
Docket No. RIN-3142-AA13

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

NATIONAL LABOR RELATIONS BOARD

Concerning

**THE STANDARDS FOR DETERMINING
JOINT-EMPLOYER STATUS**

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT 83 *FED. REG.* 46681 (September 14, 2018)

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Submitted Electronically (<http://www.regulations.gov>)

Roxanne Rothschild
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National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

**Re: RIN 3142-AA13; The Standards for Determining Joint-Employer Status;
Notice of Proposed Rulemaking and Request for Comments
83 Fed. Reg. 46681 (September 14, 2018)**

Dear Ms. Rothschild:

The Washington Legal Foundation (WLF) is pleased to submit these comments in response to the National Labor Relations Board's proposed rule that would establish standards for determining whether a business qualifies as the "joint employer" of workers who nominally are employed by a separate company.

WLF strongly supports the NLRB's decision to undertake a rulemaking proceeding regarding joint-employer standards, rather than (as in the past) addressing the issue solely through case-by-case adjudication. Rulemaking is particularly warranted in light of the upheaval in the past four years in this area. In 2015, the NLRB's *Browning-Ferris* decision repudiated its decades-old joint-employer standards. A 2017 NLRB decision overruled *Browning-Ferris*, but the NLRB vacated the 2017 decision shortly thereafter. Just last month, the D.C. Circuit added to the confusion by issuing a decision that rejected the NLRB's effort to enforce *Browning-Ferris*; the Court returned the case to the Board for further consideration. Because *Browning-Ferris* is no longer good law, it is fair to assume that prior NLRB decisions overruled by

Browning-Ferris are now the controlling precedents. But the current situation is so muddled that employers are understandably confused about how to proceed. They are entitled to receive near-term guidance on joint-employer standards, and providing guidance solely via future case-by-case adjudication would take far too long.

WLF also generally supports the standards set out in proposed Section 103.40 (the “Proposed Rule”). WLF particularly applauds the Proposed Rule’s use of “Examples” to illustrate when Company A will be deemed to possess substantial control over the “essential terms and conditions of employment” of the employees of Company B—and thus will be determined to be a “joint employer” of those employees. WLF urges the NLRB to provide even more, similar illustrations.

The NLRB’s efforts over the past several decades to adjudicate joint-employer claims demonstrate, however, that it simply is not possible to adopt a verbal formula that will fully explicate the joint-employer standards. In particular, WLF believes that far too much emphasis has been placed on the word “direct”—that is, whether the control exerted by Company A can be characterized as “direct” control. For one thing, all stakeholders appear to agree that evidence of “indirect” control can (at least in some circumstances) be relevant in determining joint-employer status. More importantly, the word “direct” is subject to widely varying interpretations. For example, the D.C. Circuit’s *Browning-Ferris* decision—in the course of suggesting that “indirect” control may, in some instances, by itself be sufficient to justify a joint-employer finding—cited (as examples of “indirect” control) conduct that WLF would characterize as “direct” control. Much more important than how different types of control are characterized is

how extensive the control actually is.

Rather than focusing on how the control is characterized, the NLRB should focus its regulatory guidance on the extent of the control. Control of the terms and conditions of employment that is “limited and routine,” or control whose impact does not focus on the essential terms and conditions of employment, is never sufficient to justify a joint-employer determination, regardless whether that control is deemed “direct” or “indirect.” But the number of potential factual permutations is too large for the NLRB to rely solely or even primarily on rulemaking to provide adequate guidance. The NLRB can best assist employers by providing them with as many examples as possible regarding how it intends to exercise its statutory authority, and then relying on adjudication to flesh out its standards.

WLF believes that the Board’s *Browning-Ferris* decision, 362 NLRB No. 186 [*Browning-Ferris I*], was a major misstep and that the D.C. Circuit properly refused to enforce it. Rather than adhering to the common-law understanding of “employer” (as directed by Congress), *Browning-Ferris I* improperly sought to re-define that term in light of “changing economic conditions.” We applaud the Proposed Rule for effectively repudiating that decision. The best way to avoid similar future missteps is to provide as many illustrations as possible regarding when a joint-employer determination is and is not appropriate. Indeed, *Browning-Ferris I*’s principal errors involved the manner in which it applied the common law to the facts before it, not the words it employed in characterizing the common law.

Interests of WLF

The Washington Legal Foundation is a public interest law firm and policy center with

supporters in all 50 States. WLF promotes economic liberty, free enterprise, a limited and accountable government, and the rule of law. WLF regularly appears in federal court in cases raising important labor-law issues. *See, e.g., Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

WLF filed a brief in the D.C. Circuit to urge the appeals court not to enforce the NLRB's *Browning-Ferris I* decision. *See Browning Ferris Industries of California, Inc. v. NLRB* [*"Browning-Ferris II"*], ___ F.3d ___, 2018 WL 6816542 (D.C. Cir. Dec. 28, 2018). WLF was concerned that the NLRB's now-inoperative *Browning-Ferris I* decision threatened to impose new, unanticipated liability on large portions of the regulated community. WLF was also concerned that the standard adopted in *Browning-Ferris I* was inherently vague and deprived companies of the ability to accurately predict the circumstances under which their activities would subject them to liability.

I. NLRB Statutory Authority

The Proposed Rule invites public comment on whether the NLRB is authorized to establish joint-employer standard by means of a rulemaking proceeding. 83 Fed. Reg. at 46686. WLF believes that a rulemaking proceeding is both statutorily authorized and appropriate.

Section 6 of the National Labor Relations Act (NLRA), 29 U.S.C. § 156, states, "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act (APA)], such rules and regulations as may be necessary to carry out the provisions of the Act." Section 6 fully authorizes the Proposed Rule, which addresses a labor-law concept (joint employers) that is recognized by the Supreme Court

as falling within the NLRB's jurisdiction yet is not directly addressed by the NLRA.

In her dissent from the decision to initiate a rulemaking proceeding, Member Lauren McFerran stated, “[T]he best way to end uncertainty over the Board’s joint-employer standard would be to adhere to existing law, not to upend it. The majority’s decision to pursue rulemaking ensures the Board’s standard will remain in flux as the Board develops a final rule and as the rule, in all likelihood, is challenged in the federal courts.” 83 Fed. Reg. at 46688. But that objection, written in September 2018, has been overtaken by later events. The D.C. Circuit in December 2018 denied the NLRB’s petition to enforce *Browning-Ferris I*. So Member McFerran’s preferred “existing law” is no longer in force. As explained in detail below, it is not at all clear what “existing law” consists of. Given the likelihood of recusals from consideration of the remanded proceedings, it is possible that the NLRB may be unable to issue *any* new decision in *Browning-Ferris* in the foreseeable future. Under those circumstances, it is highly appropriate for the NLRB to address joint-employer standards through a rulemaking proceeding. There may be no other means of providing employers with much-needed guidance in the near term.

II. *Three Decades of Joint-Employer Decisions*

The Board has long recognized that a business may qualify as the “joint employer” of a worker who is nominally employed by a separate company, if the business plays a significant role in determining the worker’s essential terms and conditions of employment. The NLRA does not define the term “joint employer.” Its only reference to the meaning of “employer” is as follows: “The term ‘employer’ includes any person acting as an agent of an employer, directly or

indirectly.” 29 U.S.C. 152(2). The Supreme Court has explained that Congress, in adopting federal labor laws, “mean[t] to incorporate the established meaning” of the term “employer,” and “intended to describe conventional master-servant relationships understood by common-law agency doctrine.” *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995).

The NLRB did not develop a consistent view of the common-law test for joint-employer relationships until 1984. In two cases decided that year—*Laerco Transp.*, 269 NLRB 324 (1984), and *TLI, Inc.*, 271 NLRB 798 (1984)—the Board adopted the standard articulated several years earlier by the Third Circuit in *NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117 (3d Cir. 1982). Under the Third Circuit standard, a joint-employer relationship exists only “where two or more employers exert significant control over the same employees.” *Id.* at 1124.

The basis of the [joint-employer] finding is simply that 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. Thus, the “joint employer” concept recognizes that the business entities are in fact separate but that they *share or co-determine those matters governing the essential terms and conditions of employment.*

Id. at 1123 (emphasis added).

After expressing the Board’s support for the Third Circuit standard, the Board expressed the joint-employer standard as follows:

[W]e find that to establish such [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.

TLI, Inc. at 1 (citing *Laerco Transp.*) (emphasis added). The NLRB determined in both *TLI* and *Laerco Transp.* that the “user” firms were not joint employers of drivers provided to them by the

“provider” firms—even though the user firms exercised “some” control over the drivers and had sufficient economic power to dictate to the provider firms the essential terms and conditions of the drivers’ employment—because the user firms had never actually attempted to dictate those terms and conditions. The Board did not suggest that evidence of an unexercised contractual right to control, or of indirect control, could never be relevant to the joint-employer inquiry; its *TLI* and *Laerco Transp.* decisions simply held that any such evidence was insufficient in those cases to “meaningfully affect” the essential terms and conditions of employment.

The NLRB adhered to its *TLI/Laerco Transp.* standard for 32 years before repudiating it in its *Browning-Ferris I* decision. The NLRB concluded that adopting a broader definition of “joint employer”: (1) comported with its congressional mandate; and (2) was warranted by a need to bring its labor regulations “[into] step with changing economic circumstances.” *Id.* at 1, 12. The Board held that even when two companies have never exercised joint control over essential terms and conditions of employment, and even when any joint control is not “direct and immediate,” the two companies will still be joint employers based on the mere existence of “reserved” joint control, or based on indirect control or control that is “limited and routine.” *Id.*

More importantly, *Browning-Ferris I* greatly expanded the Board’s previous understanding of what constitutes “control” of essential terms and conditions of employment. Such control exists, the Board held, even if a company does not dictate the work performance of individual employees of one of its independent contractors, if the terms of the contract between the two entities impose severe economic constraints on how the independent contractor determines the terms and conditions of its employees’ work:

Where the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user's guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees' working conditions are a byproduct of two layers of control.

Id. at 14.

Applying its new standard, the Board held that Browning-Ferris Industries of California, Inc. was the joint employer of workers nominally employed by one of its independent contractors, Leadpoint Business Services. Among the factors cited by the Board in support of its holding was that Browning-Ferris and Leadpoint entered into a cost-plus contract. The Board also noted that Browning-Ferris on several occasions requested Leadpoint to discipline specific employees for misconduct, and that sometimes Leadpoint responded by imposing the requested discipline.

Following a change in the NLRB's membership, the Board in 2017 issued a decision that repudiated the standard announced in *Browning-Ferris I* and re-adopted the joint-employer standard that had been in effect from 1984 to 2015. *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017). The Board explained, "We find that the *Browning-Ferris* standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations." *Id.* at 1-2. But two months later, the NLRB vacated its *Hy-Brand* decision after a determination that one Member of the Board should not have participated in the matter.

In the meantime, Browning-Ferris petitioned for review of *Browning-Ferris I*, and the

NLRB cross-applied for enforcement of its order against Browning-Ferris. The D.C. Circuit’s *Browning-Ferris II* decision repudiated much of the Board’s “changing economic conditions” rationale and declined to enforce the order. The appeals court concluded that evidence of a contractual “reserved” right of control over essential terms and conditions of employment, and evidence of “indirect” control may be “relevant” to the joint-employer inquiry. *Browning-Ferris II*, 2018 WL 6816542, at *17 (stating that the Board “need not avert its eyes from indicia of indirect control ... [a]nd that is the only question before this court. ...[W]hether indirect control can be ‘dispositive’ [of joint-employer status] is not at issue in this case.”). The court rejected the manner in which *Browning-Ferris I* applied the “indirect-control factor,” however, finding that the Board “did so at times in a manner that appears to have pushed beyond the common-law’s bounds” regarding the meaning of “employer.” *Id.* at 19.

The court emphasized that a company’s economic control over an independent contractor’s performance of its contract is not synonymous with control over the terms and conditions of employment of the independent contractor’s workers. The court held that the proper joint-employer standard is “the common law principle that a joint employer’s control—whether direct or indirect, exercised or reserved—must bear on the essential terms and conditions of employment, ... and not on the routine components of a company-to-company contract.” *Id.* (citation omitted). The “routine contractual terms” that the court deemed irrelevant to the joint-employer analysis included: use of a cost-plus contract; generalized caps on contract costs; and advance description of tasks to be performed under the contract. *Id.* at 18. The court added, “Whether Browning-Ferris influences or controls the basic contours of a contracted-for

service—such as requiring four lines’ worth of sorters plus supporting screen cleaners and housekeepers—would not count under the common law.” *Id.* at 19.

Because the D.C. Circuit rejected enforcement of *Browning-Ferris I*, that decision is no longer good law and cannot be deemed controlling precedent regarding joint-employer determinations. One can reasonably assume that *Laerco Transp.* and *TLL, Inc.*—the decisions overruled by *Browning-Ferris I*—are once again the controlling precedents. But that issue is far from clear—making it all the more important for the Board to proceed with this rulemaking in order to provide much-needed guidance.

III. The Relevance of Direct Control

As *Laerco* and *TLL, Inc.* explained, a company is a “joint employer” if it routinely engages in conduct designed to “meaningfully affect[] matters relating to the employment relationship” between another company and workers nominally employed by the other company. But neither decision sought to draw a strict line between meaningful effects that were imposed through “direct” means and those imposed through “indirect” means. Later Board decisions, in an effort provide more guidance to the business community, sought to differentiate between “direct” and “indirect” control of the terms and conditions of employment—reasonably concluding that “indirect” control is far less likely to have a significant impact than “direct” control. Although these later decisions acknowledged that “indirect” control can be relevant to the joint-employer analysis, they created a bright-line rule that indirect control can never *by itself* be sufficient to justify a joint-employer determination.

Browning-Ferris I rejected the direct/indirect distinction altogether, in light of its focus

on “changing economic circumstances.” *Browning-Ferris I* concluded that a business’s strict contractual control over the manner in which an independent contractor performs its contractual functions may often by definition constitute the requisite control over the “essential terms and conditions of employment” of the independent contractor’s workers, even though such control would normally be viewed as “indirect.” The D.C. Circuit adopted a middle course. It rejected the Board’s holding that control over contractual performance equates with control over the “essential terms and conditions of employment” of the contractor’s workers, but it held that a joint-employer determination is not precluded simply because the evidence of control consists largely of “indirect” controls. *Browning-Ferris II*, 2018 WL 6816542, at *17.

WLF believes that far too much emphasis has been placed on the word “direct” and urges the Board (in its final rule) not to rely heavily on the distinction between “direct” and “indirect” control. For one thing, all stakeholders appear to agree that evidence of “indirect” control can (at least in some circumstances) be relevant in determining joint-employer status.

More importantly, the word “direct” is subject to widely varying interpretations. We note, for example, that *Browning-Ferris I* found that certain of Browning-Ferris’s activities constituted “direct” control of Leadpoint’s employees; WLF and many other observers are bewildered by the characterization of the alleged control as “direct,” particularly given Leadpoint’s uncontested status as an independent contractor. As another example, *Browning-Ferris II*—in the course of suggesting that “indirect” control may by itself, in some instances, be sufficient to justify a joint-employer finding—cited (as examples of “indirect” control) conduct that WLF would characterize as “direct” control. The Court stated:

A categorical rule against even considering indirect control—no matter how extensively the would-be employer exercises determinative or heavily influential pressure and control over all of a worker’s working conditions—would allow manipulated form to flout reality. If, for example, a company entered into a contract with Leadpoint under which that company made all the decisions about work and working conditions, day in and day out, with Leadpoint supervisors reduced to ferrying orders from the company’s supervisors to the workers, the Board could sensibly conclude that the company is a joint employer. This is especially so if that company retains the authority to step in and exercises direct authority any time the company’s indirect mandates are not followed.

Browning-Ferris II, 2018 WL 6816542, at *18. WLF agrees with the D.C. Circuit that evidence of control of the sort it describes would sensibly lead to a “joint employer” determination. But WLF would categorize that type of control as “direct”; that is, Company A is *directly* dictating to Leadpoint the terms and conditions of employment. The fact that Company A is not actually announcing to the employees whether they are to be fired or disciplined does not, in WLF’s view, make the control over disciplinary matters any less direct.

Because there is no consensus regarding how to differentiate “direct” control from “indirect” control, WLF urges the NLRB in its final rule to avoid any significant emphasis on that distinction. Instead, WLF urges the Board to focus its regulatory guidance on the extent of the control. Control of the terms and conditions of employment that is “limited and routine,” or control whose impact does not focus on the essential terms and conditions of employment, is never sufficient to justify a joint-employer determination, regardless whether that control is deemed “direct” or “indirect.” In particular, as Congress made clear in adopting Taft-Hartley Act provisions that legislatively overruled the Supreme Court’s decision in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), economic control by a company over an independent

contractor (in the form of, for example, limited funding that may make it economically unfeasible for the independent contractor to offer the wage scale that its employees may prefer) can never be deemed control (whether direct or indirect) over the essential terms and conditions of employment. And a company that only occasionally directly intervenes in the supervision of an independent contractor's employees cannot be deemed to "meaningfully affect" the terms and conditions of their employment.

Of course, it will never be possible to draw a precise line between control that is "limited and routine" and control that is sufficiently pervasive to justify a joint-employer determination. For that reason, WLF applauds the NLRB's proposal to use "Examples" to illustrate when Company A will be deemed to possess substantial control over the "essential terms and conditions of employment" of the employees of Company B. WLF urges the NLRB to provide even more, similar illustrations.

WLF provides several illustrations that we believe would help to illuminate the meaning of "limited and routine control" and the types of evidence that would either support or undercut a joint-employer determination:

- Business contract between Company and a Contractor grants Company the right to terminate the contract at will. On four occasions over the course of several years, supervisors employed by Company observe employees of Contractor engaging in what they conclude is on-the-job misconduct. Company requests that the employees be pulled off the job. Contractor looks into the matter and discharges two of the employees but simply provides a warning to the other two. This evidence is relevant and tends to demonstrate that Company is not a joint employer because it tends to demonstrate that Company does not "control" disciplinary matters but rather simply makes recommendations.
- Business contract between Company and a Contractor grants Company the right to terminate the contract at will. At least twice a month over the course of several years, Company

requests that Contractor pull off the job employees that the Company believes have engaged in on-the-job misconduct. On every occasion, Contractor fired the employee without conducting its own investigation of the alleged misconduct. This evidence is relevant and tends to demonstrate that the Company is a joint employer because it tends to demonstrate that the Company controls disciplinary matters.

- Business contract between Company and a Contractor spells out in detail how work is to be performed (*e.g.*, the numbers of “lines” that Contractor must operate and the types of employees to be included on each line). Supervisors employed by Company routinely observe Contractor’s work performance. On most occasions when those supervisors observe that work is being performed improperly, they will bring the matter to Contractor’s management and ask Contractor to address the issue as it deems appropriate. But occasionally the supervisors will approach Contractor’s employees directly and instruct them on the proper method of performing their work. Company has not exercised direct and immediate control over the terms and conditions of employment in a manner that is not limited and routine.
- Business contract between Company and a Contractor spells out in detail how work is to be performed (*e.g.*, the numbers of “lines” that Contractor must operate and the types of employees to be included on each line). Supervisors employed by Company routinely observe Contractor’s work performance. In a significant percentage of the occasions when those supervisors observe that work is being performed improperly, they approach Contractor’s employees directly and instruct the employees on the proper method of performing their work. This is evidence that Company exercises direct and immediate control over terms and conditions of employment and thus may be acting as an employer for the workers they approach.

WLF recognizes that even a very large number of Examples included in the final rule would not be sufficient to provide guidance covering every case in which joint-employer status is alleged. There are simply too many potential factual permutations to permit the NLRB to adopt a rule that would supply an answer for all future joint-employer controversies. But given the considerable confusion created by the Board’s abrupt switches in position and the D.C. Circuit’s rejection of *Browning-Ferris I*, this rulemaking proceeding is invaluable to the regulated community, in terms both of the guidance provided and of the stability inherent in the

creation of a rule that will be binding in future adjudicative proceedings.

IV. *Browning-Ferris I Was a Major Misstep*

Federal labor law requires the NLRB to look to the common law (as it existed no later than 1947) when determining who qualifies as an “employer.” Although *Browning-Ferris I* gave lip service to the common law, the Board majority made clear that it based its decision not on traditional understandings of the employer-employee relationship but rather on a perceived need to amend labor law to bring it in step with “changing economic conditions.” The D.C. Circuit acted properly in rejecting that approach. WLF applauds the Board for its Proposed Rule that effectively repudiates the standard established by *Browning-Ferris I*. Any such major changes in labor law must originate with Congress, not the NLRB.

As the federal courts have repeatedly recognized, proper construction of the NLRA’s definitions of “employer” and “employee” requires an understanding of a 1947 amendment to the Act adopted in response to a 1944 Supreme Court decision. That amendment made clear that the NLRB was to look solely to common-law agency principles in determining whether an employer-employee relationship exists for purposes of the Act.

In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Supreme Court upheld an NLRB determination that workers to whom Los Angeles newspapers sold their papers (for resale on the city’s streets) were “employees” of the newspapers for purposes of the NLRA (and thereby entitled to collective-bargaining rights), notwithstanding the Court’s recognition that the common law would have classified the workers as independent contractors, not employees. The Court stated that Congress intended the NLRA to apply to workers whenever “the economic

facts of the relation” between the workers and those from whom they received compensation were such that collective bargaining would be “appropriate and effective for the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions”—such as when there exists “[i]nequality of bargaining power in controversies over wages, hours, and working conditions.” *Id.* at 127. The Court concluded that the NLRA applied to such relationships, notwithstanding that the relationships might not fit within “the narrow technical relation of ‘master and servant,’ as the common law had worked this out in all its variations.” *Id.* at 124.

Congress responded to *Hearst* in 1947 by expressing its strong disagreement with the Court’s broad definitions of “employer” and “employee” and by amending the NLRA to reverse the outcome of that case. The House Report accompanying the 1947 Taft-Hartley Amendments stated:

An “employee,” according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the [NLRB], means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term “employee” beyond anything that it ever had included before, and the Supreme Court, relying on the theoretic “expertness” of the Board, upheld the Board. ... It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. ... “Employees” work for wages or salaries *under direct supervision*.

H.R. Rep. 245, 80th Cong., 1st Sess. 18 (emphasis added) (quoted in *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 905 (D.C. Cir. 1978)). To make explicit its disagreement with *Hearst*, Congress amended the NLRA’s definition of “employee” in 1947

as part of the Taft-Hartley Amendments, by adding a provision stating that “[t]he term ‘employee’ ... shall not include ... any individual having the status of an independent contractor.” 29 U.S.C. § 152(3).¹

The Supreme Court later concluded that “the obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.” *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968). Moreover, federal courts that have addressed the NLRA’s definitions of “employer” and “employee” in other contexts (*i.e.*, in contexts other than determining whether the worker is an independent contractor and thus not a party to an employer-employee relationship) have similarly looked to the common law in determining whether such a relationship exists. *See, e.g., Clinton’s Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138-140 (2d Cir. 1985) (overturning NLRB determination that a joint employer relationship existed).

As explained in detail in *Hy-Brand*, there is no merit to *Browning-Ferris I*’s assertions that the common law has broadly interpreted the terms “employer” and “employee.” WLF will not repeat that explanation here. We instead focus on several points that merit special notice.

First, by definition, a doctrine is not deemed part of the common law unless it is grounded in prior court decisions applying that doctrine. Thus, one would expect the *Browning-*

¹ The House Conference Report accompanying the Taft-Hartley Amendments explained that Congress was amending the statutory definition of “employee” in response to *Hearst*, which the report criticized for holding “that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were ‘employees’ within the meaning of the Labor Act.” House Conf. Report 510 at 536-7.

Ferris I's common-law analysis to include numerous citations to court decisions. Yet, glaringly absent from the NLRB's analysis are citations to *any* court decisions finding that an entity is an "employer" despite failing to exercise its contractual rights to control the conditions of employment of workers nominally employed by another, or otherwise exercising such control. That absence of case citations speaks volumes.

The D.C. Circuit has recognized that when Congress amended the definition of "employee" in 1947, it was adopting a common-law definition of the employer-employee relationship— a definition based on the understanding that "[e]mployees' work for wages or salaries under direct supervision"— that was far narrower than the definition espoused in *Hearst Local 777*, 603 F.3d at 905 (quoting H.R. Rep. 245). Ignoring that explicit limitation, *Browning-Ferris I* interpreted the common law to permit a finding of joint-employer status even in the absence of evidence of that a company has exerted significant control over the essential terms and conditions of employment.

Indeed, if one accepts *Browning-Ferris I*'s broad reading of the common law, all would-be independent contractors could properly be classified as employees, because the economic realities of every contract are such that the user company effectively controls the conduct of the independent contractor and its employees (by means, for example, of its authority to terminate the contract). Yet, federal courts have repeatedly relied on common-law standards in upholding independent-contractor status in spite of NLRB claims that the putative employer at least indirectly controlled the terms and conditions of employment.

Thus, in *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75-76 (D.C. Cir. 1990), the D.C.

Circuit held that “[t]he extent of the actual *supervision* exercised by a putative employer over the ‘means and manner’ of the workers’ performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees” and concluded that the workers were not employees because the supervision exercised by the putative employer was not extensive. *See also Local 777*, 603 F.2d at 873, 893; *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983); *N. Am. Van Lines, Inc. v. NLRB*, 896 F.2d 596, 599 (D.C. Cir. 1989) (stating that “evidence of unequal bargaining power” between the worker and the putative employer—and the ability of the putative employer to use that power to exercise economic control over its relationship with the worker—is not, without more, evidence that the putative employer is exercising “control over the manner and means of the worker’s performance.”).

Other circuits have explicitly rejected the NLRB’s broad reading of the common law in the context of joint-employer claims. In *AT&T v. NLRB*, 67 F.3d 446 (2d Cir. 1995), the Second Circuit refused to enforce an NLRB bargaining order that was based on the Board’s determination that AT&T was a joint employer of workers nominally employed by a cleaning contractor retained by AT&T. The court rejected the NLRB’s contention that evidence of AT&T’s participation in collective-bargaining negotiations demonstrated, by itself, “the type of control necessary to establish a joint employer,” explaining:

In *Clinton’s Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985), *cert den.*, 479 U.S. 814 (1986), we held that “an essential element of any determination of joint employer status in a subcontractor context is ... sufficient evidence of immediate control over the employees.” In determining immediate control, we weigh whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any

disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process.

Id. at 451. The Second Circuit continues to adhere to its narrow understanding of the circumstances under which the common law recognizes the existence of a joint-employer relationship. *See, e.g., Service Employees Int’l Union v. NLRB*, 647 F.3d 435, 442-43 (2d Cir. 2011) (affirming the requirement of *Clinton’s Ditch* that no joint-employer determination is permissible in the absence of evidence of “immediate control” over the workers in question).

Indeed, there is every reason to conclude that the common law requires *stronger* evidence of substantial and immediate control to support a finding that workers are “employees” in the joint-employer context than in the employee/independent contractor context. As the D.C. Circuit has explained, a worker designated as an “independent contractor” has far less recourse to collective action than a worker designated as the employee of only one employer instead of two, and thus far more reason to challenge her designation:

Where the plaintiff is herself either an employee of only one employer or an independent contractor, ... classification as the latter leaves her with no protection against employment discrimination. But Redd, even if not an employee of the [putative joint employer], clearly enjoyed protection against employment discrimination by Aspen, which was indisputably her employer.

Redd v. Summers, 232 F.3d 933 (D.C. Cir. 2000).

Browning-Ferris I asserted that the Third Circuit’s decision in *NLRB v. BFI* was consistent with its expansive view of the common-law definition of the employer-employee relationship. Not true. The Third Circuit explained that its joint-employer standard was “a matter of determining which of two, or whether both, respondents control, in the capacity of

employer, the labor relations of a given group of workers,” and requires a finding “that 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.” 691 F.2d at 1122-23.

It is instructive to examine the evidence that the Third Circuit deemed sufficient to meet its facially exacting joint-employer standard. The evidence demonstrated that the top supervisor of the putative joint employer “considered himself ‘boss’ and acted as ‘boss’ with respect to the employees’ functions,” going so far as to individually approve all hires and to unilaterally discharge employees with whom he was dissatisfied. *Id.* at 1124-25. Prior to *Browning-Ferris I*, the NLRB’s standard properly precluded joint-employer determinations in the absence of similar evidence.

WLF does not fault the *Browning-Ferris I* standard for finding relevance in evidence of “control” that some might deem “indirect” control, or that consists of “unexercised” contractual powers. After all, a company can exercise significant control by subtly or not-so-subtly implying in its relations with an independent contractor that it will exercise its heretofore “unexercised” contractual powers unless the contractor complies with its “suggestions” regarding the terms and conditions of employment of the contractor’s employees. But *Browning-Ferris I* went astray by creating a standard that permitted a joint-employer determination based on evidence of “control” (regardless whether direct or indirect, and regardless whether based on unexercised contractual powers) whose impact did not focus on the essential terms and conditions of employment for Leadpoint’s workers. When (as in *Browning-*

Ferris) the evidence suggests that a company is exercising considerable control over how a contract is to be performed but precious little control over the terms and conditions of employment of the workers hired to exercise that performance, the common law does not authorize a finding that the company is an “employer.” And nothing in the common law supports such a determination when the evidence suggests that control over the essential terms and conditions of employment is, at most, limited and routine.

V. Conclusion

WLF applauds the NLRB for initiating a rulemaking proceeding designed to repudiate *Browning-Ferris I* and urges it to adopt reforms along the lines outlined above.

Sincerely,

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