
NOTE

BEYOND JOINT EMPLOYER STATUS: A NEW ANALYSIS FOR EMPLOYERS' UNFAIR LABOR PRACTICE LIABILITY UNDER THE NLRA

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This Note argues that the National Labor Relations Board should adopt a new analysis for assessing employer liability for an unfair labor practice under Section 8(a) of the National Labor Relations Act. Under current Board law, joint employers are generally jointly and severally liable for an unfair labor practice committed by either employer. This Note's proposed analysis for unfair labor practice liability would be entirely independent from the joint employer standard, which would matter only for purposes of collective bargaining. An employer would be liable for an unfair labor practice in three

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situations: (1) where the employer commits an unfair labor practice against its own employees; (2) where the employer directs another employer to commit an unfair labor practice; or (3) where the employer knew or should have known that another employer with whom it has an intimate business relationship committed an unfair labor practice, and the employer facilitated or failed to resist the unlawful practice. For the third category, employers that have intimate business relationships would include a franchisor-franchisee relationship and a general contractor-subcontractor relationship. The proposed analysis is a compromise that will further the purposes of the Act by better protecting employees' rights without imposing a subsequent obligation on employers to bargain collectively.

INTRODUCTION

If an employee of a McDonald's franchisee protests with other workers to improve the conditions of her employment, and the franchisee subsequently terminates her employment based on that protected activity, is franchisor McDonald's, USA, LLC liable for an unfair labor practice under the National Labor Relations Act ("NLRA" or "the Act")?¹ Under the current law of the National Labor Relations Board ("NLRB" or "the Board"), the answer almost certainly turns on whether McDonald's, USA is a joint employer of the franchisee's employees.² However, joint employer status should not be determinative of McDonald's, USA's liability. Instead, this Note proposes restricting the joint employer doctrine to determining an employer's collective bargaining obligations and creating a new, separate analysis for an employer's unfair labor practice liability.

Liability for an unfair labor practice should attach to an employer, regardless of whether it is a joint employer, in three situations:

- (1) where the employer commits an unfair labor practice against its own employees;

¹ National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012). In July 2014, the Office of the General Counsel of the National Labor Relations Board authorized the issue of complaints alleging that McDonald's franchisees and franchisor McDonald's, USA were joint employers that "violated the rights of employees as a result of activities surrounding employee protests." Press Release, Nat'l Labor Relations Bd., NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer (July 29, 2014), <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds> [<http://perma.cc/7V62-N2JS>].

² See *infra* Section II.A (explaining that a finding of joint employer status is generally determinative of an employer's unfair labor practice liability). A finding of joint employer status means that two or more employers jointly employ a group of employees. Each joint employer must bargain collectively with and is prohibited from committing an unfair labor practice against those employees. For further discussion of the definition of joint employer, see *infra* notes 14-18 and Section I.B (defining the current joint employer standard and the implications of being a joint employer).

(2) where the employer “directs, instructs, or orders” another employer to commit an unfair labor practice;³ or

(3) where the employer (Employer *A*) knew or should have known that another employer (Employer *B*), with whom *A* has “an intimate business” relationship,⁴ committed an unfair labor practice against *B*’s employees, and *A* facilitated or failed to resist the unlawful action.⁵

The first two situations reflect current Board law.⁶ But the third situation would require the Board to adopt a new approach to unfair labor practice liability where multiple employers are charged in the complaint. Employers whose relationship has “an intimate business character” would reach, at the very least, general contractors-subcontractors and franchisors-franchisees.⁷

Extending liability to a statutory employer that is not the employer of the employees who suffered the unfair labor practice is consistent with the language of the Act. Although only an “employer” as defined by Section 2(2) of the Act can be held liable for an unfair labor practice under Section 8(a), four of the five unfair labor practices listed under 8(a) do not require that the employer commit the unlawful practice against “his” employees.⁸ Only Section 8(a)(5) uses the possessive term “his employees,” meaning that only an employer, single or joint, of particular employees has a bargaining obligation.⁹ Thus, by virtue of *expressio unius est exclusio alterius*, the Act allows an employer to be held liable for an unfair labor practice against another employer’s employees under Section 8(a)(1)-(4) of the Act.¹⁰

The proposed analysis recognizes the distinction between Section 8(a)(1)-(4) and Section 8(a)(5). Where an employer is held liable for another employer’s unfair labor practice, it has no obligation to bargain collectively with the other employer’s employees absent a finding of joint employer status. Thus, the proposed analysis exposes an employer to unfair labor practice liability without automatically imposing a duty to bargain collectively under

³ See *Dews Constr. Corp.*, 231 N.L.R.B. 182, 182 n.4 (1977).

⁴ See *Cent. Transp., Inc.*, 244 N.L.R.B. 656, 658 (1979) (quoting *Hod Carriers Local 300 (Austin Co.)*, 101 N.L.R.B. 1257, 1259 (1952)).

⁵ The analysis builds off of the allocation of burdens in *Capitol EMI Music, Inc.*, 311 N.L.R.B. 997, 1000 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994).

⁶ See *infra* Section II.A.

⁷ See *infra* Section III.A.

⁸ 29 U.S.C. § 158(a)(1)-(4) (2012).

⁹ *Id.* § 158(a)(5).

¹⁰ *Id.* § 158(a)(1)-(4). In *International Shipping Ass’n*, 297 N.L.R.B. 1059 (1990), the Board acknowledged that it “consistently has held that an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship.” *Id.* at 1059.

Section 8(a)(5) of the Act.¹¹ For example, the Board could hold a franchisor liable for turning a blind eye to its franchisee's unfair labor practice when the franchisor could have protested or prevented the franchisee's action—perhaps by exercising a contractual right or economic pressure—but the franchisor would have no obligation to bargain with the franchisee's employees absent a finding of joint employer status.¹² Joint employer status would be irrelevant for assessing unfair labor practice liability and would matter only for collective bargaining purposes.

The time is ripe for the Board to reconsider how to assess unfair labor practice liability under Section 8(a) of the Act, particularly in light of skyrocketing tensions and uncertainty in the labor community following the Board's 3-2 decision in *Browning-Ferris Industries of California, Inc.*¹³ In *Browning-Ferris*, the Board announced a new joint employer standard that purports to return the standard to how it stood in the early 1980s by finding joint employer status where two or more statutory employers are “employers within the meaning of the common law” that “share or codetermine those matters governing the essential terms and conditions of employment,”¹⁴ which include “matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction”¹⁵ In a marked change from the previous definition, the Board stated that it will no longer require a joint employer to exercise its authority to control employees' terms and conditions of employment in a direct manner that is not “limited and routine.”¹⁶ Instead, joint employer status can now be found where an employer possesses the right to control or exercises control in a direct or indirect manner.¹⁷ The Board did not define what constitutes indirect control, although it did give the example of exercising control through an intermediary.¹⁸

The Board's decision in *Browning-Ferris* elicited strong but differing responses from the labor community. Employee advocates and unions hailed

¹¹ See 29 U.S.C. § 158(a)(5). Only an employer of “his employees” has the obligation to bargain collectively with the representatives of those employees. In situation (1) above, where an employer commits an unfair labor practice against its own employees, the employer has the duty to bargain with his employees.

¹² See *id.*

¹³ 362 N.L.R.B. No. 186 (Aug. 27, 2015).

¹⁴ *Id.*, slip op. at 2 (quoting *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982), *enforcing* 259 N.L.R.B. 148 (1981)).

¹⁵ *Id.* at 2 n.5 (emphasis omitted) (quoting *TLI, Inc.*, 271 N.L.R.B. 798, 798 (1984), *enforced*, 772 F.2d 894 (3d Cir. 1985)).

¹⁶ *Id.* at 15-16.

¹⁷ *Id.* at 16. In so holding, the Board overruled *Laerco Transportation*, 269 N.L.R.B. 324 (1984), *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *AM Property Holding Corp.*, 350 N.L.R.B. 998 (2007), *Airborne Express*, 338 N.L.R.B. 597 (2002), and other Board decisions to the extent that they are inconsistent with the new standard. *Browning-Ferris*, 362 N.L.R.B. No. 186, slip op. at 16.

¹⁸ *Id.* at 2.

the decision as a victory that will result in more findings of joint employer status,¹⁹ thus enabling employees to bargain collectively with multiple employers and impose unfair labor practice liability on multiple firms for an infringement on employees' right to self-organize.²⁰ Employers, however, regarded the decision as a major setback that will financially burden them by vastly expanding their collective bargaining obligations and imposing more liability on them in the future.²¹ These impassioned reactions are a testament to how much rides on joint employer status. If an employer is deemed a joint employer, then it has an obligation to bargain collectively with the jointly employed employees, and it will generally be liable for any unfair labor practice committed by the other joint employer.²² If an employer is not a joint employer, then it has no such obligation to bargain with another employer's employees and faces no liability for another employer's unfair labor practice, even if the employers are intimately connected in a franchisor-franchisee or general contractor-subcontractor relationship.²³ Employers generally try to avoid being named a joint employer precisely because that status imposes a collective bargaining obligation and liability for the other joint employer's unfair labor practices, both of which are costly.²⁴ At this point, it is unclear

¹⁹ See, e.g., Noam Scheiber & Stephanie Strom, *Labor Board Ruling Eases Way for Fast-Food Unions' Efforts*, N.Y. TIMES, Aug. 28, 2015, at A1 (quoting James P. Hoffa, general president of the International Brotherhood of Teamsters, as stating: "This decision will make a tremendous difference for workers' rights on the job Employers will no longer be able to shift responsibility for their workers and hide behind loopholes to prevent workers from organizing or engaging in collective bargaining.").

²⁰ See 29 U.S.C. § 158(a) (2012).

²¹ See, e.g., Scheiber & Strom, *supra* note 19, at A1 (reporting the reaction of Steve Caldeira, president of the International Franchise Association, who stated: "This will clearly jeopardize small employers and the future viability of the franchise model."); Editorial, *The NLRB's Joint Employer Attack*, WALL STREET J., Aug. 29, 2015, at A10 (stating that the decision is "sure to harm diverse industries in every state").

²² See *infra* Section II.B for an exception to this general rule.

²³ Under current Board law, a non-joint employer will only be liable for another employer's unfair labor practice if the first employer ordered the second employer to commit the unfair labor practice. See *infra* Section II.C.

²⁴ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 77 (2014) (explaining that collective bargaining imposes costs on employers as unions seek to raise wages, increase benefits, improve working conditions and safety measures, and reduce an employer's ability to unilaterally terminate a worker's employment). Employers' refusal to bargain collectively, despite being an unfair labor practice under Section 8(a)(5) of the Act, is a recurring problem. See, e.g., Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 1 (2009) (discussing "persistent complaints from the labor movement . . . that employer opposition, both lawful and unlawful, is eviscerating the rights of association and collective bargaining the Act supposedly safeguards"); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769-70 (1983) ("A major

whether the restated standard will ultimately stick.²⁵ But it is clear that tensions are high and uncertainty abounds.²⁶ In particular, employers maintaining nontraditional working arrangements—such as franchisor-franchisee, general contractor-subcontractor, user-supplier, and parent-subsidiary—are uncertain whether the new standard means that they are now joint employers with a collective bargaining obligation and potential liability for another employer's unfair labor practice.²⁷

This uncertainty is bad for employers and employees alike, yet it is unlikely to go away given the Board's emphasis that the joint employer inquiry is fact-specific.²⁸ It is entirely plausible that the Board could find that the facts and circumstances of one franchisor-franchisee relationship create a joint employer

factor in this decline [of collective bargaining] has been the skyrocketing use of coercive and illegal tactics—discriminatory discharges in particular—by employers determined to prevent unionization of their employees.”).

²⁵ A direct appeal to a federal court of appeals is not possible because it was a certification case, although the case could eventually end up in an appellate court if newly named joint employer *Browning-Ferris* commits an unfair labor practice by refusing to bargain collectively. Ben James, *4 Things to Know About the NLRB's Joint-Employer Decision*, LAW360 (Aug. 28, 2015, 8:29 PM), <http://www.law360.com/articles/696698/4-things-to-know-about-the-nlrbs-joint-employer-decision> [<http://perma.cc/YS3D-BQGC>]. However, the issue of the new standard could reach a circuit court sooner in the event that the Board applies that standard in an unfair labor practice case involving different employers. *Id.* Congressional action could also overturn the new standard. Republican Congressmen have already introduced a bill, the Protecting Local Business Opportunity Act, which would require an employer to have “actual, direct, and immediate” control over an employee to be considered a joint employer, thus returning the standard to how it stood pre-*Browning-Ferris*. Kelly Knaub, *GOP Pols Introduce Bill to Nix New Joint-Employer Standard*, LAW360 (Sept. 9, 2015, 8:39 PM), <http://www.law360.com/articles/701025/gop-pols-introduce-bill-to-nix-new-joint-employer-standard> [<http://perma.cc/QT9H-8M4L>]. Finally, the ever-changing membership of the Board itself creates an avenue for a subsequent decision to return to the prior joint employer standard. *See* 29 U.S.C. § 153(a) (establishing the term limit and selection process of members of the NLRB).

²⁶ Molly L. Kaban & Raymond F. Lynch, *Looking Ahead After NLRB Joint Employer Ruling*, THE RECORDER (Sept. 22, 2015), <http://www.therecorder.com/id=1202737905876/Looking-Ahead-After-NLRB-Joint-Employer-Ruling> [<http://perma.cc/5F4F-CKMN>] (“The board's new joint employer standard contains substantial ambiguities . . . and the decision raises as many questions as it answers.”).

²⁷ *Id.* (“Confusion over which entities are in fact employers required to be at the bargaining table could lead to instability in business relationships that were once well-defined, such as user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor and the like.”).

²⁸ *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, slip op. at 20 n.120 (Aug. 27, 2015) (“[T]he common-law test requires us to review, in each case, all of the relevant control factors that are present determining the terms of employment.”). The majority underscored that its decision did not “fundamentally alter[] the law” concerning the legal relationship between different entities, such as parent-subsidiary, contractor-subcontractor, franchisor-franchisee, and predecessor-successor. *Id.*

relationship, while another set of facts and circumstances for a different franchisor-franchisee does not.²⁹ The same goes for other types of nontraditional employment arrangements. This uncertainty is inevitable in a fact-specific inquiry and will always be present to some extent in the joint employer analysis, regardless of the standard. Too much uncertainty, however, is extremely problematic and leaves employers and employees guessing not only about bargaining obligations, but also about who can be held liable for unfair labor practices. This Note proposes a solution to the latter problem of employer liability that could, in turn, minimize the former problem by lessening the need for employees lower on the supply chain (e.g., the franchisees' employees) to bargain collectively with the lead firm (e.g., the franchisor).³⁰

The proposed analysis makes joint employer status irrelevant for determining whether an employer is liable for another employer's unfair labor practice. The analysis applies to employers in intimate business relationships, which at the very least includes franchisors-franchisees and general

²⁹ In April 2015, the Office of the General Counsel of the NLRB issued an Advice Memorandum that concluded that franchisor Freshii Development, LLC was not a joint employer with its franchisee, Nutritionality, Inc., which was charged with committing an unfair labor practice. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, Office of the Gen. Counsel, Nat'l Labor Relations Bd., to Peter Sung Ohr, Reg'l Dir., Region 13, Office of the Gen. Counsel, Nat'l Labor Relations Bd. 5 (Apr. 28, 2015), <https://www.nlr.gov/cases-decisions/advice-memos> [<https://perma.cc/ZYA8-PFCF>]. The General Counsel announced that it would reach the same conclusion regardless of whether the then-existing joint employer standard applied (pre-*Browning-Ferris*) or whether the Board adopted the General Counsel's proposed standard in *Browning-Ferris* (which was arguably broader than the standard that the Board ultimately adopted in *Browning-Ferris*). *Id.* at 6, 9. Although some franchisors took the memorandum as a positive sign that the joint employer standard will not reach the franchisor-franchisee relationship, others cautioned that the joint employer analysis is highly fact-specific. See Ben James, *Lawyers Still Leery Despite NLRB Joint Employer Memo*, LAW360 (May 13, 2015, 9:41 PM), <http://www.law360.com/articles/655384/lawyers-still-leery-despite-nlr-joint-employer-memo> [<http://perma.cc/8H72-HRDT>] (“‘I don’t think it’s highly significant,’ Seyfarth Shaw LLP’s Marshall Babson, a former NLRB member, said of the memo. ‘These facts are peculiar to this particular situation.’”). Still, even post-*Browning-Ferris*, franchisors are looking to the Freshii memorandum as having a potentially big impact in the pending McDonald’s decisions. See Joel R. Buckberg, *For Franchisors, There’s More Than Just Browning-Ferris*, LAW360 (Sept. 30, 2015, 11:01 AM), <http://www.law360.com/articles/708452/for-franchisors-there-s-more-than-just-browning-ferris> [<http://perma.cc/5A3R-Z8LG>] (“This memorandum is more significant in the broader context of franchising than the [*Browning-Ferris*] decision and remains, as of this writing, the current thinking of the NLRB’s general counsel on franchising and joint-employer status.”).

³⁰ David Weil describes lead firms as “large businesses . . . operating at the top of their industries.” WEIL, *supra* note 24, at 8.

contractors-subcontractors.³¹ These relationships are concrete and defined, leaving the employers and employees no guesswork as to which employers could be held liable for an unfair labor practice. As will be further discussed below, if a franchisor has incentive to actively discourage its franchisee from committing an unfair labor practice, then the employees of the franchisee are in a good position to exercise their protected collective rights and improve their working conditions under the franchisee without bargaining collectively with the franchisor.

This Note's proposed analysis offers a compromise to fulfill the Act's goal of protecting employees' right to organize collectively and improve their working conditions, while providing more certainty to employers and giving them an opportunity to escape unfair labor practice liability in certain situations.³² The analysis has benefits and drawbacks for both employers and employees. Employers benefit by having only their collective bargaining obligations determined by the joint employer standard. They also gain certainty in knowing that the analysis applies to franchisor-franchisee and general contractor-subcontractor relationships. A drawback for employers is that they could be held liable for an unfair labor practice committed by another employer absent a finding of a joint employer status. Certain employers higher up on the supply chain (e.g., franchisors and general contractors) could be held liable for an unfair labor practice committed by an employer lower on the supply chain (e.g., franchisees and subcontractors). For example, a franchisor would face potential liability for unfair labor practices committed by its franchisee, but the franchisor would have no obligation to bargain with the franchisee's employees absent a finding of joint employer status. Notwithstanding these drawbacks, employers gain the opportunity to escape liability for unfair labor practices, an opportunity not afforded under the current general rule making joint employer status determinative of liability. Under the proposed analysis, the franchisor could avoid liability altogether by showing that it neither knew, nor should have known, of the franchisee's unfair labor practice, or that if it did know, it tried to resist the action.

A drawback for employees of employers lower on the supply chain is that they would not be able to bargain collectively with the lead firm absent a finding of joint employer status. However, the employees would still gain better protection for their rights to organize collectively. For example, if a franchisor knew or should have known of its franchisee's unfair labor practice, but did not resist it, then an administrative law judge ("ALJ") could order

³¹ See *infra* notes 175-176 and accompanying text (arguing that the franchisor-franchisee relationship is just as intimate as the general contractor-subcontractor relationship, which the Board has specifically recognized as an intimate business relationship).

³² One of the main purposes of the NLRA is to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (2012).

affirmative relief for the franchisor. Such relief would depend on the situation. If the franchisee used the franchisor's technology (such as a computer data system or cameras) to carry out the unfair labor practice, then the ALJ could enjoin the franchisor from facilitating future unfair labor practices.³³ If the franchisee consulted with the franchisor before committing the unfair labor practice, and the franchisor did not advise against the unlawful action, then the ALJ could order the franchisor to resist future unfair labor practices by expressing its disapproval to the franchisee or by exercising any contractual rights it has to discourage the unlawful action. This affirmative relief would likely incentivize the franchisor to be more proactive in discouraging its franchisees from committing unfair labor practices, thereby giving the franchisees' employees a better opportunity to exercise their protected collective rights and improve their working conditions.

Before delving more fully into this proposed analysis, some background information is needed on the NLRA, the joint employer standard, and unfair labor practice liability. Part I of this Note examines the Act's regulation of employers, the evolution of the joint employer standard, and the implications of being a joint employer. It will also discuss the emergence of nontraditional working arrangements, particularly franchisors-franchisees and general contractors-subcontractors, which often evade a finding of joint employer status. Part II critiques the Board's current assessment of liability for alleged unfair labor practices under Section 8(a) of the Act where multiple employers are named in the charge. The Board's general treatment of joint employer status as a determinative factor for extending liability for an unfair labor practice will be examined before turning to two exceptions. These exceptions then provide the foundation for Part III, which argues for a new framework for determining an employer's liability for an unfair labor practice.

Part III argues that joint employer status should be neither a necessary nor a sufficient condition to holding an employer liable for another employer's unfair labor practice. In addition to being liable for an unfair labor practice against its own employees or for directing another employer to commit an unfair labor practice, an employer should be liable where it has an intimate business relationship with another firm, it knew or should have known that the other firm committed an unfair labor practice, and it facilitated or failed to resist that action. Part III concludes by discussing applications of the proposed analysis to employers in a franchisor-franchisee relationship and employers in a general contractor-subcontractor relationship.

³³ A recent article explained that McDonald's, USA requires its franchisees to install "assorted McDonald's-supplied computer hardware and software that compiles data about sales, inventory, and labor costs." Timothy Noah, *Inside Low-Wage Workers' Plan to Sue McDonald's—and Win*, MSNBC (May 23, 2014, 2:18 PM), <http://www.msnbc.com/msnbc/inside-low-wage-workers-plan-sue-mcdonalds-and-win> [<http://perma.cc/W879-BHBU>]. Such technology could be used by the franchisee to cut an employee's hours for union activity or to threaten an employee that union activity will jeopardize employment by increasing labor costs.

I. HISTORICAL CONTEXT: THE NATIONAL LABOR RELATIONS ACT AND LIABILITY FOR UNFAIR LABOR PRACTICES UNDER SECTION 8(A)

Congress passed the NLRA in 1935 to provide employees with a means to organize labor unions and, through their chosen representatives, bargain collectively for better working conditions and terms of employment.³⁴ The Act only protects statutory “employees” and imposes obligations on statutory “employers,” thus making the seemingly simple question of who is an employer and who is an employee intensely debated and heavily litigated.³⁵ The Act defines an employer as “any person acting as an agent of an employer, directly or indirectly.”³⁶ An employee includes “any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise.”³⁷ The most notable amendment to the definition of employee came in the 1947 Taft-Hartley Act, which clarified that independent contractors are not employees under the NLRA.³⁸

The Act guarantees certain rights to employees, such as the right to self-organize; to form, join, or assist a labor organization (union); to bargain collectively through chosen representatives; and to engage in concerted activities for collective bargaining purposes or for other mutual aid or

³⁴ National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. § 151 (2012)). While the Act is generally regarded as pro-employee, Congress was also concerned with curtailing the number of labor disputes and strikes that were burdening interstate commerce, a concern that employers likely shared and were eager to see resolved. 29 U.S.C. § 151.

³⁵ Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 612-13 (2012).

³⁶ 29 U.S.C. § 152(2). Perhaps because the definition of employer appears so open-ended, more focus is placed on the definition of employee in determining whether an employer-employee relationship subject to the Act exists. Rubinstein, *supra* note 35, at 633 & n.156.

³⁷ 29 U.S.C. § 152(3).

³⁸ Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 2(3), 61 Stat. 136, 137-38 (1947) (codified at 29 U.S.C. § 152(3)) (“The term ‘employee’ shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor . . .”). The change in the definition of “employee” came as a direct congressional response to the Supreme Court’s 1944 *Hearst Publications* decision in which it declined to use common-law standards to determine whether certain newsboys were employees, instead turning to the “history, terms, and purposes of the [NLRA],” to conclude that the newsboys were employees. *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 120-24 (1944). Congress’s rejection of the Court’s interpretation of “employee” made it clear that the Act was to be interpreted using a common law definition of employee as opposed to the economic realities definition used in Fair Labor Standards Act (“FLSA”) cases, which asks whether an individual is economically dependent on the employer. Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 280 (2006).

protection.³⁹ These rights are commonly referred to as employees' Section 7 rights. The Act regulates employers in two ways: it prohibits them from interfering with employees' rights and requires them to bargain collectively with their employees.⁴⁰ Joint employer status has implications on both of these obligations, as will be examined below.

A. *Regulating Employers Under the NLRA*

Section 8(a) of the Act lists five unfair labor practices that employers are prohibited from committing against employees.⁴¹ An employer violates Section 8(a) by (1) interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act;⁴² (2) dominating or interfering with the formation or administration of a labor organization or providing it with financial or other support;⁴³ (3) discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;"⁴⁴ (4) retaliating against employees through discharge or discrimination because they filed charges or gave testimony under the Act;⁴⁵ or (5) refusing "to bargain collectively with the representatives of his employees."⁴⁶ The Act contains no private right of action, so an employee who believes her employer committed an unfair labor practice must file a charge with the Regional Director of the National Labor Relations Board.⁴⁷ The Board has no power to assess penalties, but it grants make-whole remedies, such as reinstatement and back pay for a wrongfully discharged employee, and informational remedies, such as requiring an employer to post a notice promising not to violate the law.⁴⁸

The second way that the Act regulates employers is by demanding that they bargain collectively with the representative labor organization chosen by the

³⁹ 29 U.S.C. § 157. Employees also have the right to refrain from such activities, except where an agreement requires membership in a union as a condition of employment. *Id.*

⁴⁰ *Id.* § 158(a).

⁴¹ *Id.*

⁴² *Id.* § 158(a)(1).

⁴³ *Id.* § 158(a)(2).

⁴⁴ *Id.* § 158(a)(3).

⁴⁵ *Id.* § 158(a)(4).

⁴⁶ *Id.* § 158(a)(5). The Taft-Hartley Act of 1947, also known as the Labor Management Relations Act, added section 8(b), which lists unfair labor practices that labor organizations are prohibited from taking, such as restraining or coercing employees in the exercise of their Section 7 rights, refusing to bargain collectively with an employer, and engaging in secondary boycotts. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 8(b), 61 Stat. 136, 141-42 (1947) (codified at 29 U.S.C. § 158(b)). Given the limited scope of this Note, any discussion of unfair labor practices below can be assumed to fall under Section 8(a) and involve only employer liability.

⁴⁷ 29 U.S.C. § 160(b).

⁴⁸ *Id.*

majority of employees in the appropriate bargaining unit.⁴⁹ An employer who fails to bargain collectively commits an unfair labor practice in violation of Section 8(a)(5).⁵⁰ Collective bargaining requires an employer to meet with the representative of its employees at “reasonable times” and to make a “good faith” effort to confer, negotiate, or reach an agreement regarding “wages, hours, and other terms and conditions of employment.”⁵¹ Employers do not have to meet all of the union’s demands or make concessions.⁵² The Act’s “basic compromise” is meant to provide a means for employees to collectively improve their working conditions while simultaneously ensuring that employers have the power to stay economically viable and maintain control over their workforce.⁵³

B. *Joint Employers*

A joint employer, just like a single employer, is prohibited from infringing on employees’ right to organize collectively and must bargain with the designated representative of its employees.⁵⁴ However, the analysis for unfair labor practice liability and collective bargaining is more complicated for joint employers.

Soon after the Act passed, the Board recognized that employees may have more than one employer. In *Bethlehem-Fairfield Shipyard*,⁵⁵ the Board found that the shipyard was also an employer of the employees who worked at M & M, the on-site canteen, because the shipyard held the “right to control” the employment of M & M’s employees even though it had not exercised that control.⁵⁶ The Supreme Court ultimately approved the concept of joint employers in 1964 in *Boire v. Greyhound Corp.*,⁵⁷ stating that joint employer status exists where an employer possesses “sufficient control over the work of

⁴⁹ *Id.* § 158(a)(5) (imposing unfair labor practice liability on an employer who refuses to bargain collectively with the representative of “his” employees); *id.* § 159(a) (asserting that the designated representatives are the exclusive representatives of all employees in the unit). The Board determines the unit appropriate for bargaining, which may be “the employer unit, craft unit, plant unit, or subdivision thereof.” *Id.* § 159(b).

⁵⁰ *Id.* § 158(a)(5).

⁵¹ *Id.* § 158(d).

⁵² *Id.* (“[S]uch obligation does not compel either party to agree to a proposal or require the making of a concession.”).

⁵³ Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329, 331 (1998) (“The Act . . . expresses a compromise with the realities of capital mobility in a competitive market economy. The Act neither guarantees union-represented employees any particular wage rate nor does it require the providers of capital to agree to any particular wage enhancement demands of unions.”).

⁵⁴ 29 U.S.C. § 158(a)(1), (5).

⁵⁵ 53 N.L.R.B. 1428 (1943).

⁵⁶ *Id.* at 1431.

⁵⁷ 376 U.S. 473 (1964).

the employees.”⁵⁸ The Court emphasized that joint employer analysis is “a factual issue.”⁵⁹

Starting in the mid-1980s, the Board consistently cited *Laerco Transportation*⁶⁰ and *TLI, Inc.*⁶¹ for the standard to determine whether two entities are joint employers. In *Laerco*, the Board stated that a joint employer must “meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.”⁶² In *TLI*, the Board cited the joint employer analysis articulated by the Third Circuit in *NLRB v. Browning-Ferris Industries of Pennsylvania*,⁶³ thereby affirming that two employers that “share or codetermine those matters governing the essential terms and conditions of employment” are joint employers.⁶⁴ However, the Board’s subsequent decisions, while consistently citing the standards in *Laerco* and *TLI*, created a narrower joint employer doctrine that focused on whether a putative joint employer had “direct and immediate” control over employment matters.⁶⁵ The Board held that evidence of a putative joint employer’s supervision that was “limited and routine” in nature, such as instructing employees “what work to perform, or where and when to perform the work, but not how to perform the work,” was insufficient to support a finding of joint employer status.⁶⁶ Similarly, a contractual provision that gave a user firm authority to approve whom the supplier firm hired was not by itself sufficient for a finding of joint employer status.⁶⁷ Therefore, a putative joint employer’s indirect or potential control over employment conditions was irrelevant. The Board would only find joint employer status where an employer had “direct and immediate”⁶⁸ control over the “essential terms and conditions of

⁵⁸ *Id.* at 481.

⁵⁹ *Id.*

⁶⁰ 269 N.L.R.B. 324 (1984).

⁶¹ 271 N.L.R.B. 798 (1984), *enforced*, 772 F.2d 894 (3d Cir. 1985).

⁶² *Laerco*, 269 N.L.R.B. at 325.

⁶³ 691 F.2d 1117 (3d Cir. 1982), *enforcing* 259 N.L.R.B. 148 (1981).

⁶⁴ *TLI*, 271 N.L.R.B. at 798.

⁶⁵ *E.g.*, *Airborne Express*, 338 N.L.R.B. 597, 597 n.1 (2002) (“The essential element in this analysis is whether a putative joint employer’s control over employment matters is direct and immediate.”).

⁶⁶ *AM Prop. Holding Corp.*, 350 N.L.R.B. 998, 1001 (2007); *see also Gasoline Co.*, 302 N.L.R.B. 456, 462 (1991) (finding that a user firm’s orders to the supplier firm’s employees were “in the nature of routine directions of what tasks were required and where they were to be performed” and were insufficient to demonstrate a joint employer relationship).

⁶⁷ *AM Prop.*, 350 N.L.R.B. at 1000; *Goodyear Tire & Rubber Co.*, 312 N.L.R.B. 674, 677 (1993) (“[T]he operational control clause set forth in the contract between Goodyear and TU, standing by itself, is not evidence that Goodyear is a joint employer with TU of the drivers in question.”).

⁶⁸ *Airborne Express*, 338 N.L.R.B. at 597 & n.1.

employment,”⁶⁹ which include “hiring, firing, discipline, supervision, and direction.”⁷⁰

The Board’s recent ruling in *Browning-Ferris* purports to return the joint employer standard to its early 1980s form. The Board defined the standard as follows: “The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.”⁷¹ The Board affirmed that it would continue to define the “essential terms and conditions of employment” as including “matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction.”⁷² To determine whether joint employer status exists, the Board will first inquire whether a putative joint employer has a common law employment relationship with the employees in question.⁷³ If the common law relationship exists, then the Board will determine whether “the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.”⁷⁴ However, joint employers need not directly exercise their authority over employees in a manner that is not “limited and routine,” but rather can exercise that control in an indirect way.⁷⁵

A finding of joint employer status means increased exposure to unfair labor practice liability under Section 8(a). The Board generally holds both joint employers liable for an unfair labor practice committed by either, except in specific types of joint employer relationships where one employer can show that it neither knew nor should have known of the unlawful action taken by the other joint employer, or if it did know, that it took all possible measures within its power to resist the action.⁷⁶ An employer that is a joint employer with a contractor also faces liability under Section 8(a)(3) if it cancels its contract because of the union activity of the contractor’s employees.⁷⁷ But absent a finding of joint employer status, cancelling a contract based on the union

⁶⁹ *TLI*, 271 N.L.R.B at 799.

⁷⁰ *Laerco Transp.*, 269 N.L.R.B. 324, 325 (1984).

⁷¹ *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, slip op. at 15 (Aug. 27, 2015).

⁷² *Id.* (emphasis omitted) (quoting *TLI*, 271 N.L.R.B. at 798) (internal quotation marks omitted).

⁷³ *Id.* The common law test is derived from agency law and focuses on “the existence, extent, and object of the putative joint employer’s control” over the employees. *Id.* at 12.

⁷⁴ *Id.* at 2.

⁷⁵ *Id.* at 16. See *supra* notes 13-21 and accompanying text for further discussion of *Browning-Ferris*.

⁷⁶ See *infra* Section II.A.

⁷⁷ See Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1548-49 (1996) (discussing the distinctions in unfair labor practice liability between a direct employer and a client employer who are not joint employers).

activity of the contractor's employees is lawful under *Local No. 447, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*.⁷⁸

A finding of joint employer status imposes a duty on the employer to bargain collectively, as Section 8(a)(5) requires an employer to bargain with "his" employees.⁷⁹ Given the costs of collective bargaining and the costs imposed by remedying a past unfair labor practice, employers generally try to avoid a finding of joint employer status.⁸⁰ Presumably, the *Browning-Ferris* decision will make it more difficult for employers in a user-supplier relationship to evade a finding of joint employer status (as that was the situation examined in the case).⁸¹ But how the decision will affect other types of employer relationships remains to be seen.⁸² As is discussed below, there has been a dramatic increase in all types of nontraditional workplace arrangements.

C. *The Rise of Nontraditional Employment Arrangements*

Over the past few decades, the American workforce has become more decentralized as the once prominent structure of a big employer employing lots of employees, all working under the same roof,⁸³ has given way to franchising, subcontracting, temporary employment arrangements, and supply chains.⁸⁴ The third category of this Note's proposed analysis for unfair labor practice liability focuses primarily on employers in franchisor-franchisee and general contractor-subcontractor relationships, because these are two of the largest sectors of nontraditional employment relationships and are easily definable.⁸⁵

⁷⁸ 172 N.L.R.B. 128, 129 (1968) [hereinafter *Malbaff*]. This Note ultimately argues for *Malbaff* to be overturned. See *infra* note 184 and accompanying text.

⁷⁹ 29 U.S.C. § 158(a)(5) (2012).

⁸⁰ See *supra* note 24 and accompanying text.

⁸¹ *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, slip op. at 20 n.120 (Aug. 27, 2015).

⁸² *Id.*

⁸³ WEIL, *supra* note 24, at 8 ("During much of the twentieth century, the critical employment relationship was between large businesses and workers.").

⁸⁴ Tian Luo et al., *The Expanding Role of Temporary Help Services from 1990 to 2008*, MONTHLY LAB. REV., Aug. 2010, at 12, <http://www.bls.gov/opub/mlr/2010/08/art1full.pdf>, [<http://perma.cc/92ED-AT6T>] ("From 1990 to 2008, total temporary employment in the United States went from 1.1 million to 2.3 million, and in 2008 it represented 1.7 percent of total U.S. employment."); Rubinstein, *supra* note 35, at 640 ("There are fewer full-time employees and more part-time employees, temporary employees, independent contractors, and home workers."); Stone, *supra* note 38, at 253 ("In the past two decades, many U.S. corporations have restructured their internal organizations in a movement away from centralized decision-making toward decentralized structures and production networks.").

⁸⁵ Franchising is particularly prevalent in the fast food industry, which has over 3.5 million employees. *Accommodation and Food Services: Industry Series: Preliminary Summary Statistics for the U.S.*, U.S. CENSUS BUREAU (Nov. 21, 2014),

Therefore, these two types of nontraditional working arrangements will be discussed more in depth below.

Contracting occurs when a general contractor contracts with another business to perform certain work, and subcontracting occurs when that general contractor contracts with a subcontractor that actually employs the workers who perform the work for the lead firm.⁸⁶ Subcontracting historically has been essential to the construction, garment, and movie industries, but it has now spread to sectors such as coal mining, telecommunications, food, and cable media.⁸⁷ Franchising allows a franchisor to expand its business and brand by having franchisees operate locally capitalized and managed facilities modeled after the franchisor.⁸⁸ Franchising once was limited mostly to a few industry segments but has now spread to fast food restaurants, hotels, janitorial services, and home health care.⁸⁹

David Weil, Administrator of the Department of Labor's Wage and Hour Division, describes the increase in nontraditional employment arrangements as "fissuring"—the spreading of responsibility for employment across multiple entities.⁹⁰ While traditionally a large firm employed lots of workers to fill its many needs (manufacturing, selling, maintenance, human resources, etc.),

http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_72I1&prodType=table [<http://perma.cc/S3QC-ZJTB>]. The majority of these employees work for franchisees. See, e.g., Ben Rooney, *McDonald's Franchise Owners are Not Loving It*, CNN MONEY (Apr. 17, 2015, 10:43 AM), <http://money.cnn.com/2015/04/17/news/companies/mcdonalds-franchise-unhappy/>, [<http://perma.cc/WHE5-4WEK>] (explaining that franchisees operate ninety percent of McDonald's locations in the United States). General contractors and subcontractors are often found in the construction industry, which has over 6 million employees. *Industries at a Glance: Construction*, BUREAU OF LAB. STAT., <http://www.bls.gov/iag/tgs/iag23.htm#about> [<http://perma.cc/9LD8-LJ5C>].

⁸⁶ CATHERINE RUCKELSHAUS ET AL., NAT'L EMP. LAW PROJECT, WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 8 (2014), <http://nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf> [<http://perma.cc/3G4Z-MH3J>].

⁸⁷ WEIL, *supra* note 24, at 100-01 (providing four illuminating case studies on how subcontracting has been used in each of these industries to shift employment responsibilities from the lead company to subcontractors that were undercapitalized and noncompliant with labor laws).

⁸⁸ Black's Law Dictionary defines "commercial franchise" as "[a] franchise using local capital and management by contracting with third parties to operate a facility identified as offering a particular brand of goods or services." *Commercial Franchise*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁸⁹ WEIL, *supra* note 24, at 25.

⁹⁰ *Id.* at 7 ("Employment is no longer the clear relationship between a well-defined employer and a worker. The basic terms of employment—hiring, evaluation, pay, supervision, training, coordination—are now the result of multiple organizations. Responsibility for conditions has been blurred. Like a rock with a fracture that deepens and spreads with time, the workplace over the past three decades has fissured.").

fissuring allows a firm “to improve profitability by focusing attention and controlling the most profitable aspects of firm value while shedding the actual production of goods or provision of services.”⁹¹ Weil explains that there are two main impetuses for fissuring: capital markets and technological changes.⁹²

Capital markets demand that a “lead firm”—e.g., a franchisor or a general contractor—focus on its “core competency” by shedding nonessential activities and shifting employment to other businesses, thereby cutting its labor costs.⁹³ Technological advances, such as electronic data, product identification, and GPS, and shipment and delivery methods enable the franchisor to enforce standards on the franchisees and thus ensure that its products and services meet the franchisor’s standards.⁹⁴ The franchisor has no obligation to its franchisees’ employees for social payments, such as unemployment insurance, workers’ compensation, and payroll taxes, and it has no duty to bargain collectively absent a finding of joint employer status.⁹⁵ Ideally, the franchisee takes on these social payments and bargains collectively with its employees. However, the reality is that as work and jobs shift down the supply chain, wages decrease and labor law violations tend to increase.⁹⁶ Coupled with the overall decline in unionization, this leaves employees of franchisees, subcontractors, and other nontraditional employment arrangements particularly vulnerable to labor law violations with little power to remedy the situation.

Given that the Board often undertakes joint employer analysis in nontraditional employment arrangements,⁹⁷ the definition of joint employer is a major point of contention between employee advocates and employers.⁹⁸ The

⁹¹ *Id.* at 25.

⁹² *Id.* at 44.

⁹³ *Id.*

⁹⁴ *Id.* at 12.

⁹⁵ *Id.* at 10-11.

⁹⁶ See, e.g., RUCKELSHAUS ET AL., *supra* note 86, at 1-2 (documenting that median hourly wages for workers in industries that experience extensive contracting and franchising, such as janitorial work, fast food, home care, and food service, are ten dollars or less); Stone, *supra* note 38, at 281 (“As the numbers of atypical employees grows, more and more individuals find themselves lacking basic protection for minimum wage, health and safety, retirement security, industrial injury, and collective bargaining rights.”); WEIL, *supra* note 24, at 129-30 (recounting high percentages of wage violations, overtime violations, and off-the-clock violations by franchisee-operated stores in the fast food industry as compared to franchisor-owned stores).

⁹⁷ See, e.g., *Airborne Express*, 338 N.L.R.B. 597, 598 (2002) (Member Liebman, concurring) (recounting past cases where the Board undertook joint employer analysis); Brief for General Counsel of the NLRB as Amicus Curiae at 11, *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015) (No. 32-RC-109684), <https://www.nlr.gov/case/32-RC-109684> [<https://perma.cc/MTZ4-S5J6>].

⁹⁸ These diverging opinions were well-represented in amicus briefs submitted to the Board prior to its *Browning-Ferris* decision. Commentators and employee advocates argued that a broader joint employer standard would enable meaningful collective bargaining

Board's recent restatement of the joint employer standard in *Browning-Ferris* highlighted this fundamental disagreement, with the majority stating that the new standard reinforces the Act's core protections for employees and rests on "a clearer and stronger analytical foundation."⁹⁹ The dissent, by contrast, characterized the new standard as a "major unexplained departure from precedent" that contains "no limiting principle" and will destabilize bargaining relationships.¹⁰⁰ Assuming that the new standard survives, uncertainty remains as to how the joint employer standard will apply to employers engaged in other types of nontraditional working relationships, particularly franchisees-franchisors and general contractors-subcontractors.¹⁰¹ This Note's proposed analysis offers a means to ease the tension between employers and employee advocates while fulfilling the Act's goals of facilitating collective bargaining, protecting employee rights, and eliminating obstructions to the flow of commerce.¹⁰²

This Note argues that the Board should make joint employer status neither a necessary nor a sufficient condition for holding a firm liable for an unfair labor practice. In other words, the Board should treat a finding of joint employer status—regardless of how the Board defines joint employer—as a completely separate analysis from liability for an unfair labor practice. A finding of joint employer status would be relevant only for collective bargaining purposes. Therefore, while a broader joint employer standard would increase some employers' obligations to bargain collectively, it would not increase an employer's liability for unfair labor practices under this Note's approach. In fact, the proposed analysis would give a joint employer more opportunity to avoid liability by showing that it neither knew nor should have known of the other employer's unfair labor practice, or if it did know, that it resisted the practice. If a general contractor knows that it can be held liable for providing advice to a subcontractor that ends up committing an unfair labor practice against its employees, then the general contractor is more likely to advise the

between employees and the firm that exercises indirect or potential control over their working conditions. *See, e.g.*, Brief for SEIU as Amicus Curiae at 2, *Browning-Ferris*, 362 N.L.R.B. No. 186 (No. 32-RC-109684), <https://www.nlr.gov/case/32-RC-109684> [<https://perma.cc/MTZ4-S5J6>]. Employers, on the other hand, vehemently opposed any change to the joint employer standard, arguing that any change would result in unpredictable outcomes that could upset the stable relations between employees, unions, and firms. *See, e.g.*, Brief for National Ass'n of Manufacturers et al. as Amici Curiae at 10-11, *Browning-Ferris*, 362 N.L.R.B. No. 186 (No. 32-RC-109684), <https://www.nlr.gov/case/32-RC-109684> [<https://perma.cc/MTZ4-S5J6>].

⁹⁹ *Browning-Ferris*, 362 N.L.R.B. No. 186, slip op. at 1.

¹⁰⁰ *Id.* at 26 (Members Miscimarra & Johnson, dissenting).

¹⁰¹ *See, e.g., id.* at 20 n.120 (majority opinion) (stating that the Board's analysis applies specifically to the two employers in the present case, which were in a user-supplier relationship); James, *supra* note 25 ("[I]t remains unclear exactly how the board will apply its new standard in cases with different circumstances.").

¹⁰² *See generally* 29 U.S.C. § 151 (2012).

subcontractor not to commit the unlawful act, or to resist the subcontractor's act by applying economic pressure. Thus, the new analysis puts the subcontractor's employees in a better position to organize collectively and have their Section 7 rights protected without imposing an obligation on the general contractor to bargain collectively.

II. CURRENT ANALYSIS OF UNFAIR LABOR PRACTICE LIABILITY INVOLVING MULTIPLE EMPLOYERS

A. *The General Approach: Joint Employer Status as a Necessary and Sufficient Condition for Liability*

In the majority of cases featuring allegations of unfair labor practices against multiple employers, the Board has treated joint employer status as a necessary and sufficient condition for holding a firm liable.¹⁰³ The Board generally holds joint employers jointly and severally liable for an unfair labor practice committed by either, stating in *Ref-Chem Co.*¹⁰⁴ that each joint employer "is responsible for the conduct of the other and whatever unlawful practices are engaged in by the one must be deemed to have been committed by both."¹⁰⁵ In *Mar Del Plata Condominium Ass'n*,¹⁰⁶ the Board noted that the liability of one employer "cannot be considered separate and apart from that of its joint employer."¹⁰⁷ Treating joint employer status as a necessary and sufficient condition for extending liability where multiple employers are named in the complaint means that the Board, upon determining that an unfair labor practice occurred, can focus its analysis on whether joint employer status exists.

In *Flagstaff Medical Center*,¹⁰⁸ the complaint alleged that Flagstaff Medical Center ("FMC") committed several unfair labor practices in the aftermath of an organizing drive and named as a joint employer Sodexho, a subcontractor that provided managers to oversee the housekeeping department of FMC.¹⁰⁹ The Board first determined that FMC had committed certain unfair labor practices, such as changing an employee's shift because of her union activity, threatening that unionization would be futile, and discharging an employee for his support of unionization.¹¹⁰ The Board then turned to the issue of whether Sodexho was

¹⁰³ It should be noted that a joint employer cannot be held liable for the other joint employer's unfair labor practice if the unfair labor practice was committed outside the scope of the joint employment relationship. *United Food & Commercial Workers*, 267 N.L.R.B. 891, 893 n.7 (1983).

¹⁰⁴ 169 N.L.R.B. 376 (1968), *enft denied on other grounds*, 418 F.2d 127 (5th Cir. 1969).

¹⁰⁵ *Id.* at 380.

¹⁰⁶ 282 N.L.R.B. 1012 (1987).

¹⁰⁷ *Id.* at 1012 n.3.

¹⁰⁸ 357 N.L.R.B. No. 65 (Aug. 26, 2011).

¹⁰⁹ *Id.*, slip op. at 1-2.

¹¹⁰ *Id.* at 2, 5-8.

a joint employer of the housekeeping employees to determine if Sodexho was jointly and severally liable for FMC's unfair labor practices.¹¹¹

The Board found that Sodexho was not a joint employer of FMC's housekeeping employees and affirmed the dismissal of the unfair labor practice allegations against Sodexho.¹¹² The Board's analysis of the charges against Sodexho focused exclusively on determining whether it was a joint employer.¹¹³ Applying the *Laerco* test, the Board concluded that Sodexho did not share or codetermine the essential terms and conditions of employment for the housekeeping employees.¹¹⁴ Finding that joint employer status did not exist, the Board immediately terminated its analysis of Sodexho's unfair labor practice liability.¹¹⁵ Thus, joint employer status was the determinative factor for Sodexho's liability.¹¹⁶

Member Pearce's partial dissent reinforced this idea.¹¹⁷ Member Pearce argued that Sodexho *did* exercise direct control of the essential terms and conditions of employment of FMC's housekeeper employees, and therefore, Sodexho was a joint employer that was automatically jointly and severally liable for FMC's unlawful discharge of an employee.¹¹⁸ Member Pearce did not analyze whether Sodexho was specifically involved in the termination of this particular employee by advising FMC or facilitating the discharge. Rather, joint employer status was again treated as a necessary and sufficient condition for liability for an unfair labor practice.¹¹⁹

The same rationale can be seen in *Airborne Express*, where the complaint alleged that Airborne, a delivery company, was a joint employer of dispatchers, dock persons, and land vehicle drivers employed by Interstate Parcel, a subcontractor that provided cartage services for Airborne.¹²⁰ About six months after a union organization drive of Interstate's employees, Airborne cancelled its contract with Interstate.¹²¹ Acknowledging that a company in

¹¹¹ *Id.* at 8-10.

¹¹² *Id.* at 1-2.

¹¹³ *Id.* at 8-10.

¹¹⁴ *Id.* The Board concluded, "Sodexho's limited authority to make recommendations to FMC officials, consistent with FMC's policies and subject to FMC's final approval, is insufficient to prove joint-employer status." *Id.* at 9. It further found that Sodexho's daily supervision of the housekeeping employees was "limited and routine," and therefore insufficient to support a finding of joint employer status. *Id.* (citing *AM Prop. Holding Corp.*, 350 N.L.R.B. 998, 1001 (2007)).

¹¹⁵ *Id.* at 8 & n.22 ("We have dismissed or found it unnecessary to pass on all of those allegations, except that we have found that Conant was unlawfully discharged [by FMC].").

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 13 (Member Pearce, concurring in part and dissenting in part).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 13-14 (finding that Sodexho played a role in hiring FMC's housekeepers, disciplining housekeepers, and making recommendations for terminations).

¹²⁰ *Airborne Express*, 338 N.L.R.B. 597, 604 (2002).

¹²¹ *Id.* at 603.

Airborne's position does not violate Section 8(a)(3) of the Act by cancelling a subcontractor's contract and causing the subcontractor's employees to lose their jobs even if done for anti-union motives per *Malbaff*, the General Counsel argued that Airborne would be liable under Section 8(a)(3) if it was a joint employer with Interstate.¹²² Therefore, Airborne's liability for an unfair labor practice hinged entirely on whether it was a joint employer.¹²³ The Board affirmed the ALJ's conclusion that Airborne was not a joint employer of Interstate's employees, thereby dismissing all allegations against it.¹²⁴

Joint employer status was once again the determinative factor in *Whitewood Oriental Maintenance Co.*¹²⁵ World Service Company ("WSC"), a janitorial contractor, subcontracted cleaning work at an airport to Whitewood Oriental Maintenance Company ("Whitewood").¹²⁶ Reversing the ALJ, the Board found that WSC and Whitewood were joint employers of Whitewood's airport janitors, making WSC "jointly liable for any unfair labor practices committed by Whitewood."¹²⁷ Therefore, when the Board concluded that Whitewood violated Section 8(a)(1) of the Act when Whitewood's supervisor interrogated employees about their union sympathies, it also held WSC liable.¹²⁸ Similarly, the Board extended liability to WSC for the unlawful discharge of a Whitewood employee in violation of Section 8(a)(3) and (1).¹²⁹ Joint employer status was a necessary and sufficient condition for holding WSC liable for Whitewood's unfair labor practices.

As the above cases show, joint employer status is generally both a necessary and a sufficient condition for holding an employer liable for an unfair labor practice. This gives employers more incentive to structure their relations with other firms in a way that avoids a finding of joint employer status, which then can undermine the purposes of the Act.¹³⁰

¹²² *Id.* at 603-04.

¹²³ *Id.* at 604 ("[T]he issue of joint employer becomes the focal and deciding issue insofar as Airborne is concerned.").

¹²⁴ *Id.* at 606-07.

¹²⁵ 292 N.L.R.B. 1159 (1989).

¹²⁶ *Id.* at 1159-60.

¹²⁷ *Id.* at 1162-63.

¹²⁸ *Id.* at 1164 ("As we have found that [WSC] and Whitewood are joint employers, we attribute [the Whitewood supervisor's] actions to [WSC] . . .").

¹²⁹ *Id.* at 1168 ("Because we have found that [WSC] is a joint employer of Whitewood's janitors and because we adopt the judge's conclusion that Kelleher's discharge violated Section 8(a)(3) and (1), we conclude that [WSC] is liable for this violation and will amend the Order to require reinstatement.").

¹³⁰ See Harper, *supra* note 53, at 330 ("[T]he Act, as currently formulated and interpreted, cannot adequately respond to one particular set of economic arrangements that has offered employers inviting routes to evade collective bargaining and the basic compromise between capital and labor that the Act provides.").

B. *Exception One: Joint Employer Status as a Necessary Condition for Liability*

The Board has carved out a limited exception to the general rule that a joint employer is jointly and severally liable for the other joint employer's unfair labor practice. The exception was set forth in *Capitol EMI Music*, where the Board construed joint employer status as a necessary—but not sufficient—condition for extending liability to a joint employer.¹³¹ This exception has only been applied to violations of Section 8(a)(3) and (1), and it has been limited almost exclusively to user-supplier joint employer relationships in which an employer (often a temporary employment agency) supplies employees to the user employer. In *Capitol EMI Music*, the issue was whether both joint employers were liable for violations of Section 8(a)(3) and (1) of the Act where only one of the employers took the unlawful action.¹³² The Board agreed with the ALJ that Capitol EMI Music ("Capitol"), a distributor of recording products, and Graham & Associates ("Graham"), a temporary employment agency, were joint employers of Harris, the employee in question, who had registered for temporary employment with Graham and was assigned a position at Capitol.¹³³ The Board also agreed that Capitol's discharge of Harris was unlawful because it was motivated by Harris's union activity.¹³⁴ However, the Board disagreed with the ALJ's conclusion that Graham was liable for Capitol's unlawful discharge based solely on Graham's joint employer status.¹³⁵

The Board announced a method for determining whether both joint employers are liable for an unlawful discharge or other discriminatory discipline.¹³⁶ First, the non-acting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons.¹³⁷ Second, the non-acting joint employer acquiesced in the unlawful action by failing to protest or exercise any contractual right it had to resist the action.¹³⁸ The Board also provided specific guidelines for the allocation of burdens. First, the General Counsel of the NLRB must satisfy a two-prong test by showing "(1) that 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."¹³⁹ The burden then shifts to the non-acting joint

¹³¹ *Capitol EMI Music, Inc.*, 311 N.L.R.B. 997, 1000 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994).

¹³² *Id.* at 997.

¹³³ *Id.*

¹³⁴ *Id.* at 998 & n.7.

¹³⁵ *Id.* at 997-98.

¹³⁶ *Id.* at 1000.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

employer to show that it neither knew nor should have known of the unfair labor practice committed by the other employer, or if the non-acting joint employer did know, to show that it took all possible measures within its power to resist the action.¹⁴⁰

Here, the General Counsel met its burden of showing that Capitol and Graham were joint employers and that Capitol committed an unfair labor practice, and Graham met its burden by showing that it neither knew nor had any reason to suspect that Capitol requested Harris's removal because of his union activity.¹⁴¹ Graham, despite being a joint employer of Harris, was not liable for the unfair labor practice committed by Capitol.¹⁴² In this specific joint employer relationship, where one employer supplied employees to another employer, the Board treated joint employer status as necessary but not sufficient to extend liability for an unfair labor practice.

The Board later applied the allocation of burdens announced in *Capitol EMI Music* to a joint employer relationship featuring a successor employer.¹⁴³ But the question remains whether the analysis first posited in *Capitol EMI Music* can be stretched to all types of joint employer relationships.¹⁴⁴ The *Capitol EMI Music* analysis has remained largely cabined to the type of joint employer relationship featured in that case—a user-supplier relationship where “a nonacting joint employer with no daily involvement with the employees” can escape liability.¹⁴⁵ As the ALJ stated in *Hyundai Rotem USA Corp.*, an opinion that was partly adopted by the Board, “had the Board wanted to expand the holding in *Capitol EMI Music*, it would have done so at some point during the

¹⁴⁰ *Id.* Such actions include protesting and exercising “any contractual right it might possess” to resist the unlawful action of the other employer. *Id.*

¹⁴¹ *Id.* at 1001.

¹⁴² *Id.*

¹⁴³ *Bultman Enters., Inc.*, 332 N.L.R.B. 336, 336-37 (2000). A hotel restaurant violated Section 8(a)(3) and (1) of the Act by refusing to hire a large number of the restaurant's employees due to their union affiliation. The General Counsel sought to hold the hotel, a joint employer of the restaurant's employees, liable for the restaurant's unfair labor practices. The Board found that the General Counsel met its burden by showing that the hotel and restaurant were joint employers and that the restaurant committed an unfair labor practice. The burden then shifted to the hotel to show that it did not know nor should have known of the restaurant's discriminatory actions, or that it did know but was incapable of preventing such actions. The Board concluded that the hotel failed to satisfy its burden, pointing to evidence that the hotel actually did know of the restaurant's discriminatory practices and had assisted the restaurant in such activity, thereby eliminating any possibility that the hotel took all measures within its power to resist the unlawful actions. *Id.*

¹⁴⁴ The Board acknowledged that it was leaving open “the possibility that a finding of vicarious liability might be appropriate in cases involving different forms of joint employer relationships and different categories of unfair labor practices.” *Capitol EMI Music*, 311 N.L.R.B. at 1001.

¹⁴⁵ *Hyundai Rotem USA Corp.*, 358 N.L.R.B. No. 59, slip op. at 8 (June 14, 2012).

intervening 18 years.”¹⁴⁶ Still, the *Capitol EMI Music* line of cases contrasts with the majority of unfair labor practice cases and provides a building block for the analysis proposed by this Note.¹⁴⁷

C. *Exception Two: Joint Employer Status as Neither a Necessary nor a Sufficient Condition for Liability*

There is limited Board precedent for holding a non-joint employer liable for an unfair labor practice against another employer’s employees.¹⁴⁸ Such an extension of liability, though not often seen, is consistent with the language of the Act.¹⁴⁹ The Board has recognized that “[a]n employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affects the working conditions of the latter’s employees because of the union activities of said employees.”¹⁵⁰ For the Board to extend liability to a firm that is not a joint employer of the employees who suffered the unlawful act, the firm must be directly involved in the unfair labor action.¹⁵¹ This kind of direct involvement is only found where the relationship between two statutory employers is of “an intimate business character.”¹⁵² Examples include the relationship between a parent company and its wholly owned subsidiary, and the relationship between a general contractor and its subcontractor.¹⁵³

In *Esmark, Inc.*,¹⁵⁴ the Board found that Esmark, the holding company, was liable for violating Section 8(a)(3) of the Act for a sham closing, discharge, and reopening scheme of two plants of a subsidiary.¹⁵⁵ The Board underscored that imposing liability on Esmark did not require a finding that Esmark and its subsidiary were single or joint employers.¹⁵⁶ Instead, Esmark was held liable for the unfair labor practice because it “played a key causal role in the unlawful transactions” and demonstrated a “vigorous and detailed exercise of its right of ownership” over the subsidiary.¹⁵⁷

¹⁴⁶ *Id.*

¹⁴⁷ *See infra* Section III.A.

¹⁴⁸ *See infra* notes 155-65 and accompanying text.

¹⁴⁹ *See supra* notes 8-10 and accompanying text.

¹⁵⁰ *Dews Constr. Corp.*, 231 N.L.R.B. 182, 182 n.4 (1977).

¹⁵¹ *Comput. Assocs. Int’l, Inc.*, 324 N.L.R.B. 285, 287 (1997) (“[A]n employer involve[s] itself directly in the employment decision at issue by directing, instructing, or ordering another employer to take an unlawfully motivated action against its employees.”).

¹⁵² *Cent. Transp., Inc.*, 244 N.L.R.B. 656, 658 (1979) (quoting *Hod Carriers Local 300 (Austin Co.)*, 101 N.L.R.B. 1257, 1259 (1952)).

¹⁵³ *Comput. Assocs.*, 324 N.L.R.B. at 287 (discussing cases where a statutory employer has been held liable for an unfair labor practice against another employer’s employees).

¹⁵⁴ 315 N.L.R.B. 763 (1994).

¹⁵⁵ *Id.* at 770.

¹⁵⁶ *Id.* at 768.

¹⁵⁷ *Id.* at 767.

In *Dews Construction Corp.*, the Board held Dews Construction (“Dews”), the general contractor, liable for a violation of Section 8(a)(3) and (1) when the president of Dews required East Star Painting Corp. (“East Star”), the subcontractor, to discharge one of two East Star employees who had attended a union meeting.¹⁵⁸ The Board held Dews and East Star jointly and severally liable to make the discharged employee whole for any loss of earnings.¹⁵⁹ As in *Esmark*, the Board made no finding of joint employer status.

In *Georgia-Pacific Corp.*,¹⁶⁰ Georgia-Pacific, a corporation engaged in wood manufacturing and distribution, ordered Mack’s Welding Service (“Mack’s”), an independent contractor, not to employ any strikers from one of Georgia-Pacific’s plants.¹⁶¹ Mack’s felt it had to follow this order because to disobey the order could have resulted in the cancellation of its contract with Georgia-Pacific.¹⁶² Accordingly, Mack’s discharged one of its employees and refused to hire three other individuals as a direct result of Georgia-Pacific’s order.¹⁶³ The Board found that both Georgia-Pacific and Mack’s violated Section 8(a)(3) and (1) of the Act, and it affirmed the ALJ’s recommendation that Georgia-Pacific be held primarily responsible to remedy the monetary aspects of the unfair labor practices while Mack’s was only secondarily liable.¹⁶⁴

Thus, the Board is willing, in limited circumstances, to look beyond the existence of joint employer status to hold a firm liable for an unfair labor practice against another employer’s employees. However, the Board has taken special care not to confuse the analysis in these cases with the analysis set forth in *Malbaff*.¹⁶⁵ In *Malbaff*, the Board held that “an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter’s employees.”¹⁶⁶ The Board explained that nothing in the Act or its legislative history supported the position that it protects employers from employer discrimination.¹⁶⁷ Therefore, a non-joint employer does not violate Section 8(a)(3) by terminating its business relationship with another employer, even if it did so because of the union or nonunion activity of the latter’s employees.¹⁶⁸ Craig Becker, prior to his brief

¹⁵⁸ *Dews Constr. Corp.*, 231 N.L.R.B. 182, 182 (1977).

¹⁵⁹ *Id.* at 183.

¹⁶⁰ 221 N.L.R.B. 982 (1975).

¹⁶¹ *Id.* at 984.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 986.

¹⁶⁵ *Malbaff*, 172 N.L.R.B. 128 (1968). This Note argues that *Malbaff* should be overturned. See *infra* note 184 and accompanying text.

¹⁶⁶ *Malbaff*, 172 N.L.R.B. at 129.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

tenure on the Board, explained that the *Malbaff* line of cases allows employers “both to terminate contractors based on their becoming unionized and to select a new contractor on the grounds that it is nonunion,” which can deter employees from pursuing unionization.¹⁶⁹

The fine line between cases where the Board is willing to hold a non-joint employer liable for another employer’s unfair labor practice and cases where *Malbaff* governs can be difficult to discern, but the Board has been quick to rein in attempts to extend the principles of *Esmark*, *Dews*, and *Georgia-Pacific*.¹⁷⁰ The Board’s treatment of joint employer status as neither a necessary nor a sufficient condition of liability for an unfair labor practice committed against another employer’s employees is the exception, not the rule. However, in Part III, this Note argues that the exception should become the rule by making joint employer status irrelevant to liability for unfair labor practices.

III. A NEW ANALYSIS FOR UNFAIR LABOR PRACTICE LIABILITY

A. *The Analysis Explained*

The Board’s current approach to assessing employers’ liability in unfair labor practice cases involving multiple employers does not adequately protect employees’ Section 7 rights or give joint employers an adequate opportunity to escape liability. A new analysis is needed. Joint employer status should be neither a necessary nor a sufficient condition for holding an employer liable for an unfair labor practice. A finding of joint employer status should matter for collective bargaining purposes under Section 8(a)(5) of the Act, but it should be irrelevant for analyzing unfair labor practice liability under Section 8(a)(1)-(4).

An employer should be held liable for an unfair labor practice in three situations, the first two of which are already covered by current Board law. First, an employer is liable for an unfair labor practice that it commits against its own employees.¹⁷¹ Second, an employer is liable when it directs, instructs, or orders another employer to commit an unfair labor practice.¹⁷² Third, an employer (Employer A) should be liable where another employer (Employer B) with whom A has an intimate business relationship¹⁷³ commits an unfair labor

¹⁶⁹ Becker, *supra* note 77, at 1551.

¹⁷⁰ See, e.g., *Comput. Assocs. Int’l, Inc.*, 324 N.L.R.B. 285, 286 (1997) (“We disagree with the judge’s analysis and find that he erroneously extended the principles of *Esmark*, *Dews*, and *Georgia-Pacific* to this case. Instead, we find this case governed by the long-settled principles set forth in [*Malbaff*] . . .”).

¹⁷¹ See 29 U.S.C. § 158(a) (2012).

¹⁷² See *supra* Section II.C (discussing the imposition of liability on a non-joint employer for directing, instructing, or ordering another employer to commit an unfair labor practice).

¹⁷³ This part of the proposed analysis comes from *Central Transport, Inc.*, 244 N.L.R.B. 656, 658 (1979).

practice against *B*'s employees, and *A* knew or should have known of the unlawful action and facilitated or failed to resist it.¹⁷⁴ Given that current Board law covers the first two situations, only the third will be analyzed here.

Employers whose relationship has an intimate business character would reach at least two relationships that have resulted from the fissured workplace: general contractors-subcontractors and franchisors-franchisees. The term "intimate business character" comes from the *Esmark/Dews/Georgia-Pacific* line of cases discussed above. The Board has specifically recognized the relationship between a general contractor and a subcontractor as one of an intimate business character.¹⁷⁵ This Note argues that the franchisor-franchisee relationship is equally as intimate as the general contractor-subcontractor relationship, particularly given the amount of control the franchisor maintains over the day-to-day operations of the franchisee.¹⁷⁶ The proposed analysis is meant to be a starting point for making the Act more applicable to the modern employment context, with the possibility of applying the analysis to other nontraditional employment arrangements in the future.

The proposed analysis draws partly from the Board's allocation of burdens set forth in *Capitol EMI Music*.¹⁷⁷ Under the current standard the General Counsel must show (1) that two employers are joint employers, and (2) that one employer committed an unfair labor practice against the employees in the jointly managed workforce. The key difference in the proposed analysis is the General Counsel would instead have to show (1) that the two employers have a relationship that is of an intimate business character—i.e., general contractor-subcontractor or franchisor-franchisee—and (2) that one employer committed an unfair labor practice against its employees.¹⁷⁸ Then the burden would shift to the firm that seeks to escape liability to show "it neither knew, nor should have known, of the reason for the other [firm's] action or that, if it knew, it took all measures within its power to resist the unlawful action."¹⁷⁹ If the firm seeking to escape liability fails to meet this burden, then it would also be held liable for the unfair labor practice.

¹⁷⁴ This part of the proposed analysis comes from *Capitol EMI Music, Inc.*, 311 N.L.R.B. 997 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994). *See supra* notes 137-41 and accompanying text.

¹⁷⁵ *See Comput. Assocs.*, 324 N.L.R.B. at 287 (acknowledging an intimate business character between general contractors and subcontractors where the general contractor involved itself directly in the employment decisions of the subcontractor); *Dews Const. Corp.*, 231 N.L.R.B. 182, 182 (1977) (finding *Dews* liable for requiring its subcontractor to unlawfully terminate its employee for engaging in union activity).

¹⁷⁶ *See RUCKELSHAUS ET AL.*, *supra* note 86, at 11.

¹⁷⁷ *Capitol EMI Music*, 311 N.L.R.B. at 1000; *see supra* Section II.B (discussing how in certain cases a non-acting joint employer may escape liability for the other employer's unfair labor practice).

¹⁷⁸ *Capitol EMI Music*, 311 N.L.R.B. at 1000.

¹⁷⁹ *Id.*

Thus, in a complaint brought against Employers *A* and *B* for *B*'s unfair labor practice, the General Counsel must establish (1) that the two employers maintain an intimate business relationship and (2) that *B* committed an unfair labor practice. Employer *B* would be liable for its own unfair labor practice, but *A*'s liability would turn on how the Board interprets "knew or should have known." The Board should start with the rebuttable presumption that when two firms have an intimate business relationship, each knows or should know if the other commits an unfair labor practice. Of course, not all franchisor-franchisee relationships or general contractor-subcontractor relationships are the same, and it would be up to the employer to show that it did not know or had no reason to know about the unfair labor practice committed by the other.

The Board would also have to clarify what it means for a firm that knows of another employer's unfair labor practice to take "all measures within its power to resist the unlawful action."¹⁸⁰ In *SOS Staffing Services*,¹⁸¹ a case that was analyzed using the *Capitol EMI Music* test for joint employer liability, the Board suggested that a joint employer that knows of the other employer's unlawful action but seeks to escape liability itself should, at the very least, express its disapproval for the other employer's action.¹⁸² Adopting this low bar—expression of disapproval—as a minimum standard for the test advocated here would not be a heavy burden on employers. Moreover, requiring this from employers that engage in some type of intimate business relationship—even if that relationship does not extend all the way to being joint employers—promotes a culture of honesty, transparency, and compliance with the NLRA.

The proposed analysis benefits both employees and employers. Employees benefit by gaining better protection for their Section 7 rights even in the absence of a joint employer finding. Although the Act has always held an employer liable for an unfair labor practice committed against its employees, the new analysis recognizes the reality that in today's nontraditional working environment, holding accountable another employer that knew or should have known about the unfair labor practice will do more to protect employees' rights in the future. The type of relief that would apply to this second employer (typically a franchisor or general contractor) would depend on the situation.

For example, suppose that a general contractor and a subcontractor work on the same construction site, and the subcontractor's employees begin to organize collectively in the hopes of unionizing. The subcontractor consults with the general contractor about how it should approach the issue, and the general contractor fails to affirmatively advise the subcontractor to obey the Act and not commit an unfair labor practice. The subcontractor then violates Section 8(a)(3) and (1) by terminating two employees who were especially

¹⁸⁰ *Id.*

¹⁸¹ 331 N.L.R.B. 815 (2000).

¹⁸² *Id.* at 816 ("Obviously Skill Staff could have protested Cobb's action by, at the least, expressing its disapproval. If the second prong of the *Capitol EMI* test has any meaning at all, this, at a minimum, was surely required.").

vocal about their hopes of unionizing. Under the proposed analysis, both the subcontractor and the general contractor are held liable under Section 8(a)(3) and (1) of the Act. Appropriate affirmative relief for the general contractor would include enjoining future facilitation of the subcontractor's unfair labor practice by ordering the general contractor to affirmatively protest any potential unfair labor practices. Such affirmative relief would mean that if the subcontractor consulted the general contractor again, the general contractor must advise against the subcontractor committing an unfair labor practice. Alternatively, if the subcontractor knew about its employees' collective activity thanks to construction site cameras provided by the general contractor, then appropriate affirmative relief applicable to the general contractor would be an order not to facilitate future unfair labor practices through the use of its technological equipment.

The subcontractors' employees are better protected under the new analysis because not only do the unlawfully terminated employees stand to be reinstated and receive backpay from the subcontractor, but they now have the added protection of the order against the general contractor that should enable them to more easily exercise their Section 7 rights in the future. Of course, *Malbaff* still poses a problem in that it allows the general contractor to cancel its contract with the subcontractor based on the union activity of the subcontractor's employees, an action that would likely put the subcontractor's employees out of a job.¹⁸³ This Note joins several other commentators and former Board Member Liebman in calling for the Board to reconsider its decision in *Malbaff* and redefine the cancellation of a contract based on union activity as an unfair labor practice.¹⁸⁴ However, even if *Malbaff* remains good law, the proposed analysis still benefits employees, particularly in the long run. To return to the example from above, even if the general contractor terminates its contract with the subcontractor, it will almost certainly enter future contracts with other subcontractors. In the event that the new subcontractor's employees begin to organize collectively, the general contractor is likely to be

¹⁸³ *Malbaff*, 172 N.L.R.B. 128, 129 (1968).

¹⁸⁴ See *Airborne Express*, 338 N.L.R.B. 597, 598 n.1 (2002) (Member Liebman, concurring) (noting that the current *Malbaff* standard runs counter to the underlying purposes of Section 7); Becker, *supra* note 77, at 1550-51 (commenting that the *Malbaff* standard can impede employees' ability to unionize); Harper, *supra* note 53, at 346 n.82 ("*Local No. 447* rests on shaky ground and should be overturned . . ."); Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 271 (1995) (discussing the difficulties facing employees of a service contract company who wish to unionize but face the risk of having the building owner terminate its contract with the service company as a result of the unionization); Bitá Rahebi, Comment, *Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105, 1114 (2000) ("While it is true that temporary workers have some options available in regard to unionization, these options are not practical. The user employer can simply terminate its contract with the supplier employer solely because its employees have unionized." (footnote omitted)).

more proactive in advising the subcontractor not to commit an unfair labor practice, if simply for the reason that it seeks to avoid the hassle of another unfair labor practice charge. If employers high on the supply chain (franchisors and general contractors) are more vigilant about ensuring that they are not facilitating or encouraging another employer to commit an unfair labor practice, then the employees of employers lower on the supply chain (franchisees and subcontractors) are in a better position to organize collectively and exercise their Section 7 rights.

Employers also stand to gain from the proposed analysis. First, it gives them an opportunity to escape liability not afforded by the current general rule of holding a joint employer jointly and severally liable for the other joint employer's unfair labor practice. The proposed analysis expands the opportunity to escape liability from the *Capitol EMI Music* line of cases, which only applies to user-supplier joint employers, to employers in intimate business relationships. Second, it severs unfair labor practice liability under Section 8(a)(1)-(4) from a duty to bargain collectively under Section 8(a)(5). In the above example, the general contractor would face liability for facilitating or failing to resist the subcontractor's unfair labor practice that it knew or should have known about, but it would have no obligation to bargain collectively with the subcontractor's employees.

B. *The Analysis Applied*

To demonstrate how the proposed standard would work, one can take the facts of *MikLin Enterprises, Inc.*¹⁸⁵ The case featured MikLin Enterprises, Inc. ("MikLin"), which operated ten sandwich shops in Minneapolis and St. Paul, Minnesota, as a franchisee of nationwide fast food chain Jimmy John's. MikLin was charged with committing an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act by unlawfully disciplining three employees and discharging six employees because of their involvement in a protected publicity campaign that sought to achieve paid sick leave.¹⁸⁶ The publicity campaign explained that the employees did not get paid sick days and sought public support for their position. In the actual case, the charge was only brought against franchisee MikLin, not against franchisor Jimmy John's.

However, suppose that the charge was brought against both MikLin and Jimmy John's and that this Note's framework applied. First, the General Counsel would have to clearly establish that MikLin had taken an unlawful action against its own employees in violation of Section 8(a)(3) and (1) of the Act. This hurdle would be met, just as it was in the original case. MikLin would still be liable for committing the unfair labor practices, and it would still need to reinstate the unlawfully discharged employees and provide them

¹⁸⁵ 361 N.L.R.B. No. 27, slip op. at 25 (Aug. 21, 2014) (finding that a franchisee committed an unfair labor practice against employees involved in a publicity campaign seeking paid sick leave).

¹⁸⁶ *Id.* at 1.

backpay, as well as rescind the unlawful written warnings and remove them from the employees' files.¹⁸⁷ Second, the General Counsel would need to show that MikLin and Jimmy John's had an intimate business relationship. This hurdle would also be easily met given that MikLin and Jimmy John's are in a franchisee-franchisor relationship. The burden would then shift to Jimmy John's to show that it neither knew nor should have known of the unfair labor practice, or if it did know, that it resisted the action. In the actual case, MikLin's owner testified that franchisor Jimmy John's was aware of the posters and press release and that MikLin had been in communication with Jimmy John's throughout the previous year's union campaign.¹⁸⁸ Therefore, Jimmy John's appears to have been in a position to affirmatively advise MikLin not to commit an unfair labor practice and to protect the Section 7 rights of MikLin's employees. Absent a showing by Jimmy John's that it did attempt to protest the potential unfair labor practice by MikLin, Jimmy John's would be liable. The applicable relief would be to order Jimmy John's to affirmatively resist potential unfair labor practices committed by its franchisees by advising them to adhere to the Act.

An example in the general contracting and subcontracting context is available in *Whitewood Oriental Maintenance Co.*, where the Board found that WSC, a janitorial contractor, and Whitewood, a subcontractor, were joint employers of Whitewood's janitors.¹⁸⁹ The Board applied the general rule of treating joint employer status as determinative of unfair labor practice liability and held WSC jointly and severally liable for Whitewood's unlawful actions, which included a Whitewood supervisor interrogating employees about their support of the union.¹⁹⁰ Under the proposed analysis, holding WSC liable for Whitewood's unfair labor practice would be more difficult and would afford WSC an opportunity to escape liability.

To hold WSC liable, the General Counsel would first have to establish that Whitewood committed an unfair labor practice and that WSC and Whitewood had an intimate business relationship. Both of these requirements would be met, as Whitewood clearly violated Section 8(a)(1) by interrogating employees about their union activity, and WSC and Whitewood were in a general contractor-subcontractor relationship. The burden would shift to WSC to show that it neither knew nor should have known that Whitewood was committing an unfair labor practice, or if it did know, that it attempted to resist the unlawful action. In the actual case, a Whitewood supervisor interrogated three employees about whether they had signed a card in support of the union, and the supervisor told them that they would be better off if they had not signed

¹⁸⁷ *Id.* at 9.

¹⁸⁸ *Id.* at 7.

¹⁸⁹ *Whitewood Oriental Maint. Co.*, 292 N.L.R.B. 1159, 1161 (1989); *see supra* notes 125-30 and accompanying text.

¹⁹⁰ *Whitewood*, 292 N.L.R.B. at 1163-64.

it.¹⁹¹ There was no evidence in the case that Whitewood had communicated with general contractor WSC regarding how Whitewood should handle the union activity of its employees, or that WSC had facilitated the unfair labor practice by providing technology or information enabling Whitewood to carry out the action. So long as WSC could show that it did not know about the potential unfair labor practice and that there was no reason it should have known, WSC would escape liability. Of course, WSC would still have an obligation to bargain collectively with Whitewood's employees because of its joint employer status, but it would not automatically be held jointly and severally liable for unfair labor practices committed by Whitewood.

In the pending McDonald's cases, the proposed test for liability would take the focus off the joint employer standard and look instead at whether franchisor McDonald's, USA knew or should have known about its franchisees' alleged unfair labor practices.¹⁹² The proposed test would allow the Board to decide the McDonalds' cases without even touching upon the joint employer standard. Applying the proposed test, the cases would turn on whether McDonald's, USA knew or should have known that its franchisees were committing unfair labor practices against the latter's employees. The franchisees allegedly committed the unfair labor practices in response to strikes where employees sought to raise the minimum wage.¹⁹³ These strikes received national attention, meaning that McDonald's, USA was certainly aware that they were happening. Under the proposed analysis, the ALJ would need to determine whether the franchisees consulted with McDonald's, USA about how they should handle the strikes. If such consultation occurred, then McDonald's, USA would need to show that it advised its franchisees not to commit an unfair labor practice and attempted to prevent such an action in order to escape liability. Even if no consultation occurred, McDonald's, USA could still be liable if it facilitated the unfair labor practices through its technology or mandated equipment. For example, some of the meritorious complaints allege unlawful surveillance by McDonalds' franchisees.¹⁹⁴ If the surveillance was enabled by cameras required or provided by McDonald's, USA, then McDonald's, USA would be liable and enjoined from future facilitation of unfair labor practices. Other complaints allege discriminatory discipline and reductions in hours.¹⁹⁵ If the franchisees used McDonald's, USA-supplied computer hardware and software to track its employees' hours (or lack thereof, due to the strike) and to determine who should be disciplined,

¹⁹¹ *Id.*

¹⁹² See *supra* note 1 and accompanying text.

¹⁹³ *McDonald's Fact Sheet*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet> [<https://perma.cc/CH2H-DZYV>].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

then McDonald's, USA could be liable and enjoined from facilitating future unfair labor practices.¹⁹⁶

Regardless of whether McDonald's, USA is found liable for its franchisees' unlawful acts, the proposed analysis would not impose an obligation to bargain collectively with its franchisees' employees. By the same hand, a finding of joint employer status would be irrelevant for purposes of holding McDonald's, USA liable. A separation of the analyses for joint employer status and for unfair labor practice liability would reduce some of the tension surrounding the definition of joint employer by removing the automatic imposition of liability that now accompanies it in the event that the other employer commits an unfair labor practice. At the same time, it would make life better for employees by extending unfair labor practice liability to employers that knew or should have known about the unlawful action, thus ensuring employees protection to exercise their Section 7 rights regardless of the prevailing definition of joint employer.

CONCLUSION

Adopting this Note's proposed analysis for employer liability for unfair labor practices would be a feasible way to better fulfill the Act's goal of protecting employees who seek to organize "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."¹⁹⁷ Adopting the analysis would not require amending the Act,¹⁹⁸ and it appears fully capable of surviving *Chevron* review in the courts.¹⁹⁹ Given the Board's recent restatement of the joint employer standard and the confusion and uproar it has caused, now would be an opportune time for the Board to introduce a moderate, reasoned assessment of employers' unfair labor practice liability that benefits both employers and employees. The proposed liability structure would not only ease the burden on newly named joint employers, but would also provide protection for employees of franchisees and subcontractors to improve their working conditions, even without bargaining collectively with the franchisor or general contractor.

The Board should stop treating joint employer status as determinative of liability where employees suffer an unfair labor practice and multiple

¹⁹⁶ See Noah, *supra* note 33 (explaining that McDonald's, USA requires its franchisees to install certain computer hardware programs).

¹⁹⁷ 29 U.S.C. § 151 (2012).

¹⁹⁸ The Act has been "virtually untouched" since 1959. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1535 & n.32 (2002) ("The Act was extended in 1970 to the U.S. Postal Service . . . and in 1974 to health care institutions, with some qualifications and provisos. . . . The only other changes have been extremely minor and technical." (citations omitted)).

¹⁹⁹ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

employers are named in the complaint. Instead, joint employer status should be neither a necessary nor a sufficient condition for extending liability under Section 8(a). An employer should be liable for an unfair labor practice when (1) it commits an unfair labor practice against its own employees, (2) it directs another employer to commit an unfair labor practice, or (3) it knew or should have known that another employer with whom it had an intimate business relationship committed an unfair labor practice and it facilitated or failed to resist the unlawful action. Adopting the proposed analysis would allow a firm to be held liable for another firm's unfair labor practice without an obligation to bargain collectively with the other firm's employees. Joint employer status would matter only for collective bargaining purposes. This new analysis for unfair labor practice liability would result in more prevention and reporting of unfair labor practices among firms that maintain nontraditional working arrangements, starting with franchisors-franchisees and general contractors-subcontractors. Ultimately, the proposed test could help modernize the Act and make it more applicable to an increasingly nontraditional employment landscape.