IS THERE AN EMPLOYER IN THE HOUSE?: EVALUATING THE NATIONAL LABOR RELATIONS BOARD'S JOINT-EMPLOYER STANDARD IN THE FISSURED HEALTH CARE WORKPLACE

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INTRODUCTION

Start work as a non-managerial employee at Masonic Hospital in downtown Chicago and you will be confronted with a long sign detailing the dozens of services available throughout the sprawling medical campus. From a range of physician offices to the laboratory services, from the emergency room to long-term rehabilitative providers, it seems like a seamless, multi-faceted, but neatly ordered medical system. If you look closely, however, you may notice that many of the facilities within the building have their own name, listed at the top of the forms you fill out or on the website you visit to refer one of your patients for other services. You may see that the staff in the dining facility, the orderlies who come to change sheets on your wing, or personnel in the billing office have the

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name of various companies on their badges. You may even notice that colleagues doing the same job follow different work rules. Some share your supervisor and your training regimen, but others seem to appear only at the busiest hours and then abruptly disappear.

It is in these little details that employees can detect the true nature of the fabric of the modern health care system—a quilt stitched together to provide holistic care to patients yet amounting to a complex, and for administrators and staff alike, dizzying employment structure. In the fast-growing medical services sector, health care experts and legislators are looking to keep costs down while providing, ostensibly, more efficient and effective care. Yet when it comes to labor relations—and employees' ability to join together and form a union—these practices serve to stifle their protected rights. In today's industry staffing structures, it is not uncommon for staff working in a health care facility to be unclear about who their actual employer is and, therefore, which coworkers they can approach to start a union to fight for better compensation and working conditions.[1]

Determining the employer of a particular employee is critical for employers when considering their responsibilities under the National Labor Relations Act ("NLRA" or the "Act").[2] The NLRA, and its related administrative regulations overseen by the National Labor Relations Board ("NLRB" or the "Board"), in part governs which employer is responsible for bargaining with employees when the employees join together to form a union.[3] When collective bargaining disputes arise involving temporary and subcontracted workers, this determination often hinges on when separate companies can be considered joint employers with joint collective bargaining responsibilities. Ever since the passage of the NLRA in 1935, the Board has explored the various and complicated ways that employees can be, with legal effect, controlled by two employers simultaneously. In these cases, those two employers can be held as jointly responsible for adherence to the provisions of the NLRA.

Over the past two years, the Board has engaged in a momentous internal fight over the joint-employer standard. In 2015, in *Browning-Ferris Industries of California, Inc.*[4] ("*BFI*" or "*Browning-Ferris*"), the Board appointed by the Obama administration significantly revised the joint-employer standard, broadening out the parameters for when the Board would consider employers to have joint control over employees under the NLRA.[5] The Board declared that it

[1] *See* Alexia Kulwiec & Nicholas Yurk, *Adapting to the Changing Patterns of Industrial Life: The Importance of the NLRB Decisions in* Browning-Ferris *and* Miller & Anderson, 67 LAB. L.J. 361, 361-62 (2016); 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, 609-10 (2012).

[2] National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).

[3] 29 U.S.C. § 160 (2012); 29 U.S.C. § 158(a)(5) (2012).

[4] 362 N.L.R.B. No. 186 (Aug. 17, 2015).

[5] *Id.* at 15-16.

would no longer rely solely on proof of "direct and immediate" control by the putative employer, but would additionally consider indicia of indirect control, reserved but unutilized control, and control that was limited or routine.[6]

The response from the business community was uproarious, predicting at times the end of McDonald's,[7] the evaporation of industrial flexibility to use contingent workforces,[8] and an explosion of new union organizing.[9] Hyperbolic rhetoric abounded—one industry representative invoked the September 11th terrorist attacks to express her horror over the decision.[10] The *BFI* decision was challenged in court,[11] provoked a proposed statutory change in Congress,[12] and caused legal scholars and lawyers to write pages upon pages debating the decision's merits for two years.[13] After just two years, and with the election of President Trump, a newly constituted Board majority appointed by the Trump administration hastily reversed *BFI* in *Hy-Brand Industrial Contractors, Ltd.*[14] *("Hy-Brand")* and announced a return to the pre-2015 standard.[15] Yet, after a

[6] *Id*.

[7] *See* Steven A. Carvell & David Sherwyn, *It Is Time for Something New: A 21st Century Joint-Employer Doctrine for 21st Century Franchising*, 5 AM. UN. BUS. L. REV. 5, 6 (2015); Jason Daley, *Two Years Ago, This Ruling Rocked Franchising to Its Core. Now Everything May Change Again*, ENTREPRENEUR (Jan. 26, 2017), https://www.entrepreneur.com/article/286687 [https://perma.cc/BQZ2-5UPM].

[8] Brief for the Coalition for a Democratic Workplace et al. as Amici Curiae at 27-28, Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 17, 2015) (No. 32-RC-109684).

[9] Nathan Layne & Mica Rosenberg, *Big Labor Sees Organizing Boon for Autos, Warehouses, More from U.S. Ruling*, REUTERS (Aug. 28, 2015), http://www.reuters.com/article/usa-labor-idUSL1N11328X20150828 [https://perma.cc/NN3V-JZ3E].

[10] Josh Eidelson & Hassan A. Kanu, *Union Moves to Keep Joint Employer Case in Federal Court*, BLOOMBERG (Jan. 4, 2018), https://www.bna.com/union-moves-keep-n73014473810/ [https://perma.cc/E2LQ-N8MA] (quoting Shelly Sun, chair of International Franchise Association, as saying that level of concern about *BFI* decision was "similar to thirty minutes before the planes hit the World Trade Center").

[11] Browning-Ferris Indus. of Cal. v. NLRB, No. 16-1028 (D.C. Cir. Dec. 22, 2017) (per curiam) (remanding case to Board following Board's change of position).

[12] Save Local Business Act, H.R. 3441, 115th Cong. (2017).

[13] For recent cases considering the *BFI* standard see Orchids Paper Products Co., No. 14-CA-184895, 2017 WL 4118877 (N.L.R.B. Sept. 15, 2017); Retro Envntl. Inc., 364 N.L.R.B. No. 70 (Aug. 2016). In academic literature, see Kulwiec & Yurk, *supra* note 1, at 365-66; Daniel B. Pasternak & Naomi Y. Perera, *The NLRB's Evolving Joint-Employer Standard:* Browning-Ferris Industries of California, Inc., 32 ABA J. OF LAB. & EMP. L. 295 (2016); Stephanie A. Kortokrax, Note, *Erroneous Deviation or Faithful Restoration? An Examination of the NLRB's* Browning-Ferris *Joint-Employer Standard*, 78 OHIO ST. L.J. 227 (2017).

[14] 365 N.L.R.B. 156 (2017). Only one decision had been made ostensibly under the *Hy-Brand* standard, but there the administrative law judge found that there was direct control that established a joint-employer relationship. Seven Seas Union Square, LLC, 29-CA-164058, 2018 WL 818125 (N.LR.B. Feb. 9, 2018).

[15] *Id*. at 2.

scathing report by the Board's Inspector General finding that one of the new Board members should have recused himself due to a professional conflict of interest,[16] the Board vacated its *Hy-Brand* ruling and left, for now, the *BFI* decision on the books.[17] As of publication, the Board has not yet altered *BFI* but has announced its intention to change the joint-employer standard through notice-and-comment rulemaking, an extreme procedural rarity for the Board.[18]

Even for an administrative agency criticized by some for shifts in policy based in part on electoral changes,[19] the Board's whiplash-inducing oscillation on this subject is striking. As a result, dispassionately assessing the two legal standards found in *BFI* and in its dissent is difficult, both in divorcing the legal analysis from partisan uproar and establishing the parameters of each joint-employer standard. However, doing so is important—regardless of whether or not the Board ultimately rejects the *BFI* standard. As workplaces have fissured over the

[16] Josh Eidelson, *NLRB Throws Out Ruling in Conflict-of-Interest Controversy*, BLOOMBERG (Feb. 28, 2018), https://www.bloomberg.com/news/articles/2018-02-26/nlrb-throws-out-ruling-in-conflict-of-interest-controversy.

[17] Hy-Brand Indus. Contractors, Ltd., 366 N.L.R.B. No. 26 (Feb. 26, 2018). After the Board vacated its decision, it requested that the D.C. Circuit Court of Appeals take the extraordinary step of recalling the *BFI* case to its active docket. Daniel Wiessner, *Split D.C. Circuit Takes Back* Browning-Ferris *Joint Employer Case*, REUTERS (Apr. 9, 2018), https://www.reuters.com/article/labor-jointemployer/split-d-c-circuit-takes-back-browning-ferris-joint-employer-case-idUSL1N1RM1BQ [https://perma.cc/8TGK-THJN]. The court recently heard oral arguments as to whether it should remand the case to the Board or rule on the merits. Oral Argument, Browning-Ferris Indus. of Cal. v. NLRB, No. 16-1028 (D.C. Cir. July 3, 2018), https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/C76C6607D89B97B4852582BF005200C2/$file/16-1028.mp3 [https://perma.cc/3PYT-TXCH]. Though the court's decision is pending as of publication and may have an effect on which joint-meployer standard governs, the arguments in this paper are not directly affected by the court's decision.

[18] Robert Iafolla, *NLRB Looks to Rulemaking to Set Joint Employer Test*, REUTERS (May 10, 2018), https://www.reuters.com/article/usa-employment-jointemployer/nlrb-looks-to-rulemaking-to-set-joint-employer-test-idUSL1N1SH0J3 [https://perma.cc/7C77-G8ST]. The Board has only successfully implemented two rules through notice-and-comment rulemaking in its history, fixing the number of potential bargaining units for health care employers in 1987 and streamlining election procedures in 2014. Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1471 (2015).

[19] *See, e.g.*, James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 223 (2005) (opining that Board has "come to operate in an openly partisan manner"); Samuel Estreicher, *'Depoliticizing' the National Labor Relations Board: Administrative Steps*, 64 EMORY L.J. 1611, 1612 (2015) ("The Board, if it is doing its best to enforce its organic statute, will often be viewed by disappointed parties and their allies as "political" and by winning parties and their supporters as "effective" guardians of the law."); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 164-65 (1985) ("Their significance lies not in the numbers but in the perception of litigants and the labor relations community that the agency's rules are in perpetual flux . . . .").

past few decades, making the joint-employer scenario increasingly common, the Board's position on the topic has implications for thousands of companies and for their employees.

The health care industry offers an ideal petri dish to reckon with the legal implications of both the *BFI* and pre-*BFI* standards. One in six Americans is employed in the industry and jobs in the sector continue to grow rapidly.[20] The sector is a complex intertwined network of employers, all of whom are subject to competing and sometimes contradictory federal and state regulations that govern patient care, privacy, safety, and, as is most salient here, labor relations. The industry is geographically diverse and utilizes a range of job categories from rarified skilled professionals, such as doctors and nurses, to a range of semi-skilled and unskilled medical and non-medical support positions. This means that health care facilities often reflect the socio-economic and racial dynamics of a local community, with both the benefits and the conflicts that labor stratification can bring.

Relatedly, the health care industry has fissured in many of the same ways that other industries have over the past forty years.[21] Hospitals and nursing homes have increasingly focused on "core competencies" and subcontracted out many of the ancillary services in those facilities.[22] The compartmentalized nature of the industry has allowed massive temporary employment agencies and contingent labor companies to flourish, providing particularized employees to health care providers to meet surges in demand or specialized care options.[23] The intertwining of a heavy regulatory burden and the use of contingent labor means that indirect control is essential for health care employers to ensure compliance with patient safety, privacy, and staffing rules.[24] Yet, despite being one of the most important industries in the current American economy, the health care industry's increased use of temporary and subcontracted employees—and its related legal questions involving joint-employer status under the NLRA—has not been widely discussed.[25]

Part I of this Note explores the development of the joint-employer standard leading to the Board's decision in *BFI* and its possible reversal by the Trump-appointed Board. The differing opinions on indirect and latent control, as well

[20] *See* STEVEN BRILL, AMERICA'S BITTER PILL: MONEY, POLITICS, BACKROOM DEALS AND THE FIGHT TO FIX OUR BROKEN HEALTHCARE SYSTEM 7 (2015); *see also infra* notes 99-102 and accompanying text.

[21] Any discussion of the rise of fissured workplaces and the effects on workers requires recognition of Economist David Weil and his work on the subject. *See generally* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

[22] *See infra* notes 127-132 and accompanying text.

[23] *See infra* notes 130-133 and accompanying text.

[24] *See infra* notes 135-139 and accompanying text.

[25] For example, David Weil's book makes only passing reference to health care situations despite discussing in depth the effect of the joint-employer standard on various other industries. WEIL, *supra* note 21, at 269-71.

as control deemed routine, has led to, and will continue to lead to, fundamentally different findings on the joint-employer question when the Board applies the standard to the facts of specific labor disputes. Part II places the history of the joint-employer standard alongside the history of union organizing in the health care industry and explores how the health care workplace has fissured over the past forty years, leading to contingent workforces that are controlled indirectly by employers and less equipped to take advantage of the rights protected by the NLRA. By attempting to expand the literature on the fissured workplace to include the industry, this Note seeks to establish how the industry, with its regulatory paradigms and employment structures, serves as a useful lens through which to judge the different joint-employer standards.

Part III applies the rules from *BFI* and *Hy-Brand* to recent health care Board cases to understand the divergences of each approach and the ramifications of those differences. What these cases suggest is that a reversal of *BFI* will allow for continued manipulation by employers to avoid collective-bargaining obligations while indirectly and concretely controlling many aspects of the work by their subcontractor-provided workforce. The modern health care industry illustrates that the *Hy-Brand* standard hamstrings employees from actualizing their collective rights protected by the NLRA and, from a legal doctrine standpoint, problematically construes the common law rules of agency too narrowly, creating a path for employers to reap the rewards of the employer-employee relationship without fulfilling their responsibilities under the NLRA. Allowing for the consideration of indirect and reserved control would better fit the common law and the common practices in the health care industry.

I. JOINT-EMPLOYER STANDARD

Collective bargaining is the bedrock of the NLRA.[26] After decades of bloodshed, work stoppages, and a severe power discrepancy between employers and employees, Congress adopted the Act in an attempt to address these conflicts, giving the Board power to enforce the Act "to preserve the balance of power between labor and management."[27] Section 7 of the Act laid out fundamental inviolate rights that employees, as defined by the Act, are granted.[28]

[26] Section 7 of the NLRA grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2012). Section 8 of the NLRA is the statutory mechanism that allows the Board to take recourse when these rights are violated. 29 U.S.C. § 158 (2012).

[27] Vance v. Ball State Univ., 570 U.S. 421, 468 n.7 (2013); *see also* Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427-29 (Cynthia L. Estlund & Michael L. Wachter eds., 2012) (judging success of Act on marked decrease in labor strife and violence between employers and employees).

[28] 29 U.S.C. § 157 (2012).

These include the right to organize collectively, form a union and collectively bargain, and act collectively more broadly, for mutual aid or protection.[29] Section 8 of the Act sets parameters for when the Board can find that employers or unions have infringed upon the Section 7 rights of the employees—and establishes mechanisms to enforce the law against offending parties.[30] For example, Section 8(a)(5) of the Act made it illegal for an employer to refuse to engage in good faith bargaining with its employees who had elected to be represented by a union.[31] Upon a finding that such an employer is in violation of the law, the Board has the authority to order the employer to act and to seek a court's enforcement of the order if necessary.[32] Yet in these cases, almost immediately after the passage of the NLRA in 1935, companies sometimes denied that they were, per the definition of the Act, the employers of the employees who had elected to form a union.[33] In response, the Board established its joint-employer standard to decide these cases.[34] Ever since, the Board has grappled with situations where an employee involved in protected labor-related activities is ostensibly employed by one employer but does work on behalf of, in the facility of, or under the supervision of a second employer.[35]

The concept of joint-employer liability for collective bargaining under the NLRA has existed almost since the Act's passage. The Board first announced the potential for joint-employer collective bargaining responsibility in a 1938 decision involving bus drivers and an attempt by two employers to establish a so-called company union.[36] The term "joint employer" emerged explicitly in 1954.[37] During and after that period, the Board used a fairly straightforward fact-based analysis to determine when both employers were liable for the working conditions of the employee,[38] relying on principles from the common law governing "master-servant" relationships, which includes consideration of a

[29] *Id*. Section 7 protects employees who act collectively even when they are not pursuing collective bargaining or unionization. *See, e.g*., NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14-15 (1962) (finding that Section 7 rights include collectively walking out of dangerous workplace). *But see* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1617 (2018) (suggesting that Court may narrow its reading of Section 7 rights to only those which relate directly to "the right to organize unions and bargain collectively").

[30] 29 U.S.C. § 158 (2012).

[31] 29 U.S.C. § 158(a)(5) (2012).

[32] *See, e.g*., Red-More Corp., 169 N.L.R.B. 426, 427-28 (1968).

[33] *See, e.g*., NLRB v. Pa. Greyhound Lines, Inc., 303 U.S. 261, 271 (1938).

[34] Kulweic & Yurk, *supra* note 1, at 363.

[35] *Id*.

[36] *Id*.

[37] *See* NLRB v. New Madrid Mfg., 215 F.2d 908, 908 (8th Cir. 1954).

[38] *See, e.g*., NLRB v. Williams, 195 F.2d 669, 672 (4th Cir. 1954) (defining test as inquiry into "unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations" between two employers and as one reliant on common law).

master's control—and right of control—over an employee.[39] Simply put, in the case law, the Board investigated whether two or more employers "share[d], or codetermine[d], those matters governing essential terms and conditions of employment."[40] Building on this inquiry into each employer's control over the employees, the Board also considered whether that control was sufficient to allow for the employers to engage in meaningful collective bargaining. An employer need not "hover over [workers], directing each turn of their screwdrivers and each connection that they made" in order to be found liable as a joint employer.[41] Yet, the joint-employer liability stopped when one of the employers did not "have and/or exercise common control over the affected employees' work, wages, etc."[42] The Board also differentiated this standard from single-employer cases, where one employer was found to be "an integral part" of another employer's business,[43] and from multi-employer cases, where two or more employers in a single industry voluntarily joined together to collectively bargain a master agreement with their employees that governed their industry or part of the industry.[44]

The Board applied its joint-employer standard fairly consistently until 1982. In that year, a group of workers at, fittingly, the Browning-Ferris Corporation, claimed to be jointly employed by the company and a subcontractor.[45] The Board, and the D.C. Circuit that enforced the decision, seemed to conform neatly

[39] RESTATEMENT (SECOND) OF AGENCY § 2 (AM. LAW INST. 1958) ("A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service."). The Taft-Hartley Amendments require that the Board utilize such ordinary rules from the common law. Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 355 (6th Cir. 1983).

[40] Greyhound Corp., 153 N.L.R.B. 1488, 1495 (1965), *enforced*, 368 F.2d 778 (5th Cir. 1966).

[41] Sun-Maid Growers of Cal., 239 N.L.R.B. 346, 351 (1978), *enforced*, 618 F.2d 56 (9th Cir. 1980).

[42] John Breuner Co., 248 N.L.R.B. 983, 988 (1980).

[43] *See* Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam) ("[I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise."); *see also* Jonathan G. Axelrod, *Who's the Boss? Employee Leasing and the Joint Employer Relationship*, 3 LABOR L. 853, 857 (1987).

[44] In a joint-employment situation, employer A and B are jointly responsible for the working conditions of employee group A and thus must jointly collectively bargain with the employees. In multi-employer bargaining, employer A controls employee group A and employer B controls employee group B, but the two employers voluntarily elect to join together to form a collective bargaining agreement covering both groups of employees. Multi-employer bargaining is most frequently seen in building trades or in the trucking industry, where the respective group of employers collectively and voluntarily agrees to set a standard applicable to union workers regardless of the individual employer on a particular site. For a survey of cases regarding this line of NLRB jurisprudence, *see Multiemployer Group as Appropriate Bargaining Unit Under Labor Relations Act*, 12 A.L.R. 3d 805, 805-06 (2011).

[45] NLRB v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1119 (3d Cir. 1982).

to precedent.[46] In its decision, the Board held that the joint-employer standard remained when "one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer."[47] Yet, shortly thereafter, the Board began applying a stricter standard, holding that in order to find joint-employer status, an employer must not only have the authority to control the terms and conditions of employees' work, but also actively exert that control.[48] In this newly molded standard, the Board's factual determination became more stringent. The Board looked for specific acts by each employer regarding the hiring, firing, discipline, and supervision of employees, amongst other factors.[49] A bevy of Board rulings emerged which tightened the definition of a joint employer to require, on top of manifestations of existent authority over the employees in question, that the control be "direct and immediate" and not "limited and routine."[50] Routine instructions, as long as they did not cross into "how to do the job," no longer established joint-employer liability under the NLRA.[51] By the end of President George W. Bush's second term, the joint-employer standard was effectively narrowed to apply only to employers with direct and active control over employees.[52]

A. *The* BFI *Decision*

The facts of *BFI* are fairly representative of joint-employer cases brought before the Board from across the American economy. Browning-Ferris Industries, a large waste-disposal company, ran a recycling plant in Milpitas, California and established a temporary labor services agreement with Leadpoint whereby the latter provided workers who performed a number of roles at the plant.[53] A Teamsters local union filed a petition to represent all two hundred and forty full-time, part-time, and on-call workers at the plant, only sixty of whom

[46] *Id*. at 1122.

[47] *Id*. at 1123.

[48] T.L.I., Inc., 271 N.L.R.B. 798, 798 (1984), *enforced sub nom*., Gen. Teamsters Local Union No. 326 v. NLRB, 772 F.2d 894 (3d Cir. 1985); Laerco Transp. & Warehouse, 269 N.L.R.B. 324, 325 (1984).

[49] Pasternak & Perera, *supra* note 13, at 296.

[50] AM Prop. Holding Corp., 350 N.L.R.B. 998, 1001 (2007), *enforced sub nom*., Serv. Emp. Int'l Union v. NLRB, 647 F.3d 435 (2d Cir. 2011), *overruled by* Browning-Ferris Indus., Inc., 362 N.L.R.B. No. 186 (Aug. 17, 2015); Airborne Freight Co., 338 N.L.R.B. 597, 597 n.1 (2002), *overruled by* Browning-Ferris Indus., Inc., 362 N.L.R.B. No. 186 (Aug. 17, 2015).

[51] Island Creek Coal Co., 279 N.L.R.B. 858, 864 (1986).

[52] *AM Prop. Holding Corp*., 350 N.L.R.B. at 1001 (finding no joint employer relationship when there was "no specific evidence" that individual "trained employees or instructed them how to perform their tasks").

[53] *Browning-Ferris*, 362 N.L.R.B. at 2-3.

were solely Browning-Ferris employees and the rest who were ostensibly employed by Leadpoint.[54] Both employers challenged the request, arguing that the two sets of workers were not jointly employed by the companies and therefore each company should only be responsible for bargaining with their own designated employees.[55] In response, the Board, now composed of President Obama appointees, announced its intention to revisit the joint-employer standard while adjudicating the case.[56] It requested comments and amici briefs on the subject[57] and after reviewing these arguments, the Board announced a return to what it termed the actual holding of the 1982 Browning-Ferris case, before the standard became narrowed.[58]

The Board held that joint-employer liability would continue to exist if the facts of the case showed the employers shared or codetermined the terms and conditions of the employees' work.[59] However, the Board announced that going forward, it would consider indicia of indirect control and reserved control, and therefore no longer adhere to a bright-line rule requiring proof of "direct and immediate" control by a putative employer.[60] As required, the Board explained how this expanded understanding of the joint-employer rule fit with the common law definition of employment.[61] It also described the ways in which the old standard was increasingly ineffective in the wake of massive growth of temporary and subcontracted employment schemes, which the Board said had weakened employees' ability to form unions and establish collective bargaining agreements.[62] The previous standard, the Board explained, "leave[s] the Board's

[54] *Id*. (noting that "BFI solely employs approximately 60 employees" and the union is "seek[ing] to represent approximately 240 full-time, part-time, and on-call sorters, screen cleaners, and housekeepers who work at the facility").

[55] *Id*. at 7.

[56] *Id*. at 1.

[57] *Id*. at 1.

[58] *Id*. at 2. The Board stated the changes to the standard in the 1980s were implemented "without any explanation or even acknowledgement and without overruling a single prior decision" and were out of step with the purposes of the NLRA. *Id*. at 10.

[59] *Id*. at 2.

[60] *Id*. at 14; *see also* Jay Forester, *The Joint-Employer Standard After* Browning-Ferris II *& the 21st Century American Dream*, 5 AM. U. BUS. L. REV. 37, 40-42 (2015).

[61] *Browning-Ferris*, 362 N.L.R.B. at 12-15; *see also* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958) (laying out non-exhaustive considerations to determine who are employees).

[62] The Board also decided a critical case involving temporary employees a year later, which altered the rule regarding appropriate bargaining units, under Section 9 of the NLRA, in workplaces of so-called user employers and supplier employers. Miller & Anderson, Inc., 364 N.L.R.B. No. 39, 1-2 (July 11, 2016). Under the new standard announced in this case, temporary employees hired by a temporary agency may be considered part of a bargaining unit with permanent employees even without the employer's consent. *Id*. at 2. Taken together, the *BFI* standard and *Miller & Anderson* have the potential to alter how temporary workers

joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships."[63] In so ruling, the Board explicitly overruled the Reagan era *TLI, Inc*.[64] and *Laerco Transportation and Warehouse*[65] cases and their progeny.[66]

B. *Indirect Control*

The most meaningful doctrinal change in *BFI*, and the change that most concerned the business community, was the decision by the Board to consider indicia of indirect control in future cases.[67] The Board majority argued that the standing "direct and immediate control" rule had been silently and arbitrarily inserted into Board doctrine and was out of step with the common law definition of agency.[68] In reversing this standard, the Board cited several cases prior to the 1980s that had included evidence of indirect control in joint-employer inquiries.[69] It further held that, if substantial enough, such evidence of indirect-control could be dispositive in a joint-employer inquiry.[70] However, the Board

are considered when collective bargaining responsibilities attach under the NLRA. *See* Kulwiec & Yurk, *supra* note 1, at 367.

[63] *Browning-Ferris*, 362 N.L.R.B. at 1.

[64] 271 N.L.R.B. 798, 798 (1984).

[65] 269 N.L.R.B. 324, 325 (1984).

[66] *Browning-Ferris*, 362 N.L.R.B. at 19.

[67] The decision to include considerations of reserved control was also controversial. However, the common law is fairly clear on the ability of the Board to consider such control. In the common law, a "master," the stand-in term for employer, is defined when such a person has control "or has the right to control" the physical conduct of a servant. RESTATEMENT (SECOND) OF AGENCY § 2(1) (AM. LAW INST. 1958). In the *BFI* case, indicia of reserved control included consideration of the contract between the two companies, as it was a "cost-plus" contract, requiring Browning-Ferris to compensate Leadpoint for each supplied employee plus a fixed percentage on top for Leadpoint's supervision. *Browning-Ferris*, 362 N.L.R.B. at 19. The Board also found that Browning-Ferris was the "ultimate authority" over the conduct of all employees, regardless of whether they were on paper the employees of Leadpoint or Browning-Ferris. *Id*. at 13, 20.

[68] *Browning-Ferris*, 362 N.L.R.B. at 10 n.43, 14.

[69] Earlier cases that considered indirect control include *Floyd Epperson*, 202 N.L.R.B. 23, 23, *enforced,* 491 F.2d 1390 (6th Cir. 1974) (holding that joint-employer status is found where user firm has indirect control over employee discipline and wages); *Globe Discount City*, 171 N.L.R.B. 830, 830-32 (1968) (finding that licensor jointly employed its licensee's employees where licensor retained substantial contractual power "to control or influence the labor policies of the licensees," and retained "the right to terminate either license for default," thereby insuring "that its wishes in regard to labor relations matters will be carried out by the licensees").

[70] *Browning-Ferris*, 362 N.L.R.B. at 17-18; *see also* Forester, *supra* note 60, at 41 (identifying seven examples of indirect control that Browning-Ferris utilized to control Leadpoint workers).

retained the rule that when a subcontractor acts in mere "service under an agreement to accomplish results or to use care and skill in accomplishing results," the general contractor does not retain sufficient indirect control to establish joint-employer liability.[71]

In analyzing the Board's *BFI* standard, an illustration may help. In a common subcontracting scheme, a general contractor hires an intermediary subcontractor who then supervises its own employees.[72] In many situations, recognized by both the *BFI* majority and dissent, the general contractor does not extend sufficient control over the work of the subcontractor's employees to be held liable for their labor relations.[73] Yet there are instances where the general contractor puts in place supervisory mechanisms, conditional controls, contractual pressure, or required work rules, that tie the hands of the subcontractor as to the supervision of employees.[74] The general contractor's supervisors could dictate to their subcontracting supervisors which employees to hire, fire, discipline, or detail, day-to-day, how the employee should perform a task.[75] Here, the subcontractor is, effectively, an intermediary between the general contractor and the employees.[76] Since the general contractor has no contact with the subcontractor's employees, their control is completely indirect.[77]

In the actual *BFI* case, the companies tried to construct an invisible wall between each other ensuring that Browning-Ferris retained no direct control over Leadpoint employees even while employees of each company worked side by side.[78] Each set of employees had their own supervisors, their own human resources departments, and were kept separate in terms of wages and benefits.[79] The temporary labor services agreement explicitly stated that the workers

[71] *Browning-Ferris*, 362 N.L.R.B. at 12 (quoting from RESTATEMENT (SECOND) OF AGENCY § 220 cmt. e (AM. LAW INST. 1958)).

[72] This hypothetical is derived from *Painting Co.*, 330 N.L.R.B. 1000, 1007 (2000), although that case only included questions about direct control.

[73] *See Browning-Ferris*, 362 N.L.R.B. at 13.

[74] *See, e.g.*, Roadway Package Sys., Inc., 326 N.L.R.B. 842, 851-52 (1998).

[75] *See, e.g.*, Hamburg Indus., Inc., 193 N.L.R.B. 67, 67 (1971) (finding that indirect control exerted through "work instructions, quality control and the right to reject finished work, work scheduling, and indirect control over wages" established joint-employer relationship).

[76] *See, e.g.*, Hoskins Ready-Mix Concrete, 161 N.L.R.B. 1492, 1497 (1966) (finding that general contractor contractually retained "such overall supervision and direction" as it "deemed appropriate," which established joint-employer relationship through indirect control).

[77] *Contra Painting Co.*, 330 N.L.R.B. at 1007 (describing unusual relationship in this particular case between general contractor and subcontractor where general contractor provided employees to subcontractor to complete tasks at hand).

[78] *See Browning-Ferris*, 362 N.L.R.B. at 2-6.

[79] *Id.* at 4.

provided by Leadpoint to Browning-Ferris were Leadpoint employees and not employees of Browning-Ferris.[80]

However, the Board found indicia of indirect control. Browning-Ferris ensured that the workers Leadpoint hired were screened to comply with certain in-house rules and certifications[81] and Browning-Ferris had the right to request the termination of Leadpoint workers.[82] Leadpoint had indeed terminated workers in the past at the behest of Browning-Ferris supervisors.[83] Browning-Ferris would inform Leadpoint of how many workers it required on a given day and Leadpoint would choose who to send to fill those shifts.[84] Leadpoint had to request any raise for employees that would lead to those workers being paid more than Browning-Ferris employees.[85] Browning-Ferris set the hours of operations and shifts, which Leadpoint workers adhered to, dictated when the production line would continue running for overtime purposes, and determined when breaks occurred.[86] All of these time-management decisions equally affected the conditions of work for Browning-Ferris and Leadpoint employees. Taken together, Browning-Ferris exerted substantial control over the employees, albeit always with a Leadpoint supervisor as an intermediary. Under the new standard, combined with other aspects of the relationship that appeared to the Board to be direct control, Browning-Ferris and Leadpoint's conduct satisfied the joint-employer standard.[87]

C. *Dissent in* BFI *and the Resulting* Hy-Brand *Decision*

Member Miscimarra, joined by Member Johnson, strenuously dissented to the Board's new *BFI* standard, a dissent that became the template for the vacated *Hy-Brand* decision he wrote two years later.[88] It is likely that the Trump-appointed majority will find another case to announce its return to the pre-*BFI* standard. Miscimarra's dissent listed five salient points of criticism of the *BFI*

[80] *Id*. at 3 ("The Agreement between BFI and Leadpoint provides that Leadpoint will recruit, interview, test, select, and hire personnel to perform work for BFI.").

[81] *Id*. at 4 ("Leadpoint tests and evaluates an applicant's ability to perform the required job tasks at BFI by giving her a try-out on the material stream and assessing whether she has adequate hand-eye coordination.").

[82] *Id*. at 3, 23 (stating that employment agreements give BFI authority to terminate any personnel for any reason).

[83] *Id*. at 5 (describing processes by which BFI managers notify Leadpoint supervisors about their dismay regarding outputs, employees, etc.).

[84] *Id*. at 6-7.

[85] *Id*. at 19 (explaining that, under contract between Leadpoint and BFI, Leadpoint was unable to pay its employees more than BFI paid its employees for comparable work).

[86] *Id*.

[87] *Id*. at 20.

[88] *Id*. at 21-51 (Miscimarra & Johnson, dissenting); *see also* Hy-Brand Industrial Contractors, 365 N.L.R.B. No. 156 (Dec. 14, 2017), *vacated*, 366 N.L.R.B. No. 26 (Feb. 26, 2018).

test. First, he accused the Board of exceeding its statutory authority by implicitly and improperly relying on "economic realities" and "statutory purpose theory," both of which depart from the narrow common law basis that is supposed to undergird the NLRA's definition of who constitutes an employer.[89] Citing *NLRB v. Hearst Publications*[90] and the subsequent Taft-Hartley amendments,[91] Miscimarra argued that the Board was pretextually relying on a common law interpretation while actually relying on an analysis of current economic conditions, which is forbidden by those amendments.[92]

Second, he argued that Congress was aware of potential joint-employer situations, and deliberately did not include reference to such employment schemes in the statute to protect third-parties from pressure beyond collective bargaining, such as unfair labor practice charges and secondary economic protest activity.[93] Third, he attacked the Board's claim of deference itself, stating that the Board cannot reinterpret the common law, which he accused the majority of doing.[94] Fourth, he argued that the new rule was too vague and unpredictable.[95] This would lead to more conflict and uncertainty in terms of liability considerations by both employers and employees.[96] Last, Miscimarra stated that the Board majority was incorrectly pulling together employers who had divergent interests and levels of control over employees, resulting in ineffective bargaining.[97] Miscimarra, applying the pre-*BFI* "direct and immediate" test to the Browning-Ferris and Leadpoint workers, would have upheld the administrative law judge's determination that the employees were singularly employed by Leadpoint.[98]

II. THE HEALTH CARE INDUSTRY

It is clear that the debate over the joint-employer standard continues to rage, even after the vacatur of the *Hy-Brand* decision. For the employee seeking to organize with her coworkers, or for the employer attempting to plan for potential

[89] *Browning-Ferris*, 362 N.L.R.B. at 26 (Miscimarra & Johnson, dissenting).

[90] 322 U.S. 111 (1944).

[91] *Id.* (requiring newspaper company to bargain with union of newsboys, even though newsboys were considered independent contractors and had no employment relationship with said newspaper company).

[92] *Browning-Ferris*, 362 N.L.R.B. at 26 (Miscimarra & Johnson, dissenting). The dissent also cites *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992), as establishing the factors determining who is an employee, and therefore an employer. *Browning-Ferris*, 362 N.L.R.B. at 29 (Miscimarra & Johnson, dissenting).

[93] *Browning-Ferris*, 362 N.L.R.B. at 27-28 (Miscimarra & Johnson, dissenting).

[94] *Id.* at 30-31 (comparing NLRA's definition of employee with language in Fair Labor Standards Act).

[95] *Id.* at 35-37.

[96] *Id.* at 35.

[97] *Id.* at 37-43.

[98] *Id.* at 49.

liability, prognostication as to the application of both standards is valuable. In order to do so here, this Note has chosen the health care industry as a testing ground. Though there are limitations in studying the NLRA (which is almost universally applicable to employers engaged in interstate commerce) in the context of a single industry, the health care industry is an ideal and under-studied testing ground for this policy for a handful of reasons. In many ways, the industry is the centerpiece of the American post-industrial workforce.[99] Much of its history in labor relations has been written during the rise of the fissured work place because a large segment of the industry recently came under the auspices of the NLRA in 1974.[100] The industry is structurally predisposed to fissuring because of the necessary utilization of departments of employees, working side by side, ranging from skilled to unskilled. Indeed, the industry has mirrored the rest of the economy in increasing its reliance on contingent, temporary, and subcontracting employment, resulting in hundreds of thousands of health care employees working in these sorts of jobs every day.[101] Profits are immense for companies supplying health care workers—AMN Healthcare, the country's largest health care temporary employment agency, has reaped one billion dollars a year in annual revenue since 2013 and reported $469 million as gross annual profit in 2015.[102] Last, and perhaps most importantly, the industry is subject to a heavy, multifaceted regulatory burden which also encourages indirect control

[99] The broad health care sector constitutes nearly one-fifth of all economic output in the United States. Martin Gaynor, Kate Ho & Robert J. Town, *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LITERATURE 235, 235-36 (2015) (noting that health care spending was equal to eighteen percent of United States GDP in 2011). One in six American workers hold health care-related positions. BRILL, *supra* note 20, at 7. Particular professions within the field, most notably home health aides, are some of the fastest growing jobs in the country. BUREAU OF LABOR STATISTICS, HOME HEALTH AIDES AND PERSONAL CARE AIDES (2016), http://www.bls.gov/ooh/healthcare/home-health-aides.htm [https://perma.cc/28XP-9QQS] (noting that employment of home health aids is expected to increase by forty-one percent by 2026).

[100] *See infra* notes 114-117 and accompanying text.

[101] In 2014, 2.87 million U.S. residents were employed via temporary staffing agencies and nine percent of those residents were employed in the health care industry. *See NLRB Ruling Affects Temporary Workers at Health Care Facilities*, CALIFORNIA HEALTHLINE (Aug. 15, 2015), http://californiahealthline.org/morning-breakout/nlrb-ruling-affects-temporary-workers-at-health-care-facilities/ [https://perma.cc/9SY9-ST9Q]; *see also* Jacque Wilson, *Controversy Surrounds Hospital Contract Workers*, CNN (Aug. 2, 2012), http://www.cnn.com/2012/08/01/health/controversy-temporary-employees/ [https://perma.cc/E7EE-KKPS] (providing 2012 statisitcs).

[102] Information about the industry practice of supplying "travelers," nurses, and technicians on a floating basis to health care facilities is detailed in an anti-trust lawsuit filed by Aya Healthcare Services, another large national temporary employment agency against AMN Healthcare. Plaintiff's Complaint at 3, Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., No. 3:17-CV-00205 (S.D. Cal. Feb. 2, 2017), 2017 WL 460793.

over subcontractors and temporary employees to ensure compliance with rules on staffing, patient care, and safety.[103]

Yet, despite the health care industry's clear relevance to the debate about fissured work places, it has largely been missing from the joint-employer conversation. Much of the conversation after the *BFI* decision focused on the possible impact on McDonald's or other franchising arrangements.[104] Industry analysts panicked at the concept that the McDonald's corporation, for example, could be held liable for the collective bargaining obligations of a single franchise anywhere in the United States.[105] However, the joint-employer standard is just as relevant, if not more, in more traditional workplaces like nursing homes or manufacturing plants.[106] In these examples, temporary or subcontracted workers from a supplier employer, such as a temp agency, come into a "user employer's"[107] facility, use that employer's equipment, and work ostensibly as part of an integrated workforce. Health care is a classic example of this arrangement, where the intermingling and multi-layered supervision of variously employed workers is not only a normal practice, but at times a requirement of federal or state regulations designed to ensure patient safety.[108] It is in these health care work arrangements where the Board's joint-employer standard makes a difference for health care employees seeking to effectuate their rights under the Act.[109]

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[103] *See infra* notes 133-142 and accompanying text.

[104] *See, e.g.*, Thomas Walsh, III, *Supersizing the Definition of Employer Under the National Labor Relations Act: Broadening the Joint-Employer Standard to Include Franchisors and Franchisees*, 47 U. TOL. L. REV. 589, 593 (2016).

[105] *See, e.g.*, John T. Bender, *Barking Up the Wrong Tree: The NLRB's Joint-Employer Standard and the Case for Preservng the Formalities of the Business Format Franchising*, 35 FRANCHISE L.J. 209, 226 (2015).

[106] Kulweic & Yurk, *supa* note 1, at 362.

[107] Caroline Galiatsos, Note, *Beyond Joint Employer Status: A New Analysis for Employers' Unfair Labor Practice*, 95 B.U. L. REV. 2083, 2099 (2015). This Note mirrors language used by the Board and by scholars in describing temporary or subcontracted employment agreements, where a "user employer" refers to a firm that uses employees and a "supplier employer" as one who supplies employees. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B No. 186, 3 n.10 (Aug. 27, 2015). This is the language central to the line of cases most recently affected by *Miller & Anderson*, 364 N.L.R.B. No. 39 (July 11, 2016). *See* M.B. Sturgis, Inc., 331 N.L.R.B. 1298 (2000), *overruled by* Oakwood Care Ctr., 343 N.L.R.B. 659 (2004).

[108] Karen S. Rieger & Eric S. Fisher, *Medical Staff Bylaws and Managed Care Provider Panels: Organization and Credentialing*, *in* HOSPITALS: LIABILITY, PEER REVIEW, AND CREDENTIALING ISSUES Tab 3, 23-24 (2005) (collecting cases and explaining that staff bylaws sometimes impose contractual obligations as well as general duty to comply).

[109] *See infra* Part III.

A. *The NLRA and the Health Care Industry*

Formally, the nonprofit health care industry has had to concern itself with liability under the National Labor Relations Act for a relatively short period of time, although nursing homes and other health care facilities have been governed by the Act since its passage.[110] Originally, governmental hospitals were explicitly excluded from coverage under the NLRA.[111] In 1947, the Taft-Hartley Act ("Taft-Hartley") exempted "voluntary" hospitals, then the term for private nonprofit hospitals, from the NLRA.[112] Although there was still notable and far-reaching union organizing in these hospitals through voluntary recognition by employers,[113] it was not until 1974 that the NLRA was amended to cover employees who worked for nonprofit health care employers (estimated to be 1.4 million employees at the time).[114] Congress inserted a specific definition of a "health care institution," bringing "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person" under the purview of the Act.[115] The Health Care Institution Amendments sought to balance the "public's right to receive uninterrupted health care" with the rights

[110] National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012). Some states, such as Michigan, allowed for organizing in nonprofit hospitals earlier under their own labor statutes. INSTITUTE OF LABOR AND INDUSTRIAL RELATIONS, UNIONIZATION OF THE HEALTH CARE INDUSTRY: HOSPITAL AND NURSING HOME EMPLOYEES UNION LEADERS' CONFERENCE REPORT 2 (Ronald J. Peters et al. eds., 1980).

[111] The original language, under the NLRA's definition of an "employer," excluded from such a designation "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." National Labor Relations Act, Pub. L. No. 198, 49 Stat. 449 (codified as amended at 29 U.S.C. §152(14) (2012)).

[112] 29 U.S.C. § 152(2) (2012). Prior to the passage of the Taft-Hartley Act, a court had enforced the application of the NLRA to nonprofit hospitals, likely spurring lobbying for the exemption that was subsequently included. Cent. Dispensary & Emergency Hosp., 50 N.L.R.B. 393 (1943), *enforced*, 145 F.2d 852 (D.C. Cir. 1944).

[113] Most important in the pre-1974 health care union organizing was the New York City health care workers union named "1199" which succeeded in starting unions in many New York City hospitals during the 20th century. LEON FINK & BRIAN GREENBERG, UPHEAVAL IN THE QUIET ZONE: 1199/SEIU AND THE POLITICS OF HEALTH CARE UNIONISM 169 (2d ed. 2009). By 1974, 1199 had seventy-five thousand members. *Id.*

[114] Ira Michael Shepard, *Health Care Institution Amendments to the National Labor Relations Act: An Analysis*, *in* HEALTH CARE LABOR LAW 217, 218 (Ira Michael Shepard & A. Edward Doudera eds., 1981). For-profit hospitals were covered by the Act, which was confirmed in *Butte Med. Props.*, 168 N.L.R.B. 266, 267 (1967).

[115] 29 U.S.C. § 152(14) (2012).

of health care employees.[116] In doing so, the law placed unique restrictions on strikes by health care unions and on bargaining-unit composition.[117]

The health care industry quickly confronted the costs and benefits of liability and bargaining responsibilities under the NLRA. Union organizing picked up swiftly in the industry after the law went into effect. By 1980, more than thirty unions were involved in organizing in the health care industry.[118] Union elections were more successful in the health care industry than in other industries at the time.[119] Expenses in the hospital industry increased 12.7% between 1976 and 1980, and wage increases accounted for an estimated half of that rise in costs.[120] While there are a host of reasons for the increase in costs, studies have shown that union wage premiums did increase pay, especially for lower-skilled health care workers.[121] A nurse involved in organizing other nurses at the time summed up management's reaction by stating: "There are people who feel that the trend toward unionism in the hospital sector, combined with the pressures generated by the consumer movement and gradual implementation of a health planning network in every local area on up to the national level, is already beginning to force that decentralization of power."[122] Forty years later, the health care industry is certainly aware of the costs that a looser joint-employer standard can bring its facilities and bottom lines.

[116] Shepard, *supra* note 114, at 218. Importantly, some health care institutions were excluded from NLRA coverage, including hospitals determined not to engage in interstate commerce, determined by whether the hospital brought in more than $250,000 of gross average revenue, or $100,000 if the institution in question was a nursing or convalescent home. *Id.* at 230, 232; *see also* E. Oakland Cmty. Health All., Inc., 218 N.L.R.B. 1270 (1975); Marquette Gen. Hosp., 216 N.L.R.B. 301 (1975).

[117] *Health Care Law Under the NLRA*, AM. BAR ASS'N 11-13, https://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/health_care.authcheckdam.pdf [https://perma.cc/PDK5-GVED] (last visited Sept. 27, 2018).

[118] FINK & GREENBERG, *supra* note 113, at 169.

[119] John E. Higgins, Jr., *Health Care Industry Labor Law Trends*, *in* HEALTH CARE LABOR LAW, *supra* note 114, at 30-31.

[120] Daniel S. Freeman & Bradford L. Kirkman-Liff, *Trends in Hospital Unionization and a Predictive Model for Unionizing Success*, 29 HOSP. & HEALTH SERVS. ADMIN. 101, 101 (1984).

[121] Barry T. Hirsch & Edward J. Schumacher, *Union Wages, Rents and Skills in Health Care Labor Markets*, 19 J. OF LAB. RES. 125, 126 (1998) (showing relatively small "union premium" wage differential of three percent for unionized registered nurses but up to twelve percent for nurse's aides and health care service workers).

[122] KAREN A. O'ROURKE & SALLEY R. BARTON, NURSE POWER: UNIONS AND THE LAW 14 (1981).

B. *Why Did the Health Care Industry Fissure?*

The heyday of union organizing in health care came in the 1980s while there was an ongoing dramatic drop in union membership in manufacturing.[123] This was also an era when industries across the spectrum of the American economy increased the use of temporary workers and subcontractors as part of cost-cutting models.[124] It was the age of the fissured workplace. In the health care industry, the corresponding drive for increased efficiency and tighter cost controls, including the use of staffing agencies and other contingent workers, was managed care.[125] This term refers to coordinated strategies by both health care CEOs and governmental agencies to more effectively drive down health care costs.[126] For hospitals and nursing homes, this was also about negotiating with insurance companies and the Federal Medicare and Medicaid programs in terms of reimbursement rates to maximize payments for patient care and services.[127] In essence, under the guise of managed care, health systems were engaged in a collective bargaining akin to the type used by unionized employees. Over the years, health care operations utilized various methods to enhance the flow of information, interconnect networks of specialists to meet patient needs, and, importantly for considerations of joint employment, come up with creative employment practices using shared, contingent, or temporary personnel.[128] The employment side of the managed care model tried, in part, to demonstrate to insurance companies and the federal government a concerted movement towards cost controls.[129] In theory, these controls would lead to lower health care expenditures while also affording the health care entities the power to develop broader services and reach a larger patient base.[130]

These industry attempts to streamline and create labor efficiencies have of course had implications, intentional and unintentional, for the negotiation of

[123] Literature on the decline of American unions is ubiquitous. For some excellent sources, see generally SANDRA ALBRECHT, THE ASSAULT ON LABOR: THE 1986 TWA STRIKE AND THE DECLINE OF WORKERS' RIGHTS IN AMERICA (2015); KIM MOODY, AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM (1988).

[124] WEIL, *supra* note 21, at 49-52.

[125] For a relatively comprehensive history of managed care developments, *see* PETER R. KONGSTVEDT, ESSENTIALS OF MANAGED HEALTH CARE (6th ed. 2013).

[126] Sandra D. van der Vaart, *Managed Care and Medical Staff Issues* 1-2 (Am. Health Lawyers Ass'n Seminar Materials Working Paper No. P12089732, 1997).

[127] Sujit Choudhry & Troyen A. Brennan, *Collective Bargaining by Physicians – Labor Law, Antitrust Law, and Organized Medicine*, 345 NEW ENG. J. OF MED. 1141, 1141 (2001).

[128] The now classic model for understanding the "organizational objective" of nonprofit health care facilities was laid out by Joseph Newhouse in the 1970s. He argued that such entities are interested in maximizing utility and account for variables of costs, quality, and patient demand. Joseph P. Newhouse, *Toward a Theory of Nonprofit Institutions: An Economic Model of a Hospital*, 60 AM. ECON. REV. 64, 65-68 (1970).

[129] David F. Drake, *Managed Care: A Product of Market Dynamics*, 277 JAMA 560, 562 (1997).

[130] *Id*. at 563.

effective collective bargaining agreements between employers and employees. Health care has followed a trend, common throughout the country's industries, to focus on its "core competencies," which, intentionally or not, served to increase contingent workforces and decrease the size of bargaining units.[131] Health care adopted the "human resources" revolution in the 1970s and 80s, based on a philosophy still popular today called "Total Quality Management."[132] For the health care industry, an increased focus on providing health services meant the increased subcontracting of food, janitorial, and laundry services, all necessary for a health care facility, but theoretically outside the expertise of executives.[133] As in other industries, health care providers pursued outsourcing for a series of reasons, including the desire to avoid unionization in these areas—or to eliminate existing bargaining units and replace them with cheaper subcontractors.[134] As pressure mounted to lower costs while maintaining high levels of patient care, hospital administrators preferred flexible workforces to stable ones, utilizing temporary nurses and technicians and further fissuring the industry.[135]

The natural and artificial ways health care employers have compartmentalized workplaces and divided employees further enabled the steady trend towards fissuring. This is exemplified on one level by stratification, caused by required education levels and skill set factors. Few workforces have employees working next to each other with a range of professional qualifications. In one cafeteria, staff with advanced medical degrees like doctors and nurses eat alongside support staff without a high school diploma. Along with this hierarchy, the compartmentalization of health care is also borne out by notorious gender and

[131] *See* M.B. Sturgis, 331 N.L.R.B. 1298, 1311-12 (2000) (Brame, dissenting in part); *see also* Joy Vaccaro, Comment, *Temporary Workers Allowed to Join the Unions: A Critical Analysis of the Impact of* M.B. Sturgis *Decision*, 16 ST. JOHN'S J. LEGAL COMMENT. 489, 508 n.107 (2002).

[132] Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322, 2357 (1998).

[133] WEIL, *supra* note 21, at 49; *see also* Christina Marsh Dalton & Patrick L. Warren, *Cost Versus Control: Understanding Ownership Through Outsourcing in Hospitals*, 48 J. OF HEALTH ECON. 1, 4-5 (2016).

[134] Replacing permanent employees with outsourced workers is a common cause of labor disputes, as seen in a recent case with the Mayo Clinics in Minnesota. Over one hundred food service workers swiftly organized a union to try to prevent the outsourcing of their jobs to a contractor. Barb Kucera, *Workers Join Union as Mayo Clinic Pursues Outsourcing Plan*, WORKDAY MINN. (Oct. 19, 2016), http://www.workdayminnesota.org/articles/workers-join-union-mayo-clinic-pursues-outsourcing-plan [https://perma.cc/W437-69D5].

[135] Importantly, studies have shown that the impetus for using subcontractors and temporary workers is based on the ebbs and flows of patient demand and staffing needs, and not primarily motivated by union avoidance. *See* Sukyong Seo & Joanne Spetz, *Demand for Temporary Agency Nurses and Nursing Shortages*, 50 INQUIRY 216, 224 (2013). This Note does not contend that NLRA liability is anything but a factor among many in the decision-making process by health care entities when establishing their staffing patterns.

race dynamics.[136] Historically, women and racial minorities have constituted a large percentage of the health care workforce.[137] Many scholars have argued that the workforce composition was a reason nonprofit health care entities were initially excluded from coverage under the NLRA, though this is seen most starkly when considering health care workers who have sometimes been categorized as domestic workers, including many home health aides.[138] In an industry where certain job roles are often dominated by employees of the same race or national origin, there can be natural divisions in the breakroom or in hiring practices that are at times exploited by employers to fight unionization or to avoid joint-employer liability.[139] Union organizers in hospitals frequently face difficulties bridging the divide not only because of perceptions about professionalism between workers with different job titles, but also because positions can become effectively segregated along racial or ethnic lines.[140]

The compartmentalizaiton of employment systems has facilitated health care's transition to a fissured workplace, replete with temporary or subcontracted workers, without disrupting the cohesive nature of health care facilities (at least on paper).[141] Yet, in terms of labor relations, such compartmentalization inherently stands in the way of labor peace as health care

[136] Mignon Duffy, *Doing the Dirty Work: Gender, Race, and Reproductive Labor in Historical Perspective*, 21 GENDER & SOC'Y 313, 320-23 (2007) (describing racialized hierarchy within "reproductive labor," category of work predominated by women and traditionally seen as caregiving); *see also* Evelyn Nakano Glenn, *Racial Ethnic Women's Labor: The Intersection of Race, Gender and Class Oppression*, 17 REV. OF RADICAL POL. ECON. 86, 100-01 (1985).

[137] Janelle M. Rettler, *Women's Work: Finding New Meaning Through a Feminist Concept of Unionization*, 22 GOLDEN GATE U. L. REV. 751, 751 n.1 (1992) (stating female workers comprised eighty-eight percent of nursing aids and ninety-six percent of registered nurses).

[138] Agricultural workers, domestic employees, and some hospital workers were all excluded from coverage under the NLRA and all three industries were dominated at the time by ethnic and racial minorities and also by women. *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 120 (2011).

[139] For example, in a suit brought by the California Nurses Union against a series of Sutter hospitals, the union accused the company of discrimination by refusing to hire Filipino nurses as a negotiation tactic in a contract dispute with unionized Filipino nurses. Molly Hennessey-Fiske, *California Nurses Assn. Files Complaint Alleging Discrimination Against Filipinos at Bay Area Hospital*, L.A. TIMES (Aug. 19, 2010, 9:57 PM), http://latimesblogs.latimes.com/lanow/2010/08/california-nurses-assn-filipino-bay-area-lawsuit.html [https://perma.cc/7BHU-QBUB].

[140] FINK & GREENBERG, *supra* note 113, at 47 (describing tensions between predominately white skilled labor force and minority service worker employees during early 1199 hospital organizing drives in New York).

[141] *See* Dan Zuberi, CLEANING UP: HOW HOSPITAL OUTSOURCING IS HURTING WORKERS AND ENDANGERING PATIENTS *passim* (2013) (detailing rising mortality and infection rates when British Columbia eliminated many unionized health care positions and replaced them with subcontractors).

entities have exploited these separations to ensure that employees cannot join together to form unions or address shared workplace concerns.

C. *Indirect Control of the Contingent Health Care Workforce*

With the combative labor and unionization history within the health care industry, executives are undoubtedly aware of the idiosyncrasies of the industry itself that make it particularly ripe to be affected by any change to the joint-employer standard. Today, more than when the NLRA was first applied to most of the health care industry, administrators are squeezed between regulations that are governed by various administrative agencies. Health care is different from food or hotel franchising or even manufacturing because it is a highly regulated industry in which the administrative regulations from various agencies can raise questions as to which law applies.[142] While some companies, like Browning-Ferris, may have the ability to analyze the Board's revised joint-employer standard and rewrite their contracts with Leadpoint in an attempt to further distance itself from any semblance of direct or indirect control over the subcontracted employees,[143] such maneuvering is more difficult in a health care setting. Intuitively and relatedly, the industry is also geographically bounded—a health care facility cannot generally pick up and move to another region seeking cheaper labor costs.[144]

Due to this regulatory system, the question of indirect control is an essential one for health care employees and employers. Regulatory guidelines often require more hands-on supervision in order to protect the health of patients and patient privacy, which in turn may be clearer indications of joint-employer status with subcontractors.[145] Indirect control may be created by ensuring that

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[142] Mark Wilson Ford, *The Board's New Math:* Browning-Ferris *and How 2 = 1*, 41 EMP. REL. L.J. 47, 50 (2016).

[143] One of the primary mechanisms governing non-union health care employees is the practice of establishing Medical Staff Bylaws, which are often required by state law and federal health care programs. However, these bylaws have been found in some states to be binding contracts and therefore may further intertwine a user health care employer with its supplier employer. Rieger & Fisher, *supra* note 108, at 1-2; *see, e.g.*, Islami v. Covenant Med. Ctr., 822 F. Supp. 1361, 1370-71 (N.D. Iowa 1992) (collecting cases ruling on whether medical staff bylaws create enforceable contract); Lewisburg Cmty. Hosp., Inc. v. Alfredson, 805 S.W.2d 756, 756-57 (Tenn. 1991).

[144] Federal law used to also require Certificate of Need programs in every state, preventing the over proliferation of hospitals in a given area by restricting hospitals to a four beds per one thousand-people ratio. *See* FRANK A. SLOAN & CHEE-RUEY HSIEH, HEALTH ECONOMICS 250-51 (2012). While federal programs no longer place restrictions on every state, some states have retained such requirements. *Id.*; *see also* Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health, 654 F.3d 919, 923-24 (9th Cir. 2011) (discussing history of such regulation and striking down Washington's Certificate of Need rule).

[145] *See infra* Section III (discussing application of BFI standard to health care industry); D'Arcy Guerin Gue & Steven J. Fox, *HIPAA: A Long Term Enterprisewide Priority*, GUIDE TO MEDICAL PRIVACY AND HIPAA § 711 (2015) ("[H]ealth care providers and business

subcontractors comply with, for example, the Medicaid and Medicare reimbursement programs where federal regulations can dictate certain levels of staffing, credentialing procedures, and quality controls.[146] Indirect control also seems more likely to be exerted the closer a worker's role is to the core of the employer's work—therefore, nurses and nurses' aides may require more hands-on oversight by the health care entity to ensure compliance with regulations than security guards or food service employees.

Another example of regulations that increase the need for direct and indirect control over contingent health care employees is the Health Insurance Portability and Accountability Act ("HIPAA").[147] HIPAA requires that health care facilities ensure all staff are trained to properly protect patients' private information.[148] Health entities must decide whether to designate a temporary worker as a "part of the hospital's workforce," or as a "business associate" and sign an agreement with the subcontractor company to provide adequate HIPAA training.[149] These HIPAA regulations more closely place contingent employees under the control of the hospital or nursing home. While, under the pre-*BFI* test, such required training may not be sufficiently direct to contribute to the joint-employer determination, it is possible that under the *BFI* standard, it would be dispositive as a form of indirect control. The HIPAA requirements, in effect, mean that the health care employer has less flexiblity to remove itself from the day-to-day practices of its subcontractors.[150] All of these factors contribute to the effect of

associates may find it necessary to conduct virtually identical [Health Insurance Portability and Accountability Act ("HIPAA")] training and reinforcement programs for non-employee workers as provided for employees.").

[146] Conditions for hospitals to participate in Medicare are contained within 42 C.F.R. pt. 482. Conditions of Participation for Hospitals, 42 C.F.R. pt. 482 (2011). The Joint Commission of Healthcare Organizations, a nonprofit and an integral part of the industry's self-regulation, also set standards of accreditation that affect how health care facilities hire staff and therefore partially governs subcontracting contracts. *See* Matt Phillion, *Joint Commission Issues Interim Staffing Effectiveness Standards*, 29 HEALTHCARE LEADERSHIP REV. 10, 10-11 (2010).

[147] Pub. L. No. 104-191, 110 Stat. 1936 (1996).

[148] While there is no explicit requirement that training be provided to staff, the civil penalty provision, 45 C.F.R. § 160.402 (2008), ensures that health care entities teach their employees about HIPAA rules. Those rules governing the implementation of HIPAA are commonly called the "Privacy Rules" and are codified at 45 C.F.R §§ 160-164.

[149] *See* 45 C.F.R. § 160.103(3)(iii) (2013) (defining business associates as including subcontractors and applying HIPAA Privacy Rule requiring training for such associates to such subcontractors).

[150] With HIPAA regulations for example, health care entities often must have "business associate" agreements with temporary employment agencies to ensure that such employees receive proper training—and this may be a strong data point in proving joint employment. *See* James B. Calnan, *Compliance Means Caution: Take Steps to Ensure Patient Privacy with Business Associate Contacts*, HEALTHCARE NEWS (May 2003), http://healthcarenews.com/compliance-means-caution-take-steps-to-ensure-patient-privacy-with-business-associate-contracts/ [https://perma.cc/78SU-UL47].

the stronger joint-employer standard on the industry. It is no wonder that the American Hospital Association joined a brief seeking to deny the Board's enforcement of its *BFI* decision.[151]

III. BFI *AND ITS DISSENT APPLIED TO THE HEALTH CARE INDUSTRY*

The winding path of health care history has intertwined the industry with the Board's joint-employer standard throughout its development. Health care organizing has been especially central in the related line of cases involving Section 9 of the NLRA and the determination of bargaining units that encircle both temporary or subcontracted jointly employed workers and permanent employees singularly employed by one of the employers.[152] In terms of the more direct joint-employer question, as long as the industry continues to use contingent employment structures, it makes a big difference for health care employers and employees whether *BFI* or Member Miscimarra's dissent is the joint-employer standard that the Board will apply.

This Section therefore looks at the sets of facts in two recent health care cases, *Sprain Brook Manor Rehab*[153] ("*Sprain Brook*") and *HealthBridge Management*[154] ("*HealthBridge*"), as models of the two joint-employer standards. These cases provide an avenue to apply both the *BFI* and pre-*BFI* standards to facts in the industry. What emerges is a clear difference between the standards. The results suggest that health care employers, including those with overt anti-union animus, were able to manipulate employment dynamics despite clear indications of indirect control prior to *BFI* and thereby prevent subcontracted and temporary employees from exercising their Section 7 rights. If the Board returns to a pre-*BFI* standard requiring "direct and immediate" control, the Board will fail in its mandate to adapt the NLRA to the changing patterns of the American economy and will misinterpret the common law.[155]

A. Sprain Brook Manor Rehab

Sprain Brook Manor Rehab, the first major health care case after *BFI*, required the administrative law judge ("ALJ" or "judge") to consider both the pre-*BFI* and post-*BFI* standard. It also serves as a useful illustration of a severely anti-union employer who went to great lengths to use subcontracting to avoid

[151] *See* Brief for Coalition for a Democratic Workplace et al. as Amici Curiae at 27-28, Browning-Ferris Indus. of Cal., 362 N.L.R.B. No. 186 (2015) (No. 32-RC-109684).

[152] Health care facilities have been at the heart of the *Miller & Anderson* line of cases, touched on previously, *supra* note 62. *See, e.g.*, Lee Hosp., 300 N.L.R.B. 947 (1990), *overruled by* M.B. Sturgis, Inc. 331 N.L.R.B. 1298 (2000).

[153] No. 02-CA-089490 (N.L.R.B. Apr. 29, 2016), *aff'd*, 365 N.L.R.B. No. 45 (Mar. 21, 2017).

[154] 365 N.L.R.B. No. 37, 1 (Feb. 22, 2017) *appeal docketed*, HealthBridge Mgmt., LLC v. NLRB, Nos. 17-934, 17-1149 (2d Cir. Apr. 20, 2017).

[155] *See* NLRB v. J. Weingarten Inc., 420 U.S. 251, 265 (1975); *see also* Kulwiec & Yurk, *supra* note 1, at 361-62.

collective bargaining responsibilities. In *Sprain Brook*, the employer waged a ten-year campaign against recognizing a union, resulting in the subcontracting of *every single* employee in the facility.[156] Yet, after a drawn out legal battle, Sprain Brook and its subcontractors were found to be joint employers under the pre-*BFI* standard.[157] The judge decided, after considering the new factors in the *BFI* standard, that there were enough indicia of direct and immediate control that application of *BFI* retroactively was unnecessary.[158]

In 2006, workers at the Sprain Brook nursing home and rehabilitation facility voted to form a union with 1199 as their representative.[159] The bargaining unit consisted of certified nursing assistants ("CNAs"); dining staff; cleaning services, both housekeeping and laundry; and geriatric aides.[160] The owners of Sprain Brook tried every trick in the book to avoid settling a collective bargaining contract, including intimidation of employees, firing of employees active in the union, and systematic unilateral changes to the terms and conditions of the employees' work, despite no contract having been previously signed.[161] In 2012, management subcontracted *every single position* represented by 1199 to three separate subcontracting entities.[162] Nurses' assistants, along with non-unit licensed professional nurses ("LPNs") were fired from the nursing home and rehired by a staffing company called Budget.[163] Budget was additionally responsible for hiring and providing dining and dietary employees, but with the added wrinkle that the food service department was managed by a company named Pinnacle.[164] Housekeeping and maintenance were subcontracted to a company called Commercial Building Management Corporation ("CBM").[165] Then, adding to the sordid nature of the case, Budget had previously signed a

[156] *Sprain Brook*, No. 02-CA-089480 at 7, 12-17.

[157] *Id*. at 41-49.

[158] *Id*. at 49-50.

[159] *Id*. at 7.

[160] *Id*.

[161] In labor law, once employees have elected a bargaining representative, employers are forbidden from changing the status quo of the employees' terms and conditions of work. Unilaterally changing these conditions while bargaining is ongoing, with some exceptions, is a violation of the NLRA. NLRB v. Katz, 369 U.S. 736, 746-47 (1962). In the health care context, see Provena Hosps., 350 N.L.R.B. 808, 811 (2007) (holding that employer's unilateral implementation of bonus system for unionized nurses while contract was being negotiated violated law).

[162] *See Sprain Brook*, No. 02-CA-089480 at 12-16. It is worth noting that entities subject to collective bargaining requirements are required to negotiate the subcontracting of bargaining unit work prior to implementing such a change. *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 215 (1964) (holding that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is subject to collective bargaining).

[163] *See Sprain Brook*, No. 02-CA-089480 at 17.

[164] *Id*. at 17.

[165] *Id*. at 12.

collective bargaining agreement with Local 619 (later succeeded by Local 713) of the International Brotherhood of Trade Unions ("IBOTU"), which, according to the accusations in the Board complaint, served as a company union.[166]

1199 filed a complaint charging that the subcontractors were joint employers with Sprain Brook and responsible for jointly bargaining the first contract.[167] The employers disagreed, arguing that they were not joint employers at all. In fact, three of the companies denied having employed any dietary aides or cooks—leading to the ALJ's incredulous summation that "[i]f one is willing to accept the untenable arguments of the three [companies], the illogical conclusion would be that the dietary aides and cooks worked for no employer after September 12, 2012."[168]

Because the case dragged on for so long, the decision straddled the *BFI* decision, leading to a mixed analysis by the ALJ on the question of joint-employer status. The ALJ began with application of the pre-*BFI* standard, emanating from cases such as *TLI* and *Laerco*, looking for indicia of direct and immediate control by both Sprain Brook and the subcontractors in question.[169] Sprain Brook initially paid the dietary aides through payroll for the first three months of its relationship with Pinnacle, but the workers were supervised by Pinnacle staff and were given personnel rules with Budget logos.[170] Sprain Brook provided the equipment for the employees to use, though Pinnacle provided monogrammed uniforms for the staff.[171] Budget was in charge of disciplining employees, though Pinnacle supervisors oversaw Budget supervisors to ensure that such discipline was carried out.[172] If Sprain Brook felt that an employee was not performing adequately, it could request that the contractors find another employee.[173] Sprain Brook also suggested discipline when performance was deemed inadequate.[174] Budget administered health insurance and implemented cuts to employees' sick time and vacation, while Pinnacle was in charge of deducting the dues sent to Local 713.[175]

For the ALJ, using the considerations listed in the common law, there was sufficient evidence of direct control by Sprain Brook and each contractor to find

[166] *Id*. at 24.

[167] *Id*. at 4.

[168] *Id*. at 42.

[169] *Id*. at 41-45.

[170] *Id*. at 42-43.

[171] *Id*. at 43 ("Virtually all the equipment used by the Budget and Pinnacle employees to perform their jobs belonged to Sprain Brook.").

[172] *Id*. at 41.

[173] *Id*. This, however, may actually be an indication of indirect control according to the dissent in *BFI*. *See* Browning-Ferris Indus. of Cal. Inc., 362 N.L.R.B. No. 186, 36 (Aug. 17, 2015) (Miscimarra & Johnson, dissenting).

[174] *Sprain Brook*, No. 02-CA-089480 at 41-43.

[175] *Id*. at 41.

joint-employer liability even under the pre-*BFI* standard.[176] Beyond the question of control, the judge held that each employer had the ability to effectively collectively bargain together, using what the judge deemed an "equal voice."[177]

B. HealthBridge Management

HealthBridge Management also involved facts that preceded the *BFI* decision. It involved the question of subcontracting at six nursing homes in Connecticut, a workplace issue that presaged a strike at these nursing homes a few years later in 2012.[178] Unfair labor practice charges concerning subcontracting emerged a few years before this strike. Workers in these nursing homes had been represented by District 1199[179] ("1199 New England"), a Service Employees International Union ("SEIU") affiliate, since the early 1990s.[180] In 2006, HealthBridge subcontracted its supervision of housekeeping and laundry employees at three of its Connecticut nursing homes to Healthcare Services Group ("HSG").[181] A subcontracting company worth almost three billion dollars,[182] HSG took over payroll and other managerial functions in 2009, but was required by the existing collective bargaining agreement to keep all current housekeeping and laundry employees on the same terms as when these managerial functions were performed directly by HealthBridge.[183] The subcontract between HSG and HealthBridge was terminated in May 2010.[184] Shortly thereafter, HealthBridge decided to unilaterally change the existing collective bargaining agreement with its employees, requiring that employees reapply for their jobs as probationary new hires—resulting in major pay cuts for almost all of the workers.[185]

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[176] *Id*. at 37-44.

[177] *Id*. at 46.

[178] HealthBridge Mgmt., 365 N.L.R.B. No. 37 at 1 (Feb. 22, 2017) *appeal docketed*, HealthBridge Mgmt., LLC v. NLRB, Nos. 17-934, 17-1149 (2d Cir. Apr. 20, 2017); Steven Greenhouse, *7 Weeks into Connecticut Nursing Home Strike, the Accusations Fly*, N.Y. TIMES (Aug. 19, 2012), http://www.nytimes.com/2012/08/20/nyregion/strike-against-healthbridge-nursing-homes-in-connecticut-continues.html.

[179] While 1199 New England shares a history, and numerical designation, with the 1199 union in New York state, 1199 New England retains a separate identity within its affiliation with the Service Employees International Union and represents health care workers in Connecticut and Rhode Island. FINK & GREENBERG, *supra* note 113, at 253-61.

[180] *HealthBridge Mgmt*., 365 N.L.R.B. at 2.

[181] *Id*.

[182] *Healthcare Services Group*, FORBES (May 2016), https://www.forbes.com/companies/healthcare-services-group/ [https://perma.cc/FJZ8-H8KU] (last visited Sept. 27, 2018).

[183] *HealthBridge Mgmt*., 365 N.L.R.B. at 2.

[184] *Id*. at 3.

[185] *Id*. The Board eventually found that this unilateral change was a violation of Section 8(a)(5) of the NLRA.

The joint-employer question in the case arose from HealthBridge's contention that, at the time of the termination of HSG's managerial contract, the housekeepers and laundry staff "had no employment relationship" with HealthBridge.[186] The Board was not persuaded. It found evidence of direct and immediate control establishing HealthBridge as a joint employer with HSG while the subcontract was in effect.[187] The Board cited plenty of evidence. Employees were told at the time of the subcontract that it was a "payroll transfer" and every employee was retained, without HSG performing any hiring, interviewing, or review procedures.[188] Employees retained their seniority and when one tried to use his seniority to transfer, it was rejected by HSG, only to be overruled by HealthBridge's regional manager.[189] Grievances were filed with and resolved by HealthBridge, even as HSG ostensibly controlled the collective bargaining agreement ("CBA") at this point.[190] There was also no claim that HSG was a successor who took over the CBAs, and the union was not informed of any change to the party with whom it contracted.[191] Not only were the employees still receiving the same pay and benefits, and governed by the same work rules as before, but HealthBridge had also taken pains to assure the union that no changes would be made while HSG managed the departments.[192] The housekeepers were "required" to perform "exactly the same work, in exactly the same places."[193]

However, Member Miscimarra dissented on the joint-employer question. He disagreed that HealthBridge and HSG were joint employers, and would have instead found that HealthBridge violated the Act in another way, by using "short-term operational changes to defeat their collective-bargaining obligations."[194] On the joint-employer question, Miscimarra asserted that as soon as day-to-day management transferred to HSG, they became the sole employers of the housekeepers despite acting in effect as an intermediary for

[186] *Id*. at 5.

[187] *Id*. at 9 (finding that "the Respondents did not merely 'co-determine' but solely determined the relevant terms of employment").

[188] *Id*. at 6.

[189] *Id*. at 3.

[190] *See id*.

[191] *See id*. at 10.

[192] *Id*. at 6.

[193] *Id*. at 5.

[194] *Id*. (referencing Member Miscimarra's dissent, who concurred in finding of violation of Section 8(a)(5) due to Respondent's use of "short-term operational changes to defeat their collective-bargaining obligations"). For cases on this labor law doctrine, see Golden State Warriors, 334 N.L.R.B. 651, 654 (2001), *enforced mem*., 50 Fed. Appx. 3 (D.C. Cir. 2002); El Torito-La Fiesta Rest., Inc., 295 N.L.R.B. 493, 493-496 (1989) (finding that employer broke law by refusing to adhere to collective bargaining agreement after fourteen month closure for remodeling), *enforced*, 929 F.2d 490, 496 (9th Cir. 1991).

HealthBridge who ultimately established the ongoing terms of work for employees.[195]

C. *Applying* BFI *and Its Dissent*

Placing these two cases side by side approximates the different outcomes under the two joint-employer standards. While neither case used the *BFI* standard, the rift between the two standards emerged implicitly in *Sprain Brook* and explicitly in *HealthBridge*. Under the *BFI* standard, had the ALJs applied it, all the employers at both Sprain Brook and HealthBridge would have been considered joint employers because of direct and indirect control over the terms and conditions of the employees. Under the rule prior to *BFI*, which may be ressurrected by the Trump-appointed Board, only the employers at Sprain Brook would be considered joint employers.[196] According to Member Miscimarra's dissent, HealthBridge "ceded all direct and immediate control over 'matters relating to the employment relationship'"[197] and this was, according to Member Miscimarra, dispositive as to the joint-employer question before *BFI*.[198] For him, there was not sufficient evidence of direct control.

This reveals the ultimate problem with the "direct and immediate" standard—despite two instances of very obvious manipulation to simultaenously control the terms and conditions of workers, but give direct supervision to an intermediary subcontractor, employers like HealthBridge, or presumably a more careful Sprain Brook, are free from joint-employment responsibilities under the pre-*BFI* test. All an ill-intentioned employer need do to avoid liability is insert a buffer employer so that employees cannot negotiate their terms and conditions of work with the employer that truly controls the levers of power.

Following Member Miscimarra's standard in both his *BFI* dissent and *HeathBridge* partial dissent to its end result shows how estranged the pre-*BFI* standard had become from the common law of agency. The common law is clearly concerned with which entity wields control over the actions of the employees, not with which supervisor ultimately delivers the orders to the employees.[199] In *HealthBridge,* the nursing home held ultimate sway over the

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[195] *HealthBridge Mgmt.*, 365 N.L.R.B. at 32-34 (Miscimarra, dissenting in part).

[196] However, careful reading of this decision suggests that not even *Sprain Brook* would have met Miscimarra's "direct and immediate" test. Much of the evidence that the ALJ cites may actually be indirect control, even though the ALJ termed those examples as direct control.

[197] *HealthBridge Mgmt.*, 365 N.L.R.B. at 35 (Miscimarra, dissenting in part).

[198] *Id.*

[199] The Second Restatement of Agency expressly says that an employer-employee relationship can exist even if attenuated. RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d (AM. LAW INST. 1958). In addition, the list of considerations for determining such a relationship focus on the power-relationship between the two parties and does not mention communication or supervisory methods. *Id.* at § 220(2)(a-j); *see also* Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV.

employees even after it had subcontracted to HSG.[200] HSG may have run some day-to-day functions, but it was ultimately powerless—and would have been powerless in future collective bargaining with the employees. If Member Miscimarra had his way, the employees would have walked into a collective bargaining meeting with HSG only to be told that they were contractually obligated to follow certain terms and conditions, and that they would also have to look to HealthBridge for the final say on other employment issues.[201] In other words, Member Miscimarra reads the common law to allow employers all the benefit and none of the cost of these subcontracted employment schemes. An employer like HealthBridge would reap the economic wealth from the labor of the workers, ensure that the subcontractor follows its business interests through a contract that establishes terms and conditions of the workers, and face no responsibilities to those same workers. The people who suffer from this relationship are the disempowered workers. The employer takes and does not give.[202] Such a crabbed interpretation of the common law serves only to provide a blueprint to a severely anti-union employer, such as in *Sprain Brook,* to cynically use a modified version of HealthBridge's subcontracting trick to rip away its employees' long-standing labor rights.

D. *Concerns Beyond Collective Bargaining*

The critical refrain that the dissent in *BFI* relies upon is that the new joint-employer standard lacks a clear outer limit of application.[203] This is a policy-driven criticism that ignores the very common law from which rules of employment are derived.[204] No employer in the sorts of cases covered by *BFI*

329, 334 (1998) (discussing relationship between control over employees and vicarious tort liability as origin of common law rule).

[200] *HealthBridge Mgmt.*, 365 N.L.R.B. at 3.

[201] This case is easily distinguishable from *John Breuner Co.*, 248 N.L.R.B. 983 (1980), as additionally discussed in note 42 *supra*. Here, the employees continued to work in the nursing home under a CBA that locked in every working term and HealthBridge continued to exert day-to-day control, albeit indirectly through HSA supervisors.

[202] Contrary to Member Miscimarra's assertion, the holding in *HealthBridge* also did not upend cases where employers legitimately subcontracted out a unionized department so that the subcontractor retained previous employees and kept the existing CBA. *See generally*, Summit Express, Inc., 350 N.L.R.B. 592 (2007). Here, HSG was hemmed in at all sides from actually controlling the terms and conditions of the employees—by the CBA, by the subcontracting agreement, by direct and indirect exerted control, and by rules and regulations that the nursing home was subject to.

[203] *See* Browning-Ferris Indus. of Cal. Inc., 362 N.L.R.B. No. 186 at 37-43 (Aug. 17, 2015) (Miscimarra, dissenting).

[204] Member Miscimarra hyperbolically announces that the majority opinion imposes responsibilities on any employer who has more than "zero control", *id.* at 31, ignoring clear limits contained in the majority's decision. *Id.* at 15 (reaffirming commitment to common law, inclusive of considerations of indirect control); Pasternak & Perera, *supra* note 13, at 302.

will be surprised by the other employer with whom it shares joint-employer responsibility. These health care cases illustrate succinctly that the contracting employers intentionally and knowingly establish contracts with subcontractors that set terms and conditions of work and retain control in both direct and indirect ways.

As a result of this clear line established by *BFI*, Member Miscimarra's concerns over employer exposure to union pressure beyond collective bargaining responsibilities are misplaced. As previously noted, his primary concerns were expanded secondary boycotts, picketing,[205] and more unfair labor practice charges against employers.[206] Employers, he worried, would be subject to economic harms due to employees with whom they do not truly have a relationship with.[207]

Miscimarra paints with too broad a brush.[208] Employers can recognize when they have inserted a subcontractor as an effective agent, using that separate employer as a supervisory tool so that control can be exerted indirectly.[209] Employers can also recognize subcontracting relationships that are not covered by *BFI*, where the subcontractor or intermediary employer truly does have sufficient independence to control terms and conditions of its employees' work.[210] When a hospital contracts out its dining services and leaves all essential functions of employment up to the subcontractor, these cases suggest that the hospital can do so while avoiding responsibilities as a joint employer.

Instead, the *HealthBridge* case illustrates the perverse incentives that a return to a direct and immediate control standard will create for employers to subcontract their workforce, effectuating destruction of those employees' rights. The perversity lies in the ways in which this rule allows for employers to split

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[205] Under Section 8(b)(4)(A) of the NLRA, unions are not permitted to boycott or picket "secondary" employers who are "wholly unconcerned in the disagreement between an employer and his employees." *See, e.g.*, NLRB v. Bus. Mach., Local 459 (*Royal Typewriter Co.*), 228 F.2d 553, 558 (2d Cir. 1955). If a party is found to be a joint employer, it can face pickets and boycotts that a secondary employer would not. Mautz & Oren, Inc. v. Teamsters, 882 F.2d 1117, 1123 (7th Cir. 1989) (citing Ironworkers Dist. Council, 292 N.L.R.B. 562, 584 (1989)); *see also* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(B) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 959-60 (2005).

[206] *See* Hy-Brand Indus. Contractors, 365 N.L.R.B. No. 156, 29 (Dec. 14, 2017), *vacated*, 366 N.L.R.B. No. 26 (Feb. 26, 2018).

[207] *Id.* at 30.

[208] *See* Forester, *supra* note 60, at 43 (arguing that since determination of employment relationships has always been on case-by-case basis under common law, complete certainty for employers is not possible—and should not be goal of labor law).

[209] Employers have dealt with a "case by case" approach to determining employment relationships since the common law developed. *See id.* (citing Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964).

[210] *See* Pasternak & Perera, *supra* note 13, at 306-09 (discussing decisions after *BFI* where Board regional directors found that no joint-employment relationship existed).

apart colleagues who clearly share work conditions and interests under a common employing authority.

Imagine when employees arrived at work the day after HSG was contracted at the three HealthBridge nursing homes. Their working conditions remained the same as the day before and their collective bargaining agreement was still in effect. The agreement was also still binding on their colleagues at the three other HealthBridge nursing homes whose supervision had not been subcontracted to HSG. Thus, all the employees were still under the same contractual umbrella. On that day, ultimate authority remained the same—HealthBridge controlled the work of the group of employees at three nursing homes directly, and at three HSG-supervised homes indirectly. Yet, Member Miscimarra's standard prevents coordinated actions by employees at the different nursing homes simply because HSG was inserted into the equation as a buffer for half of the nursing homes. This undercuts the purpose of the NLRA. In this scenario, the HSG employees could not join a picket line at the other HealthBridge facilities where HSG was not present.

Consider the power this gives to an employer. HealthBridge could isolate a particularly organized or powerful group of employees at one facility simply by subcontracting out their supervision, while retaining clear indirect control over them. Doing so would therefore prevent those employees from joining their colleagues at other nursing homes within the same enterprise to protest the work conditions imposed collectively by HealthBridge. This seems like a clear infringement on the rights of employees.[211] The *BFI* test simply makes it more difficult for this type of manipulation to occur, without subjecting unsuspecting non-controlling employers to liability or picket lines.

Though some critics suggest otherwise, broadening out the joint-employer standard to include consideration of indirect control and reserved control also clearly does not prevent the subcontracting of health care work to avoid joint-employer liability.[212] In *HealthBridge*, the company could have gone through clear steps to sever the connection between the housekeepers and its core operations. It could have informed and bargained with the union about subcontracting. HSG could have taken over the CBA as a successor.[213] HealthBridge could have left the decisions regarding grievances, transfers, seniority, and work responsibilities to HSG. Since housekeepers are removed from the core work of the nursing home, such a transfer would have been even

[211] For a related critique of the narrowness of the pre-*BFI* standard inhibiting employees' right to protest, *see* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 32-33 (2016).

[212] *See* Howard Yale Lederman, *The National Labor Relations Board's Redefined Joint Employer Standard Is Justified and Necessary*, 96 MICH. B.J. 30, 30 (2017).

[213] *See* HealthBridge Mgmt., 365 N.L.R.B. No. 37 at 10 n.40 (Feb. 22, 2017) (distinguishing Dist. 1199E, Nat'l Union of Health Care Emps., 238 N.L.R.B. 9 (1978)). The majority correctly notes that, in the distinguished case, the subcontractor notified the union of a transfer of ownership and sought to bargain over terms of work with the union. HSG did not do so, nor was it empowered to do so.

clearer than some medical employees who may still have required careful supervision by HealthBridge to ensure compliance with HIPAA, Medicare regulations, or other health care rules. After taking these steps, there would be little to no indicia of direct or indirect control over the housekeepers, except for a contractual expectation with their subcontractor that the necessary tasks be performed. Such subcontracting could very easily have been classified as "service under an agreement to accomplish results or to use care and skill in accomplishing results."[214] In health care, this sort of service agreement is quite common for ancillary or non-core services, and under *BFI* would clearly not create a joint employer relationship. Yet HealthBridge—and Sprain Brook—took none of these steps away from exerting control. The employers were clearly relying on the conjured "direct and immediate" standard to protect themselves from liability while effectuating their true goal: eliminating the rights of their employees to engage in protected Section 7 activities to form a union and collectively bargain with the employer who controlled their work.

For the common law definition of an employee[215] to mean anything, especially in the health care industry where indirect control is common, the employment relationship cannot be destroyed simply by shifting supervisory responsibility to the subcontractor, while setting in stone the work terms and conditions for employees and retaining ultimate, reserved, or indirect control over those workers. Handing over the management reins while contractually binding a subcontractor's ability to alter the terms of work for employees seems to be a clear instance where the employees were still subject to the control of the party who contracted out their work. The solution adopted in *BFI* to consider indicia of indirect and latent control is a much more effective way for employees to exert the rights granted to them in the NLRA.

CONCLUSION

An employee leaving at the end of the work day from their hospital workplace may want to approach a colleague to discuss difficulties on the job. They may even want to join together with that colleague, and others, to take action to change the conditions of their job—from better compensation, to stronger safety procedures, to protection against a predatory supervisor. Yet, if the employee does not know who else works for their employer, and therefore who else would fall under the shared umbrella of protection created by the NLRA, they will understandably be stymied in bringing change to their workplace. In the age of the fissured health care workplace, the joint-employer standard is therefore exceedingly important to ensuring the rights of employees to join together, form

[214] *See* Browning-Ferris Indus. of Cal. Inc., 362 N.L.R.B. No. 186 at 12 (Aug. 17, 2015) (stating that clear subcontracting agreements without manifest control by the user employer would not subject the parties to joint-employer liability) (quoting RESTATEMENT (SECOND) OF AGENCY § 220 cmt. e (AM. LAW INST. 1958)).

[215] Someone "subject to the other's control or right of control." RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

unions, and take other concerted action for their mutual aid or protection. Yet, as practices in health care employment have unfolded in line with other industries—incorporating subcontracting and temporary workers into a system shaped by regulatory complexity, ever-shifting staffing patterns, and the managed care system—the ability of employees, both permanent and temporary, to effectuate their rights under the NLRA has dulled. Under the old and narrow joint-employer standard, employers were able to shirk responsibility simply by using intermediary employers to avoid direct control. Those employees were left with little recourse under the NLRA because they were prevented from bargaining with the employer who truly controlled their working conditions.

The Board's consideration of indirect and latent control practices, in the face of this history, is a strong step in the right direction to return to the most logical understanding of the common law of agency. As a result of the *BFI* decision, despite hystrionics of critics, the NLRA can continue to be relevant in the modern context. Any future reversal of this rule would be a step backwards. Such a reversal would have the effect of continuing problematic staffing patterns designed to subvert employees' rights under the Act—and would also continue to perversely incentivize employer manipulation of staffing practices to avoid liability, while reaping profits from the labor of workers. The health care industry, and the law that governs its employers and employees, are better served by a capacious joint-employer standard that encompasses the employer who in reality controls the terms and conditions of an employee's work.