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Employer Update

Riding the Wave: Employees Seizing Momentum of Increased Litigation and Legislation Involving Background Checks

*By Gary D. Friedman**

In This Issue

The Fair Credit Reporting Act and related state statutes appear to be taking their place alongside wage and hour laws as one of the favorite class claims brought by the plaintiff's employment bar. This area of jurisprudence is burgeoning primarily due to a number of favorable conditions in the current employment climate – increased scrutiny of the hiring and screening process and a wave of state specific legislation that complements and even compounds liability under the existing federal structure – as well as mandated procedures and the availability of damages that make class certification an attractive avenue for litigation. In this article, we will cover several specific areas of potential vulnerability that employers should focus on when developing and evaluating their use of background checks in the hiring process, as well as several state statutes that employers should be aware of that could expand their responsibilities and increase their potential exposure in class action lawsuits.

Employer Responsibilities Under the Fair Credit Reporting Act

As more information on individuals becomes readily accessible through the internet and social media, an entire cottage industry has cropped up around providing detailed profiles to employers. For a small fee, companies can have instantaneous access to an applicant's credit history, criminal record, and employment history, a wealth of data that can be used for legitimate purposes such as confirming the accuracy of an applicant's credentials or reducing the risk of hiring individuals who may have histories of theft or embezzlement. Yet while the ease of obtaining background and credit checks has increased over the years, many employers may not be fully cognizant of the various and nuanced requirements of federal and state statutes that govern their use of such information.

Originally passed in 1970, the Fair Credit Reporting Act ("FCRA")[1] was enacted to promote the accuracy, fairness, and privacy of information in the files of consumer reporting agencies, but it extends well beyond governing the practices of companies like Equifax, Experian and TransUnion. The statute and the regulations promulgated under it by the Consumer Financial Protection Board (CFPB) impose various requirements on employers who want to use any "consumer report" for any "employment purposes." These terms have been broadly defined by the CFPB and often broadly construed by many courts. A "consumer report" could be anything from someone's credit history to their

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record at the DMV, and "employment purposes" could be the evaluation of an applicant for an open position or of an employee for a promotion or a raise. The FCRA also creates a separate category of "investigative consumer reports," which include consumer reports in which information on an individual's "character, general reputation, personal characteristics, or mode of living" is obtained through personal interviews with neighbors, friends, or acquaintances. These types of reports are subject to additional requirements, including confirmation of adverse information by the credit reporting agency prior to furnishing the report to employers.

While the ease of obtaining background and credit checks has increased over the years, many employers may not be fully cognizant of the various and nuanced requirements of federal and state statutes that govern their use of such information.

Before obtaining a consumer report, an employer must, among other requirements, disclose to the individual that a consumer report may be used for employment purposes, and must obtain authorization from the individual in writing. Even after disclosure has been made and authorization has been obtained, employers must take additional steps if they want to take an "adverse action" based on a consumer report. "Adverse actions" include declining to hire or promote someone, deciding to terminate an active employee, or making any other negative employment decision. Before taking such action, the employer must provide the individual with a copy of the report, information on their rights under the FCRA, and give individuals a reasonable period to dispute any information in the report that they believe is incorrect. If an employer follows all of the foregoing steps and decides to implement the adverse action, it must provide to the individual additional notice of the adverse action, contact information for the reporting agency, and additional information regarding the individual's rights. All of these specific requirements provide ample opportunity for non-compliance, which can result in significant exposure when amplified across a company-wide application process. This is particularly true in the current climate of increased government focus on background checks.

State Statutes and Federal Agency Emphasis

Beginning in 2010, the Equal Employment Opportunity Commission ("EEOC") publicly made the use of background checks in the hiring process a point of emphasis. At a meeting of the EEOC in October 2010, in a discussion on employers' use of credit history in employment decisions, Chairwoman Jacqueline Berrian said that the agency was "increasingly aware of the practice's potential discriminatory impact on workers and job applicants."[2] In April 2012, the EEOC issued enforcement guidelines that stressed that hiring decisions should be made based upon job qualifications and employers should not dismiss any applicant with a criminal history. The EEOC has often taken the position that use of these types of background reports disparately impacts minorities and women in violation of federal anti-discrimination statutes. Even though the EEOC was recently rebuffed by the Sixth Circuit when it brought suit against Kaplan Higher Education for considering credit histories in hiring for certain positions,[3] the EEOC's steadfast opposition to the use of certain background checks likely means that more lawsuits are yet to come. And while it may be at the vanguard, the EEOC is not alone in its opposition to the use of certain information in hiring decisions.

Over the past few years, many state and local governments have adopted "ban-the-box" laws that more strictly regulate and often delay employer inquiries into applicant criminal histories until later in the hiring process. The list includes many of the country's largest employment centers: California, Illinois, Minnesota, New Jersey, New York City, Philadelphia and Washington D.C. The list continues to grow as more governments introduce similar legislation. These laws often require employers to wait until after determining whether an applicant has met

the minimum job requirements for a position before they inquire into their criminal history. Some go further and require that the employer complete an initial screening interview or even make a conditional offer of employment before they can even ask about an individual's criminal record.[4] While there are exceptions that make the laws inapplicable to certain employers or with respect to certain job positions, the vast majority of companies must abide by these restrictions, which extend to questions on an employment application, questions asked during an interview, and the content of any background checks that are performed.[5] California further restricts the use of criminal background and arrest records of applicants and employees in the Fair Employment and Housing Act and related provisions of the California Labor Code. California employers may not request or use information about any applicant or employee concerning arrests that did not result in a conviction, referral to any pretrial diversion program, or any conviction that has been judicially dismissed or ordered sealed.[6] It also prevents California employers from requesting or using information about marijuana-related arrests that are more than two years old.

Cities and states have also gotten into the act with respect to the use of credit history and credit reports in employment decisions. New York City recently passed a law amending its Human Rights Law with respect to the use of an employee's or applicant's consumer credit history for employment purposes.[7] The law went into effect September 3, 2015, and has certain unique features. We previously covered the passage of the law in a recent Employer Update,[8] but enforcement guidelines released by the New York City Commission on Human Rights ("NYCCHR") since then give clearer insight on how the law will be enforced, and as many sources have noted, the Commission is "interpreting the [law's] restrictions broadly and its exemptions narrowly."[9] One of the most noteworthy facets of the New York City law is that it creates the potential for substantial exposure for employers if they even *request* credit information, regardless of whether the information is used in making adverse employment decisions. California's laws on credit reporting have their own intricacies. Among other unique features, the Investigative Consumer Reporting Agencies Act defines "investigative consumer report" in a way that resembles the FCRA definition for standard consumer reports, thereby imposing additional requirements on requests for similar information.[10] The California Labor Code prevents employers from using a consumer credit report for employment purposes absent certain outlined exceptions.[11] These restrictions are discussed further below.

This combination of particularized requirements on employers and increased emphasis from federal and state governments makes the FCRA and related state statutes a prime target for class action litigation.

Areas of Vulnerability and Practice Tips

This combination of particularized requirements on employers and increased emphasis from federal and state governments makes the FCRA and related state statutes a prime target for class action litigation. Many employers fall prey to the same "trouble spots," which provide employees' counsel with opportunities to bring class actions involving background checks:

- **The absence of a clear and unequivocal disclosure:** The FCRA requires that employers provide a "clear and conspicuous" disclosure in writing to the employee or applicant before the report is procured. The disclosure must also be in a document that consists solely of the disclosure and state that a report may be obtained for employment purposes.
  - Several employers have run into problems by including a release of liability with the disclosure and authorization form, or by including the disclosure in an employment application or job advertisement. Domino's Pizza recently settled such a class action for more than $2 million when it included a release with the disclosure.[12] If an employer intends to perform a background check, the disclosure and waiver should be

separate and apart from any other forms or application materials, particularly any release of liability. This is also true of current employees, and employers should not provide the disclosure in an employee handbook or other general employment document.

- **Credit reports – To request or not to request?:** As mentioned above, New York City's law on consumer credit reports creates substantial compliance hurdles for employers. Standard disclosure and certification forms that can be used to satisfy the requirements of the FCRA are insufficient under the City law. Before even requesting the information, the employer must identify in the disclosure statement to the applicant or employee the applicable exemption under the Human Rights Law, and the regulations state that the employer has the burden of proving that an exemption applies by a preponderance of the evidence to avoid liability.[13] The guidance further advises employers to keep a detailed log of requests for credit information and the applicable exemption(s) that they claim to respond to NYCCHR requests for information. This places a burden on the employer to be extremely facile with the contours of the job opening early in their search process. A similar burden applies to compliance with the aforementioned section of the California Labor Code, even though it addresses use of credit information rather than the initial request, because employers must still be prepared to identify the exemption that applies if it decides to take adverse action.
  - Employers should reconsider whether credit history – or criminal arrest data, which we discussed above – are vital pieces of information to request of applicants and employees or to include as part of their standard background checks. With numerous states and municipalities passing laws restricting or forbidding such inquiries, implementing a company-wide policy can be difficult and risky even if proper authorization and disclosure are sought. Some employers are no longer requesting credit histories and specifying on disclosure forms that such information is not being requested in any background check.
- **The lack of a separate consent and waiver of rights:** The FCRA requires that the consumer authorizes the acquisition of the consumer report in writing, which authorization may be made on the disclosure form. The FCRA does provide some flexibility with respect to online applications, and an employer may obtain consent from an applicant electronically in those instances.
  - The aforementioned concerns about the inclusion of a release as part of a disclosure-and-consent form apply in this context as well. District courts have certified classes and granted summary judgment where combined authorization/notice forms include release language.[14] Employers should beware of the use of a single affirmation and consent to all terms and conditions of an online job application (what is commonly known as a "clickwrap" agreement). Such single affirmation and consent documents may not per se violate certain federal and state laws, but they may be subject to scrutiny by the courts. Furthermore, employers should note that the ability to obtain consent electronically or orally only applies to applications for employment when "the only interaction between the consumer and the person in connection with that employment application has been by… computer." Background checks that are used as part of the termination or promotion process – when an individual is already employed – must still be obtained in writing.
- **Immediate adverse action without notice:** Before taking any adverse action based in whole or in part on the report, employers must provide the applicant or employee with a copy of the report and a description in writing of the applicant/employee's rights. The CFPB has published a specific notice form that must be included for an employer to satisfy its obligations under the FCRA. Separate employer obligations apply to individuals applying online, which include providing information on how to contact the consumer reporting agency and request a copy of the report.
  - The government agencies tasked with enforcing the FCRA have stated that employers must give applicants and employees a reasonable amount of time – the FTC said that five business days is

reasonable – to contest the report's contents before proceeding with the adverse action. Employers should also take steps to ensure that the prior notice cannot be viewed as "perfunctory." A judge in the Eastern District of Virginia recently denied an employer's summary judgment motion on this issue where the employer had set up a semi-automated process that denied certain applicants after criminal information was found.[15] Employers should make sure that managers and other individuals involved with the hiring process do not make any final determinations or set up automatic rejection processes that do not allow for applicants or employees to examine and possibly contest the contents of a background report.

- **Lack of notice and information after adverse action has been taken:** An employer's work is not done when it sends the appropriate notice to the applicant or employee before taking the adverse action. Once the adverse action is taken, the employer must provide notice of the applicant's or employee's rights as well as information on the credit reporting agency.
  - Employers must be careful to provide all required notices if the contents of a consumer credit report are part of an adverse decision to terminate, because a standard rejection letter or silence from the employer will be insufficient. Employers should also be precise in their communications if the credit report was not used as the basis for an adverse action – a simple statement as such on a rejection letter or communication could provide valuable insulation against blanket claims that the employer did not abide by all necessary requirements.

1. 15 U.S.C. § 1681, *et seq*.
2. Transcript available at: http://www.eeoc.gov/eeoc/meetings/10-20-10/transcript.cfm
3. *E.E.O.C. v. Kaplan Higher Educ. Corp.,* 748 F.3d 749 (6th Cir. 2014).
4. New York City recently passed some of the most expansive laws regarding the use of criminal background checks, requiring that employers make a conditional offer of employment before inquiring into criminal history and making it unlawful to discriminate based on criminal convictions. *See* N.Y.C. Admin. Code § 8-107(10) and (11).
5. For additional explanation and discussion of ban the box laws, see Lawrence J. Baer & Kendra Okposo, New Jersey Joins a Growing List of State and Local Governments to Enact "Ban-the-Box" Laws, http://www.weil.com/~/media/files/pdfs/employer_update_sept_2014.pdf
6. *See* Cal. Gov't Code §§ 12900 to12996 and Cal. Lab. Code §§ 432.7 to 432.8.
7. *See* N.Y.C. Admin. Code § 8-107(24) and (27).
8. *See* Lawrence J. Baer & Kiira Johal, New York City Limits the Use of Credit and Criminal History in Employment Decisions, http://www.weil.com/~/media/files/pdfs/2015_07_30_employer_update.pdf
9. Mark E. Brossman and Ronald E. Richman, Now We Know How NYC's Credit Check Ban Will Be Interpreted, http://www.law360.com/articles/699533/now-we-know-how-nyc-s-credit-check-ban-will-be-interpreted
10. *See,* Cal. Civ. Code §§ 1786 to 1786.60
11. *See,* Cal. Lab. Code § 1024.5.
12. *Singleton v. Domino's Pizza, LLC,* 976 F. Supp. 2d 665 (D. Md. 2013).
13. The guidance from the New York City Commission on Human Rights can be found at http://www.nyc.gov/html/cchr/downloads/pdf/CreditHistory-InterpretiveGuide-LegalGuidance.pdf
14. *Reardon v. ClosetMaid Corp.,* No. 2:08-CV-01730, 2013 WL 6231606 (W.D. Pa. Dec. 2, 2013).
15. *Manuel v. Wells Fargo Bank, Nat. Ass'n,* No. 3:14CV238, 2015 WL 4994538, at *12 (E.D. Va. Aug. 19, 2015).Upon reviewing a report that showed certain criminal convictions, the employer communicated with the third party that the applicant should be coded as "ineligible," after which the third party sent both a "Pre-Adverse Action notice" and an "Adverse Action Notice." The Court ruled that because the employer's use of the ineligibility code was the only communication that it made to the third party company about the applicant unless the applicant disputed the background check after he received the "pre-adverse action notice," a jury could find that the communication was a final adverse action.

Controversial NLRB Ruling Significantly Expands Joint Employment Status

By Lawrence J. Baer and Millie Warner

On August 27, 2015, a three-member majority of the National Labor Relations Board (the Board) issued a controversial decision in *Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186 (Aug. 27, 2015), concerning the standard for deeming two or more independent entities "joint employers" of a group of employees under the National Labor Relations Act (the Act or the NLRA). Finding that its longstanding standard for determining joint employer status had become "out of step with changing economic circumstances"—namely, the growth in contingent and temporary employment—the Board announced a new joint employer test expressly designed to expand the number of entities subject to collective bargaining and other obligations under the Act. Previously, an entity that contracted for the services of workers employed by a third-party would only qualify as a joint employer of those workers and thus be required to bargain with a union if it both possessed and exercised direct control over the terms and conditions of those workers' employment. Endeavoring to facilitate union organizing of contingent workers and ensure that the businesses that rely on contingent workers have an obligation to bargain with a union with respect to the terms and conditions of their employment, the Board abandoned those requirements. Now, the Board will find joint employer status under the Act when an entity directly or indirectly controls the terms and conditions of employment of another business's employees, or when the entity has the right to exert such control, even if it never exercises that right.

Below, we analyze the Board's *Browning-Ferris* decision and offer advice on steps that companies should take in light of the Board's new joint employer standard.

Background

Browning-Ferris Industries of California, Inc. (BFI) operates a recycling facility that processes "mixed materials, mixed waste, and mixed recyclables" into "separate commodities that are [then] sold to other businesses." *Id.* at *2. BFI employs approximately 60 employees, most of whom work outside the recycling facility "mov[ing] materials and prepar[ing] them to be sorted inside the facility." *Id.* Those employees are represented by the Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (the Union).

BFI supplements its workforce with approximately 240 temporary workers provided by a staffing agency, Leadpoint Business Services (Leadpoint), under a temporary labor services agreement. *Id.* at *3. The workers provided by Leadpoint work inside the recycling facility manually sorting the material, cleaning the equipment, and cleaning the facility. *Id.* BFI's contract with Leadpoint states that "Leadpoint is the sole employer of the personnel it supplies," and "nothing in the Agreement shall be construed as creating an employment relationship between BFI" and Leadpoint's workers. *Id.*

Now, the Board will find joint employer status under the Act when an entity directly or indirectly controls the terms and conditions of employment of another business's employees, or when the entity has the right to exert such control, even if it never exercises that right.

In July 2013, the Union petitioned the Board to represent the Leadpoint employees working at BFI's facility. *Browning-Ferris Indus. of California, Inc.,* 32-RC-109684, 2013 WL 8480748, at *1 (Aug. 16, 2013) (BFI I). For BFI to have a duty under the Act to bargain with the Union with respect to the Leadpoint workers' wages, hours, and other conditions of employment, an employment relationship would have to exist between BFI and the Leadpoint workers. *Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186, at *11-12; *see*

also 29 U.S.C. § 158(a)(5) (providing that an "employer" has an obligation to bargain in good faith with a union). The Union therefore asserted that BFI and Leadpoint jointly employed the workers Leadpoint assigned to work at BFI's facility.

After a hearing, one of the Board's regional directors found that BFI did not directly (i) set the Leadpoint employees' wage scale, (ii) control their recruitment, hiring, discipline, or termination, (iii) supervise their day-to-day work, or (iv) control their work schedules. *BFI I,* 2013 WL 8480748, at *10-11. Applying the Board's existing precedent, which required an entity to exercise "direct and immediate" control over the essential terms and conditions of employment to be deemed a joint employer, the regional director held that Leadpoint was the "sole employer of the employees" it provided to BFI. *Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186, at *1, 9.

The Union appealed the regional director's decision to the full Board. The Board granted the Union's request for review and invited interested parties to file amicus briefs addressing whether the Board should "adhere to its existing joint-employer standard or adopt a new standard."

The Board's Decision: Expanding the Standard for Joint Employer Status

After briefing by the parties and numerous amicus curiae, including the Board's General Counsel, the Board reversed the regional director's holding in a 3-2 decision that split along party lines. The Board did not dispute that, as the regional director found, BFI did not qualify as a joint employer of the Leadpoint workers under existing Board precedent. But citing to changing economic conditions—particularly the growth in the number of workers employed by temporary staffing agencies—and the Board's "responsibility to adapt the Act to the changing patterns of industrial life," the majority "decided to restate … [its] legal standard for joint-employer determinations." *Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186, at *11, 19 (citations omitted).

The majority reaffirmed what it called the "core of the joint-employer standard": that two or more entities may be deemed joint employers of a single workforce if (i) a common-law employment relationship exists, and (ii) "they share or codetermine" the "essential terms and conditions of employment." *Id.* at *12, 15. The majority, however, abandoned its longstanding requirements that to qualify as a joint employer, an entity have "direct and immediate" control over the employees, and that it actually exercise its control. *Id.* at *15-16. Under the Board's new standard, an entity may be deemed a joint employer if it controls the terms and conditions of employment, either directly or indirectly through an intermediary, or if it has the contractual right to exert control, even if it never exercises that right. *Id.* The Board also made clear that the inquiry into a putative joint employer's control over the "essential terms and conditions of employment" is not limited to hiring, firing, discipline, and supervision. *Id.* at *15. The Board also will consider a putative joint employer's control over other areas that impact employees' day-to-day work, such as the right to determine the number of workers to be supplied, scheduling, seniority, overtime, work assignments, and the "manner and method of work performance. *Id.*

Citing to changing economic conditions—particularly the growth in the number of workers employed by temporary staffing agencies—and the Board's "responsibility to adapt the Act to the changing patterns of industrial life," the majority "decided to restate… [its] legal standard for joint-employer determinations."

Applying its new joint employer standard, the majority held that although BFI rarely exercised control over Leadpoint's workers, BFI was a joint employer with Leadpoint of the Leadpoint workers because BFI "shared control over or co-determined" the terms and conditions of their employment. In reaching this conclusion, the majority noted that:

- while BFI did "not participate in Leadpoint's day-to-day hiring process," BFI "codetermine[d] the outcome of that process" because it had the right to impose minimum qualifications for working at its facility (such as passing a drug test) and to reject any worker that Leadpoint assigned to BFI (*id.* at *18);
- although Leadpoint employees supervised the Leadpoint workers' work at BFI, BFI controlled the speed of the sorting lines, set productivity standards, and communicated directives through Leadpoint, and thus "exercise[d] control over the processes that shape the day-to-day work" of the Leadpoint workers (*id.* at *18);
- because BFI determined the "number of workers it require[d], … the timing of employees' shifts, and … when overtime [was] necessary," it made the "core staffing and operational decisions that define all employees' workdays," even though Leadpoint selected the particular employees who would work during the particular shift (*id.* at *19); and
- while BFI did not set the Leadpoint workers' wage rates or provide benefits to them, BFI played "a significant role in determining employees' wages" because it mandated that Leadpoint not pay its employees higher wages than BFI employees for comparable work, and BFI and Leadpoint had a cost-plus arrangement[1] (*id.*).

Rather than identify any particular factor as determinative, the majority endorsed a flexible, fact specific analysis, leaving further guidance to emerge in an "evolutionary process" as particular cases arise and are decided in the future. *Id.* at *20.

Two Board Members Dissent

In a lengthy and sharply worded dissent, Board members Miscimarra and Johnson strongly objected to the majority's revision of the Board's joint employer standard and warned of the negative consequences that would flow from the new standard. First, the dissent pointed out that the Board's new joint employer standard applies not only in representation cases, but also in unfair labor practices proceedings. According to the dissent, the implications will be far-reaching, subjecting "countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what would have heretofore been unlawful secondary strikes, boycotts and activities." *Id.* at *21. At the same time that the Board's new standard expands the number of entities that will be considered joint employers, the fact-specific, multifactor test, the dissent charged, leaves employees, unions, and employers without "certainty or predictability regarding the identity of the 'employer.'" *Id.* at *22-23. This, the dissent predicted, will "actually foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the 'employer' side." *Id.* at *23. Finally, while the *Browning-Ferris* decision arose out of a relationship between a staffing agency and its client, the dissent argued that the Board's new joint employer standard lacks any clear limits and will also "fundamentally alter the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, credit-debtor, and contractor-consumer business relationships under the Act." *Id.*

Advice for Employers

Many businesses have structured their relationships with temporary staffing agencies, vendors, and other third-parties in reliance on the standards established by more than 30 years of settled Board precedent. Now that the Board has overruled that precedent,[2] companies would be prudent to revisit the ways in which they have structured those relationships. While, as the majority acknowledged, the Board's new joint employer standard is highly fact-specific, *id.* at *20, companies should review their contracts and practices with entities with which they potentially could be deemed joint employers to assess the risk of joint employer liability under the expanded standard. In particular, companies that rely on contingent work arrangements should review their contracts in light of the Board's analysis of the BFI-Leadpoint contract and for, among other things, any instances in which they reserve the right to control terms and conditions of the contingent workers' employment. Companies should weigh the practical benefits and risks of

maintaining or renouncing any such contractual right to control, and may consider amending their agreements to the extent that they suggest a right to control the third-party's employees if such control is not necessary in the context of the particular relationship.

Going forward, before entering into any new contractual arrangements for temporary or contingent workers, companies may—recognizing the risk that they may later be deemed a joint employer of the workers with a duty to bargain under the NLRA—wish to evaluate employee-management relations at the service provider, and avoid providers for whom relations appear strained or there otherwise appears to be a risk of a bargaining demand by the provider's employees.

1. In particular, the Board noted that after new minimum wage legislation became effective, BFI and Leadpoint entered into an agreement confirming that BFI would pay a new higher rate for the Leadpoint employees. *Id.*
2. On September 9, 2015, Chairman of the House Committee on education and the Workplace Rep. John Kline (R-Minn.) introduced in the House of Representatives and Chairman of the Senate Committee on Health, Education, Labor, and Pensions Lamar Alexander (R-Tenn.) introduced in the Senate a bill entitled the Protecting Local Business Opportunity Act (H.R. 3459, S. 2015), that would amend the NLRA to return to the prior, pre-*Browning-Ferris* joint employer standard. The bill provides that "two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate."

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