Supreme Court of Korea

Plaintiff (Appellant): Korean Metal Workers' Union (KMWU under KCTU) Defendant (Appellee): HD Hyundai Heavy Industries Co., Ltd. (HHI)

Case Number / Name: 2018ㄷ나(Da)296229 /

Amicus Curiae Brief of the International Lawyers Assisting Workers (ILAW) Network on Behalf of the Plaintiff (Appellant) KMWU/ Korea Confederation of Trade Unions (KCTU)

I. Introduction

The International Lawyers Assisting Workers (ILAW) Network respectfully submits this Amicus Curiae brief to the Supreme Court of Korea to support the Plaintiff (Appellant) Korean Metal Workers' Union (KMWU) in its ongoing litigation for collective bargaining rights in this pending matter.

The International Lawyers Assisting Workers (ILAW) Network is a global network of legal academics and practitioners who represent workers and their representative organizations, including trade unions. The ILAW Network includes over 1400 members in over 100 countries, including members in Korea. The core mission of ILAW is to bring together legal practitioners and scholars in an exchange of ideas and information in order to best represent the rights and interests of workers and their organizations wherever they may be.

In the case at hand, Hyundai Heavy Industries Co. Ltd. (HHI), one of the world's largest shipbuilding companies, has contracted with a number of subcontractors to manufacture ships at HHI's facilities. Historically, most if not all of the workers building the ships were employed directly by HHI. However, in recent years, the company's business model has changed, and it now relies heavily on workers employed by subcontractors.

The subcontractors are located within HHI's operations and effectively act as labor suppliers, dispatching their own workers to processes required and prescribed by HHI. In terms of capital, organization, size, technology, expertise, and independence, the subcontractors are very much subordinate to HHI, and most have no independent business outside of performing HHI's work. In many crucial respects, it is HHI, not the subcontractors, that has the authority to make decisions that affect the working terms and conditions of the subcontractors' workers.

International Lawyers Assisting Workers Network
1130 Connecticut Ave, NW
Washington DC, 20036

The subcontractors' workers organized a trade union under the KMWU and demanded collective bargaining with HHI regarding various matters over which HHI maintains and exercises control. Until this time, however, Korean labor law has been interpreted only to allow collective bargaining between an employer and the workers who are parties to a direct employment contract with that employer, regardless of the actual work relationship.

This was true in the United States for many years, as well. Over the past several decades, however, as business models have significantly changed and more employers have begun relying on contractors, subcontractors, franchisees, and temporary employment agencies, the courts and the national labor board have reinterpreted the definition of "employer" under the nation's labor law to adjust to these new business models, applying a "joint employer" standard for purposes of allocating collective bargaining responsibilities.

With this background, the ILAW Network offers the following description of the evolution of the "joint employer" doctrine in the United States.

II. History and Evolution of the Joint Employer Doctrine under United States Labor Law.

The National Labor Relations Act of 1935, as amended, (NLRA), 29 U.S.C. §§151-169, is the principal law in the United States that governs labor protections for the nation's workers, including their right to organize trade unions and engage in collective bargaining. Under §§2(2) and 2(3) of the NLRA, 29 U.S.C. § 152, an "employer" includes any person that acts as an agent of an employer, directly or indirectly.

As originally enacted, the NLRA did not incorporate the concept of "joint employers." However, as the United States increasingly experienced structural changes in business arrangements and in employment over the years, the courts and the National Labor Relations Board (NLRB) -- the independent federal agency charged with enforcing the NLRA, 29 U.S.C. §153 -- came to recognize that without interpreting "employer" so as to include joint employer responsibility, workers might find no one effectively accountable for some of the most basic violations of their labor law rights.

For example, where a contractor, a franchisee, a temporary employment agency, or various other types of nominal employers have little or no real control over basic employment terms, collective bargaining with only that entity is in practice ineffective. Recognizing as joint employers the typically larger user company in those situations where it actually controls or codetermines the employment conditions of the workers in question, ensures that those workers have the opportunity to bargain with the party that has the real decision-making

power in the relationship. By contrast, failing to recognize it as a joint employer undermines the NLRA's purpose, and often leaves no one accountable for violations of the law.

Thus, over time, the courts and the NLRB developed the joint employer concept in order to address situations where more than one entity shared or codetermined control over the employment conditions of the same workers. Acceptance of this concept with an explanation of how it should be applied culminated in the U.S. Supreme Court's decision in *Boire v. Greyhound Corp.,* 376 U.S. 473 (1964), a union representation election case involving the relationship between a company operating a bus terminal and its cleaning contractor. The Supreme Court explained that the question of whether Greyhound "possessed sufficient control over the work of the employees to qualify as a joint employer" was "essentially a factual question for the NLRB to determine." 376 U.S. at 481. The NLRB's subsequent decision in *Greyhound Corp*., 153 NLRB 1488 (1965), enf'd 368 F.2d 776 (5th Cir. 1966) applied the analysis, and found Greyhound and the cleaning contractor to be joint employers because they "share[d] or co-determine[d] those matters governing essential terms and conditions of employment." 153 NLRB at 1495.

Subsequently, in a precedential appeals court decision issued by the nation's Third Circuit Court of Appeals, *NLRB v. Browning-Ferris Industries (BFI-I)*, 691 F. 2d 1117 (3d Cir.1982), the Court held that an entity, even if not the labor supplier of a group of workers, would be considered a joint employer if it exercised actual control over those employees. This precedent often came to be referred to as the "direct and immediate control" standard.

In the succeeding decades, workers' need for joint employer protection became even more significant as companies increasingly used contractors, franchisors, and temporary agencies to perform core business functions. As David Weil, formerly an Assistant Labor Secretary in the United States Department of Labor under President Barack Obama, explained in his seminal 2014 book *The Fissured Workplace*: *Why work became so bad for so many and what can be done to improve it*, such outsourcing and contracting arrangements have allowed companies to externalize risk and shift costs relating to minimum wages and overtime laws, health and safety protections, anti-discrimination requirements, and job security.[1] As a result, he finds, this "fissuring" of the workplace, in turn, has had a substantial effect on the erosion of wages, benefits, and other working conditions in recent decades.

As something of a counterbalance, the joint employer doctrine has provided a certain degree of assistance in leveling the bargaining table, by linking economic power and legal responsibility.

[1] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard Univ. Press 2014)

Moreover, it has served to enforce the statutory intent of the NLRA by treating the actual decision-maker entities as statutory employers and thus requiring them to bargain and comply with the nation's labor law.

III. Today's Prevailing Joint Employer Standard, after a Period of Legal Challenges and Judicial Review, Remains Consistent with the *Browning-Ferris Industries* (BFI-I) Precedent

As noted in Part II above, the *Browning-Ferris Industries* (BFI-I) 1982 precedent established a "direct and immediate control" standard to be used in applying the joint employer doctrine. Under this standard, an entity could not be deemed a joint employer if it merely had the potential to exercise control over employees but did not actually exercise such control. In 2015 this standard was revisited by the National Labor Relations Board in the case of *Browning-Ferris Industries of California, Inc. (BFI-II)*, 362 NLRB No. 186 (2015). Referencing the trends regarding increased outsourcing and other shifts in work-related economic structures, the NLRB broadened the standard, ruling that a company could be found to be a joint employer even if it had only indirect or reserved control over working conditions. This revised standard focused on the company's simple potential to influence working conditions.

The revised standard was in effect for only a short time, however, since the NLRB decided largely to revert to the prior "direct control" standard in 2020 after going through an Administrative Procedures Act rulemaking process, 5 U.S.C. § 553. [2] The new joint employer rule, entitled *"Joint Employer Status Under the National Labor Relations Act,"* 85 Fed. Reg.11184 (February 26, 2020), reverted to a narrower standard and required a showing of "substantial direct and immediate control" to establish joint employer status. The rule was a direct response to the Board's 2015 broader decision and restored what it now determined to be a more predictable standard, emphasizing actual, not theoretical or reserved, control over workers' terms and conditions of employment.

The key provisions of this 2020 rule will be discussed below in Part IV, since they remain operative at this time, but for the sake of a complete historical timeline, it should be noted that the NLRB made one further but ultimately unsuccessful attempt to revise the joint employer

[2] The NLRB has two ways to establish new precedents under the NLRA, case-by-case decision-making and broad policy rulemaking. Case decision-making is used to resolve individual disputes, and results in fact-specific decisions issued by the NLRB in contested cases. 29 U.S.C.§ 156. Normally, it applies retroactively to the parties and sets precedent going forward. It can be more easily reversed by future NLRB decisions. By contrast, rulemaking is used to issue broad, forward-looking rules. It requires public notice and an opportunity for public comment. Administrative Procedures Act, 5 U.S.C. § 553. It applies prospectively and uniformly to all. Rulemaking is much less commonly used than case-by-case decision-making and is harder to reverse since, again, it requires public notice and opportunity for comment.

standard, engaging in another rulemaking process that led to the issuance of yet a new rule in 2023, *Standard for Determining Joint Employer Status Under the National Labor Relations Act,"* 88 Fed.Reg. 73946 (Oct 27, 2023). However, before ever taking effect, the 2023 version was successfully challenged in court, resulting in a court injunction which blocked enforcement of the rule and a simultaneous order that the 2020 rule be reinstated. *Chamber of Commerce of the United States of America v. NLRB, No. 6:23-cv-00553 (*E.D. Texas 2024).

As a result, the NLRB's 2020 rule governing the determination of whether a company should be deemed a joint employer remains in effect, and -- as discussed in Part IV below -- continues to provide the operative joint employer standard that courts and the NLRB have relied upon in resolving joint employer cases in recent months and years.

IV. Analysis of the Prevailing Joint Employer Standard: The National Labor Relations Board's 2020 Joint Employer Rule

On February 26, 2020 the NLRB, using its agency rulemaking authority, issued the final version of a rule setting out the legal standard for analyzing whether workers are jointly employed by affiliated businesses, effectively rolling back the standard it had established in the *Browning-Ferris Industries II* case discussed above. *"Joint Employer Status Under the National Labor Relations Act,"* 85 Fed. Reg.11184 (February 26, 2020). The new rule, which took effect on April 27, 2020, reinstated the earlier test that provided that a business is a joint employer if it has "substantial direct and immediate control" over another company's workers. In other words, it would not be sufficient to qualify a business as a joint employer if it exhibited only "indirect control" over a contractor, franchisee, or other employment supplier, or if it only reserved the ability to exert such control without actually exercising it.

In issuing the final rule, then-NLRB Chairman John Ring stated in the agency's accompanying press release: "With the completion of today's rule, employers will now have certainty in structuring their business relationships, employees will have a better understanding of their employment circumstances, and unions will have clarity regarding with whom they have a collective-bargaining relationship."(NLRB, Office of Public Affairs, February 25, 2020.)[3]

Under the rule, in order to qualify as a joint employer, user companies would have to have "substantial direct and immediate control" of at least one key term or condition of a worker's job such that the user company "meaningfully affects matters" pertaining to the employment

[3] National Labor Relations Board, NLRB Issues Joint-Employer Final Rule, NLRB (Feb. 25, 2020), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule.

relationship. 29 C.F.R. Part 103.40(a). The NLRB defines those "essential terms and conditions of employment" as:

> wages
> benefits
> hours of work
> hiring
> discharge
> discipline
> supervision
> direction
>
> 29 C.F.R. Part 103.40(b)(c)

It defines "substantial" direct control as actions that have a "regular or continuous consequential effect" on any one (or more) of the eight core aspects of a worker's job that it had listed. Sporadic, isolated, or de minimis control would not be sufficient. Significantly, the NLRB made clear that the entity alleged to be a joint employer would only need to have substantial direct control over *one* of those essential terms, not all, to be held a joint employer. Moreover, the rule also specifies that even though examples of a business indirectly controlling or maintaining an unexercised (reserved) contractual ability to control any of those terms would not in and of themselves alone lead to a joint employer finding, they could still be considered relevant to the joint employer analysis in order to lend support to, or supplement evidence of, actual direct control. 29 C.F.R. Part 103.40(a).

Finally, under the rule, if an entity qualifies as a joint employer, it then has a legal duty to bargain over any and all terms and conditions of employment over which it possesses and exercises substantial direct and immediate control with a union that represents the employees of the labor supplier. And likewise, a user firm may be considered an employer of workers that a labor union is seeking to represent – that is., in a situation where the employees of the supplier are not already unionized.

As alluded to above, subsequent attempts to revise the NLRB's joint employer standard yet again were unsuccessful, both under case law and rulemaking. Thus, the standard set forth in the NLRB's 2020 rule has remained the operative standard by which the country's labor board and the courts have continued to analyze joint employer cases to this date.

V. NLRB and Court Decisions Applying the Joint Employer Standard

The National Labor Relations Board's 2020 joint employer rule, 29 C.F.R. Part 103.40(a), as discussed above, established a somewhat narrow but arguably balanced standard for determining joint employer status under the National Labor Relations Act (NLRA), asserting that an entity would be considered a joint employer if it exercised "substantial direct and immediate control" over one or more essential terms and conditions of employment, including wages, benefits, hours of work, hiring, discharge, discipline, supervision, and/or direction. Mere indirect control or reserved authority, without actual exercise, was deemed insufficient, though it was held to be relevant in supplementing evidence of direct control.

While the 2020 rule provided clarity, its application in NLRB and court decisions has been limited. However, several recent cases that have applied this rule have found that even under this somewhat narrower standard, the entities in question still qualified as joint employers.

In *Cognizant Technology Solutions U.S. Corporation and Google LLC, Joint Employers and Alphabet Workers Union-Communications Workers of America, Local 1400*, 372 NLRB No.108, (2023), for example, a group of YouTube music content moderators had been hired through a staffing firm, Cognizant Technology Solutions, to provide services to Google. Cognizant's content moderators, through the Alphabet Workers Union - Communications Workers of America (AWU-CWA), Local 1400, petitioned for a union election, and sought to bring Google into the election as a joint employer. Both companies denied Google's joint employer status, and the burden was therefore on the petitioner union to prove Google's status at a hearing before an NLRB Regional Director.

In the NLRB's Decision and Direction of Election upholding the Regional Director's findings, the NLRB found that the Union had established that Google was a joint employer of the petitioned-for employees because it "share[s] or codetermine[s] the employees' essential terms and conditions of employment"[4] with Cognizant.

Specifically, it found that Google possessed and exercised such substantial direct and immediate control over the employees' supervision and direction of work, benefits, and hours of work as to warrant a finding that Google meaningfully affects matters relating to the employment relationship with those employees.

In analyzing the degree of control over these terms of employment, the NLRB noted that Google's personnel actually instruct Cognizant's employees how to perform their work; that Google drafts and maintains workflow training charts which govern the details of employees'

[4] 372 NLRB No. 108 at p.1

International Lawyers Assisting Workers Network
1130 Connecticut Ave, NW
Washington DC, 20036

performance of specific tasks; that it maintains exclusive control over the digital tools and processes that Cognizant employees use to perform the contracted-for work; and that it maintains tight control over the prioritization and expected rate of performance of assigned tasks.[5]

The NLRB also found that Google exercises "substantial direct and immediate control over supervision by actually issuing weekly employee performance appraisals" and "through its exclusive control of the detailed quality of 'rubrics' under which the employees' work is constantly evaluated."[6]

It went on to explain that with respect to the details of Cognizant employees' performance of tasks through training and continuous evaluation, "Google exercises its authority over supervision through intermediary employees of Cognizant. But because the record establishes that no intermediary Cognizant employee has discretion or authority to modify the detailed operational instructions or evaluate rubrics exclusively imposed by Google, Google's control over supervision in these respects remains direct and immediate within the meaning of 29 C.F.R. Part 103.40 (a) and (c)(7)[the NLRB joint employer rule]."[7] On this issue, the Board concluded: "We find that none of the control described above that Google exercises over the employees' supervision is "limited and routine" in nature within the meaning of 29 C.F.R. Part 103.40 (c)(7).

Continuing with the Board's analysis, it found that with respect to Google's control over benefits, "Google requires suppliers (such as Cognizant) of its 'extended workforce' to provide a minimal level of benefits to those employees, and thereby exercises substantial direct and immediate control over the employees' benefits within the meaning of [29 C.F.R. Part] 103.40 (a), c)(2), and (d), including 'selecting the level of benefits'."[8]

Finally, with respect to Google's control over the employees' hours of work, the Board found that "Google and Cognizant co-determine the employees' holiday schedule and their overtime hours, which establishes direct and immediate control over hours of work with the meaning of [29 C.F.R. Part]103.40(a), (c)(3), and (d). The Board therefore found that Google possessed and exercised such substantial direct and immediate control over at least one (and in fact more) essential term or condition of the petitioned-for employees' employment as to warrant a finding that Google "'meaningfully affects' matters relating to their employment relationship

[5] id.
[6] id.
[7] id.
[8] 372 NLRB No.108 at p.2

and is therefore their joint employer under 29 C.F.R. Part 103.40(a). It thus directed a representation election to take place listing both companies as employers.[9]

The NLRB had a further opportunity to analyze the joint employer relationship of these same parties after the union won the election, but the employers refused to bargain, again denying joint employer status. The case came back before the NLRB through an unfair labor practice charge alleging that the companies were unlawfully refusing to bargain as joint employers. The NLRB issued its decision in this case on January 3, 2024, finding no reason to depart from its earlier analysis in the 2023 election case, and again ruling that Google was indeed a joint employer of Cognizant's employees and therefore obligated to engage in collective bargaining with the union. *Cognizant Technology Solutions U.S. Corp and Google LLC* 373 NLRB No.9.[10]

Meanwhile, in November, 2024, in another case involving Google, the NLRB ruled that it was also a joint employer of a group of contract workers employed by a different contractor, Accenture Flex. *Accenture d/b/a Accenture Flex; Google LLC/Alphabet Inc. (as Joint Employers)* Case No. 20-RC-319743.

The workers involved in this case were part of Google's Content Creation Operations team and performed work that included writing and editing articles for Google products. When the workers filed a petition seeking a union representation election, the NLRB first needed to determine whether the employer in the election would be Accenture Flex alone, or Accenture Flex and Google as joint employers. The NLRB's Regional Director determined the companies to be joint employers, and the election was held, resulting in a vote in favor of unionization with the Alphabet Workers Union-Communications Workers of America (AWU-CWA), Local 9009.

In response to a Request for Review of the Regional Director's Decision and Direction of Election, the NLRB issued its ruling affirming the Regional Director's finding that Accenture Flex and Google were joint employers. The decision upheld Google's status as a joint employer because it "share[s] or codetermine[s] the employees' essential terms and conditions of employment" with Accenture, possessing and exercising "such substantial direct and immediate control over the employees' benefits, hours of work, supervision, and direction as to warrant a finding that google meaningfully affects matters relating to the employment relationship with those employees."[11]

[9] id.

[10] Google appealed the decision, but by the time it was decided Google's contract with Cognizant had expired and the contractor had been terminated. As a result, without addressing the joint employer issue, the court dismissed the case as moot. *Alphabet Workers Union - Communications Workers v. NLRB*. No. 24-1003 (D.C. Cir. 2025)

[11] *Accenture Flex* at p.1

International Lawyers Assisting Workers Network
1130 Connecticut Ave, NW
Washington DC, 20036

The Board pointed to evidence of Google's control over the level of benefits paid to Accenture's employees. It found that Google exercises direct and immediate control over employees' benefits by codetermining the level of benefits to be offered to Accenture's employees pursuant to the parties' Master Services Agreement; control over holiday schedules and overtime [citing *Quantum Resources Corp.,305 NLRB 759,760-761 (1991)* which found a joint-employment relationship in part because user-employer authorized overtime and, through its contract, codetermined holidays, and *Gourmet Award Foods, Northeast, 336 NLRB 872,873 (2001)* which found a joint-employer relationship in part because the user-employer determined the employees' hours in including overtime and because of its control over the direction of employees.

Indeed, in analyzing whether the amount of control over direction that Google exercised was sufficient to warrant a finding of joint employer status, the NLRB noted: "...even if this essential term and condition does not support joint-employer status, Google's status as a joint employer would still be established based on the other terms and conditions that support joint-employer status" — a reminder that under the NLRB's 2020 Joint Employer Rule, the standard for determining joint-employer status requires a finding of sufficient control over only one of the eight specified essential terms and conditions.[12]

Following the issuance of this November, 2024 decision, the NLRB in January, 2025 filed a complaint in two related cases - one challenging Google's ongoing refusal to bargain as a joint employer and the other challenging Google's and Accenture's actions in unilaterally changing certain working conditions of their joint employees without prior bargaining with the union. *Accenture Flex and Google LLC*, Case 20-CA-353557. The complaint remains open as of this date.

Meanwhile, the 2024 *Accenture-Google* decision remains significant precedent in determining joint employer status under the NLRB's prevailing 2020 joint employer rule.

VI. The Joint Employer Bargaining Process Once Status is Established

Upon a determination of joint employer status, each joint employer bears an independent duty to bargain collectively with the employees' representative union. This obligation, however, is strictly limited to the terms and conditions of employment over which that employer exercises "substantial direct and immediate control."

The NLRB's prevailing 2020 joint employer rule, discussed above, clarifies and codifies this long-standing principle, first in its *Preamble*, *85 Fed. Reg. 11186, 11206 (Feb. 26, 2020):*

[12] *Accenture Flex* at p.3, fn 4.

> "A joint employer is only required to bargain over those particular terms and conditions of employment that it controls. A joint employer is not required to bargain over terms and conditions that it does not control…. This rule ensures that liability under the NLRA is commensurate with control**,** promoting stability in bargaining relationships." (emphasis deleted).

Again in the regulatory text of the Rule, itself, this limitation is spelled out, in 29 C.F.R. Part 103.40(e):

> "(e) Duties of joint employers. A person that is a joint employer under this section must bargain collectively with the representative of the employees with respect to those matters relating to the employees' terms and conditions of employment that the joint employer possesses and exercises substantial direct and immediate control over."

As discussed in Part IV above, an entity qualifies as a joint employer only if it meaningfully affects essential employment matters such as wages or benefits, hours of work, hiring, firing, discipline, supervision, or direction. The duty to bargain thus attaches solely to those matters within the employer's actual control, and an employer is not required to negotiate over terms outside its sphere of authority.

This principle is consistent with that found in case precedents cited in the Rule. In *Laerco Transportation*, 269 NLRB 324, 325 (1984), the Board emphasized that each joint employer's bargaining obligations correspond precisely to the aspects of employment it directly controls. For instance, if one employer controls hiring and firing decisions while another oversees work schedules, each is obligated to bargain only over those terms under its direct authority. This division of responsibility ensures that bargaining duties are fairly and predictably allocated, preventing one employer from bearing an undue burden for matters outside its control. See also *TLI, Inc.*, 271 NLRB 798 (1984) (joint employers must bargain over terms they actually control, not those managed by another entity); *Airborne Express* 338 NLRB 597 (2002)(only employers with control over essential terms must participate in bargaining over those specific terms).

With respect to the process itself, joint employers have flexibility as between themselves in terms of how they handle the negotiations. They may appear jointly at the bargaining table, with each employer sending its own representatives. Alternatively, they may agree to have one employer lead the negotiations (typically the employer with more control), but in that case the other employer is still legally bound by the resulting contract and must approve and implement the relevant terms. They may even choose to bargain separately, if they wish.

In any case, whether they bargain jointly or separately, both joint employers remain legally responsible for failures to bargain in good faith over terms they control, and for other related unfair labor practices within the scope of their joint employer relationship. *Southern California Gas Co.*, 302 NLRB 456 (1991); *United Food and Commercial Workers,* 267 NLRB 891,893 n.7 (1983) With this limitation, joint employers may be held jointly and severally liable for failing to bargain in good faith, 29.U.S.C § 158 (a)(5), (d), for interfering with union activities, 29 U.S.C. §158 (a)(1), or for retaliating against union supporters, 29 U.S.C. §158 (a)(1)(3). And once a collective bargaining agreement is reached, both joint employers must comply with the contract's terms, including adherence to any grievance and arbitration or other dispute resolution procedures that may exist. 29 U.S.C.§158 (a)(5).

In sum, the obligation to bargain collectively under joint employer status is limited to each employer's actual control over employment terms and conditions. However, as to those terms over which an employer does exercise substantial direct and immediate control, it must adhere to the same bargaining responsibilities as is expected of sole employers. This approach, grounded in both NLRB case precedent and the 2020 Rule, promotes clarity, fairness, and consistency in the collective bargaining process among joint employers.

VII. Conclusion

The increasing reliance by employers on contractors, franchisees, and staffing agencies in the United States has resulted in the National Labor Relations Board and the courts having to regularly address questions of joint employment in the course of resolving disputes under the country's labor and employment laws. As the law has evolved, the issue has been not over whether a business that uses workers supplied by other employers can be found to have joint employer status and responsibilities, but rather over what degree of control must be shown in order to determine whether the user business is indeed a joint employer.

Thus, over the years, even as the prevailing joint employer standards have somewhat varied in the amount and type of control that must be shown, it has become clear that if the user company exercises "substantial direct and immediate control" over at a minimum just one essential term of employment of the workers' contractor or supplier company, then the two entities are joint employers and they each have an obligation to bargain with the union over such terms that each controls. Moreover, this would be true whether the contractor/supplier company is already unionized when the user company contracts with the supplier, or whether the employees decide they wish to unionize once their employer is already a supplier or contractor for the user company.

Respectfully Submitted

Jonathan Hiatt

Counsel for International Lawyers Assisting Workers (ILAW) Network
U.S. Solidarity Center
1130 Connecticut Ave. NW Ste. 800
Washington, DC 20036