

June 10, 2019

Melissa Smith, Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Joint-Employer Status Under the Fair Labor Standards Act [Regulatory Information Number (RIN) 1235-AA26]

The National Waste & Recycling Association (NWRA) submits these comments on behalf of the waste and recycling industry in response to the Proposed Rulemaking issued by the Department of Labor's Wage and Hour Division (WHD) in their effort to establish a standard for determinations of joint-employer status.

NWRA appreciates WHD's recognition that the current situation lacks the clarity and certainty that businesses require in order to comply. Safety is the top concern for NWRA and our members. We want every single member of our industry to make it home each day safely, free from injury or fatality. We believe that a clear delineation of employer responsibility will help ensure a safe workplace, whereas a blanket assumption of joint-employer status can result in confusing and conflicting directives that make employees less, not more, safe.

BACKGROUND

NWRA is the trade association representing the private sector waste and recycling industry that is essential to maintaining the quality of American life by protecting public health and the environment. The delivery of waste and recycling services impacts all residential, commercial, and industrial properties on a daily basis. Our members collect, process, and manage waste, recyclables, organics, and medical waste; operate and manage landfills in compliance with all federal and state laws; manage and service truck fleets and collection vehicles; design, manufacture, sell, and service equipment and supplies.

The association's mission is to provide leadership, education, safety expertise, research, and advocacy to promote the waste and recycling industry. NWRA's goal is to ensure a climate where our members can continue to provide safe, economically sustainable, and environmentally responsible services and jobs that benefit communities throughout America.

NWRA's Safety Committee provides insights and best practices on how to prevent injuries to the industry's workers. The association convenes a number of institutes that provide leadership on landfills, recycling, and healthcare waste. The association also serves as Secretariat for the American National Standards Institute (ANSI) Z245 Equipment Technology and Operations for Wastes and Recyclable Materials. Along with our partner Informa, we collaborate on WasteExpo, North America's largest waste and recycling exposition and conference. Our educational offerings are known and respected around the world.

Our members operate in all 50 states and the District of Columbia. Waste and recycling facilities number nearly 18,000 scattered throughout the U.S., mirroring population centers. Our nearly 700 members are a mix of publicly-traded and privately-owned local, regional, and Fortune 500 national and international companies. NWRA represents approximately 70 percent of the private sector waste and recycling market.

The solid waste industry directly employs about 420,000 people as of early 2018. It is estimated that the private sector waste and recycling industry is responsible for sustaining more than one million jobs.

NWRA's membership includes the parent company of Browning-Ferris Industries (BFI), which was at the center of NLRB's 2015 decision that changed the long-standing definition of what constituted a joint-employer.¹ This ruling directly applied to and impacted the waste and recycling industry.

COMMENTS

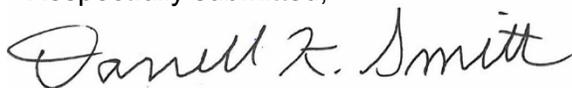
The NLRB's decision in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (*Browning-Ferris*) fundamentally changed the NLRB's 30-year old joint-employer standard holding that so-called "indirect" or "reserved" control over essential employment terms can result in a joint-employer finding. Important to NWRA's members, among other things, is the *Browning-Ferris* decision puts users of contractors at risk of a joint-employer finding if they require their contractors' workers to follow safety rules generally applicable to anyone on the premises, regardless of their employment status.

NWRA supports the NLRB's proposed regulation that would find an employer may be considered a joint-employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction; and an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine.

CONCLUSION AND RECOMMENDATIONS

The waste and recycling industry agrees with the need for a consistent standard to guide businesses in confidently deciding whether to enter into arrangements intended to constitute contractor relationships. A bright line test where substantial, direct, and immediate control over putative employees is required for joint-employer status -- as embodied in the NLRB's proposed rule -- is the logical and clear solution. WHD should adopt standards that are in alignment with the NLRB's proposed regulation.

Respectfully submitted,



Dr. Darrell K. Smith, PhD
President & CEO

¹ Because BFI is a party to ongoing joint-employer litigation, it does not take a position with respect to these comments.