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PREEMPTIVE BARGAINING: THE IRS, THE DOL, THE NLRB AND OVERLAPPING RESPONSIBILITIES

I. INTRODUCTION

In the eighth season of the television series *Seinfeld*, there is a minor subplot involving the character Kramer.[1] Kramer enters an investment firm in Manhattan to use their bathroom and, upon exiting, is dragged into an office meeting.[2] Shortly thereafter, Kramer finds himself absorbed into the company as a quasi-employee.[3] He enjoys the structure of working for apparently the first time, and continues his pseudo-employment despite drawing no salary and being under no contract.[4] It quickly becomes clear that he has no capacity or aptitude at the job, or working in general, as demonstrated through a comic montage.[5] Eventually he is called into a supervisor's office to be fired.[6] Kramer's response is "I don't even really work here."[7] To which the boss replies, "that's what makes this so difficult."[8]

While that situation is built around the comic absurdity of the character transitioning directly from the bathroom to the boardroom,[9] it is no longer without a real world analogue. The modern trend expands beyond the traditional legal boundaries of the employer and employee relationship.[10] If these decisions are codified in the future it is not

1. *See Seinfeld: The Bizarro Jerry* (NBC television broadcast Oct. 3, 1996); David Sims, *Seinfeld: "The Bizarro Jerry"/"The Little Kicks,"* A.V. CLUB (Nov. 10, 2011, 12:00 PM), http://www.avclub.com/tvclub/seinfeld-the-bizarro-jerrythe-little-kicks-64753.

2. *Seinfeld: The Bizarro Jerry*, *supra* note 1.

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *See id.*; *see also* Sims, *supra* note 1 (describing Kramer having a job and that he filled his briefcase with crackers).

10. U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1, at 15 (July 15, 2015) [hereinafter DOL Note] ("[T]he Act's intended expansive coverage for workers must be considered when applying the economic intended expansive coverage for workers must be considered when applying the economic realities factors to determine whether a worker is an employee or an independent contractor.").

beyond the realm of possibility that a worker could be called into the office of an administrator that is not his traditional employer. Kramer's "I don't even really work here"[11] could be just as mistaken as the actual employee who drags Kramer into the board meeting.

This Note will look at the recent trend in decisions between employers and distant employees. It will suggest that the recent developments in labor law are too drastic to survive in the current economy and too broad to avoid butting up against the already established responsibilities of other federal agencies. It is foreseeable that in the future it will be dramatically easier to be an employee without having been directly hired by an employer or having any traditional employment relationship with the employer.[12] Both the recent National Labor Relations Board ("NLRB") decision in *NLRB v. Browning-Ferris Industries of California, Inc.*, ("BFI") and the Department of Labor's ("DOL") Advisory Note ("DOL Note"), are emblematic of the recent trajectory toward eliminating the requirement that an individual be directly hired by the employer in order to be an employee.[13] However, this recent trend has not been without controversy. These decisions are two of the various factors that have led to a record number of federal wage and hour suits in 2015.[14] Interestingly, the two recent actions also represent these government agencies stepping into the well-worn territory of the Internal Revenue Service ("IRS") and possibly completely beyond their jurisdiction.[15] In brief, this Note will argue that it is the NLRB's job to tell employees what rights they have and it is the IRS's job to tell people what type of worker they are.

The BFI decision was met, not only, with celebration by workers and unions who declared "[t]his is a great day,"[16] but also with concern

11. *Seinfeld: The Bizarro Jerry*, *supra* note 1.

12. *See* NLRB v. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186, 1, 18 (Aug. 27, 2015) (explaining that the housekeepers, screen cleaners, and sorters are not hired by BFI, but are their employees); DOL Note, *supra* note 10, at 1 (providing a "broader scope of employment than the common law control test").

13. *See Browning-Ferris*, 362 N.L.R.B. No. 186 at 18 (explaining that BFI is not a part of the "day-to-day hiring" but "codetermines the outcome" of the process); DOL Note, *supra* note 10 (explaining that there is now a broader scope of employment and some employers may utilize staffing agencies as a means of hiring new employees).

14. Rebekah Mintzer, *Wage and Hour Suits Reach Record High in 2015*, CORP. COUNSEL (Nov. 25, 2015), http://www.corpcounsel.com/id=1202743359611/Wage-and-Hour-Suits-Reach-Record-High-in-2015?slreturn=20151025164153.

15. *See infra* Part IV.

16. *Workers at Center of NLRB's 'Joint Employer' Ruling Vote to Join Teamsters Union*, TEAMSTERS (Sept. 4, 2015), https://teamster.org/news/2015/09/workers-center-nlrbs-joint-employer-ruling-vote-join-teamsters-union.

by employers and legal blogs, cautioning employers to reread their existing contracts.[17] Additionally, it prompted almost immediate retaliatory federal legislation.[18] However, some scholars suggested the decision may have served solely to remove precedential clutter that was interfering with the persistent meaning of the Fair Labor Standards Act ("FLSA").[19] The DOL Note prompted stronger language like "seek immediate advice from counsel" despite the fact that the Note has yet to be implemented.[20] It concludes with a declaration that "most workers are employees" *already*.[21] In combination, the BFI decision and the DOL Note reshape the landscape of labor law while redefining terms already present in labor contracts.[22] This Note will look at both of these decisions and their immediate aftermath. This Note will then examine the doctrine of preemption as it exists currently and analogize it into a situation where two federal agencies are attempting to cover the same ground. Finally, this Note will conclude by asserting that actions by these labor organizations are invalid based on lack of jurisdiction.

The BFI decision and DOL Note, in essence, seek to reclassify existing workers.[23] The "most workers are employees" phrase is an open invitation to the bargaining table.[24] This action seems to overlap with the existing work of the IRS in classifying workers into categories in order to tax them.[25] The NLRB wants a stronger presence at the negotiating table, the IRS wants an accurate amount of the worker's

17. *See, e.g.*, *NLRB's New Joint Employer Standard Creates Enormous Uncertainty*, LAB. AND EMP. LAW PERSP. (Aug. 31, 2015), https://www.laboremploymentperspectives.com/2015/08/31/nlrbs-new-joint-employer-standard-creates-enormous-uncertainty.

18. Pamela Wolf, *'Protecting Local Business Opportunity Act' Hearing Examines NLRB Joint Employer Standard*, WOLTERS KLUWER, http://www.employmentlawdaily.com/index.php/news/protecting-local-business-opportunity-act-hearing-examines-nlrb-joint-employer-standard (last visited Nov. 22, 2016).

19. *See id.* (explaining that "*Browning-Ferris* overrules administrative precedent," thus returning to "traditional common-law principles").

20. *See* James G. Ryan, *Employee Versus Independent Contractor? New DOL Guidance Suggests that Most Workers are Employees*, CULLEN AND DYKMAN LLP BLOG POSTS (Aug. 1, 2015, 1:28 AM), http://www.cdllpblogs.com/?p=1440; *see also* DOL Note, *supra* note 10.

21. DOL Note, *supra* note 10, at 15.

22. *See, e.g.*, Browning-Ferris Indus. Of Cal., Inc., 362 N.L.R.B. No. 186, 1, 41 (Aug. 27, 2015); DOL Note, *supra* note 10, at 5.

23. *See Browning-Ferris*, 362 N.L.R.B. No. 186 at 27 (expressing a different classification, such as "independent contractor"); DOL Note, *supra* note 10, at 1 (discussing the issue of misclassification).

24. *See* DOL Note, *supra* note 10, at 15.

25. *Form SS-8: How Should You Handle Worker Classification*, CPA & BUSINESS ADVISORY BLOG, PIEPER WHITAKER & BJORK, LLC (July 31, 2015), http://pwbcpas.com/blog/2015/07/31/form-ss-8-how-should-you-handle-worker-classification.

money. This Note will address this jurisdictional conflict using the theory of preemption.

II. THE DOL NOTE

The DOL Note is concerned with clarifying the existing independent contractor test and is designed as a response to what it perceives as unnecessary litigation between employers and workers who aspire to be employees, though their contract might label them independent contractors.[26] The DOL is looking at what it has determined to be a wide range of misclassification in the workplace.[27] It is making an effort to explain the test.[28] The DOL Note juggles the FLSA, the "suffer or permit" standard, and various common law, while trying to synthesize meaning.[29] Quoting the Supreme Court, the DOL Note states "the FLSA [scope] is 'the broadest definition that has ever been included in any one act.'"[30] It further indicates that being labeled an "independent contractor" does not close off the possibility of the classification of an employee.[31] The paperwork can say "independent contractor" and the law may still recognize an employee.[32]

The "suffer or permit" standard refers to the obligation of the employer.[33] This standard is written into the FLSA[34] and dates back to the New Deal.[35] The general meaning behind it is that if you've been hired to do a job, everything you do that benefits the employer is *working* whether it happens during the agreed upon hours or not.[36] "An employer cannot sit back and accept the benefits of an employee's work

26. DOL Note, *supra* note 10, at 1.

27. *Id.*

28. *See id.*

29. *See id.* at 1-2.

30. *See id.* at 4.

31. *See id.* at 5.

32. *See id.* at 5. Reiterating that "[e]conomic realities, not contractual labels, determine the employment status for . . . the FLSA." *Id.* (quoting Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 755 (9th Cir. 1979)).

33. *See id.* at 4.

34. 29 U.S.C. § 203(g) (2012).

35. *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, THE U.S. DEP'T. OF LAB., http://www.dol.gov/oasam/programs/history/flsa1938.htm (last visited Nov. 22, 2016); DOL Note, *supra* note 10, at 3 ("Prior to the FLSA's enactment, the phrase 'suffer or permit' (or variations of the phrase) was commonly used in state laws regulating child labor and was 'designed to reach businesses that used middlemen to illegally hire and supervise children.'").

36. *See FLSA Hours Worked Advisor*, THE U.S. DEP'T. OF LAB., http://webapps.dol.gov/elaws/whd/flsa/hoursworked/sufferpermit.asp (last visited Nov. 22, 2016).

without considering the time spent to be hours worked."[37] "Merely making a rule against such work is not enough."[38] The DOL views this as incomparably broad.[39] This sense of broadness is present throughout the entire DOL Note.[40] The 'suffer or permit' standard was "specifically designed to ensure as broad of a scope of statutory coverage as possible."[41] This is the background theory that propels the DOL's argument.[42]

The DOL Note endorses a six-factor analysis and notes that many previous applications have not been broad enough.[43] This analysis is termed the "economic realities test,"[44] and it typically includes:

> (A) the extent to which the work performed is an integral part of the employer's business; (B) the worker's opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer.[45]

Gone, it seems, are the days of the so-called "plumber" test.[46] "Although a plumber might come to your house and do some work for you, the plumber isn't your employee."[47] While the test was created as a kind of layman's shorthand for who is and who is not considered an employer's employee, the rationale behind the test is still applicable nonetheless.[48] That is, a plumber, who is called to work on a plumbing issue in your house, is not your employee on the basis of your call for

37. *Id.*
38. *Id.*
39. *See* DOL Note, *supra* note 10, at 4.
40. *See generally id.* (referenced throughout the Note but beginning at page 206).
41. *Id.* at 3.
42. *See id.*
43. *See id.* at 4.
44. *Id.*
45. *Id.*
46. *See, e.g.*, Lisa Guerin, *Are You an Employee or an Independent Contractor?*, NOLO, http://www.employmentlawfirms.com/resources/employment/are-you-employee-or-independent-contractor.ht (last visited Nov. 22, 2016); *Employment Determination Guide*, EMP. DEV. DEP'T., STATE OF CAL., 2, http://www.edd.ca.gov/pdf_pub_ctr/de38.pdf (last visited Nov. 22, 2016).
47. Guerin, *supra* note 46.
48. *See id.*

service.[49] The plumber also works for other people, brings his own tools, and, generally, arrives to perform work at your house on a one-off basis.[50]

A. The Extent to Which the Work Performed is an Integral Part of the Employer's Business

Looking at each factor in turn, it appears that focus in (A) is on the word "integral."[51] The DOL favors a broad view where any singular link in the chain of business can be viewed as integral.[52] More traditionally, "work [was] integral to the employer's business if it [was] a part of its production process or if it is a service that the employer is in business to provide."[53] The DOL is looking for attenuation when applying this factor, and, in doing so, raises more questions about the boundaries of "integral" than it settles.[54]

B. The Worker's Opportunity for Profit or Loss Depending on His or Her Managerial Skill

The focus here appears to be on the level of decision making granted to a non-employer.[55] The more autonomy a party demonstrates, the less likely he or she could be considered an employee.[56] However, this is distinct from the party's decision to work more hours for increased wages.[57] Put succinctly, the party that orders chairs is more likely to be an independent contractor than the party that decides to work through the weekend to meet a deadline.[58] When they say "managerial" the DOL clearly contemplates administrating as opposed to delegating.[59] The DOL also views this as a loss scenario.[60] To what extent does a

49. *See id.*

50. *Id.*

51. *See* DOL Note, *supra* note 10, at 6.

52. *See id.*

53. *Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act*, THE U.S. DEP'T OF LAB., http://www.dol.gov/whd/regs/compliance/whdfs13.htm (revised May 2014).

54. *See* DOL Note, *supra* note 10, at 6-7.

55. *See id.* at 7.

56. *See, e.g., id.* at 8-9.

57. *Id.* at 7.

58. *See id.*

59. *See id.* at 8 ("the alleged employees . . . had no decisions to make . . . with the operation of an independent business").

60. *Id.*

party's behavior result in his or her financial future?[61] If an independent contractor chooses not to employ a website, he may reduce costs at the expense of word of mouth and accessibility, whereas an employee would have no say in the employer's online presence.[62]

C. The Extent of the Relative Investments of the Employer and the Worker

In the third factor of the economic realities test, some aspects of the plumber test are taken into account.[63] The DOL's interpretation of this factor weighs the value of a party providing their own work materials in the process of performing their own job.[64] The significance being that sometimes the worker has his own wrench and sometimes the employer provides the wrench, however, whether the employer or the worker provides the tool does not automatically dispose of the issue.[65] The DOL seems to have the financial balance it is looking for that is comprehensive of the total investment by the working party.[66] The DOL is tethering financials: it is not just that the worker has spent money, but also how that spent money compares to the employer's spent money.[67] Here, the directive is towards a balancing test of out-of-pocket money.[68]

D. The Requirement of Special Skill or Initiative in the Work Performed

For this factor, the DOL is unconcerned with the nature of specialization of the worker's skill.[69] "Even specialized skills do not indicate that workers are in business for themselves, especially if those skills are technical and used to perform the work."[70] The DOL is

61. *See id.* at 7-8.

62. *See, e.g., id.* at 9 ("The investment of a true independent contractor might, for example, further the business's capacity to expand, reduce its cost structure, or extend the reach of the independent contractor's market.").

63. *See id.* at 9 ("[I]nvesting in tools or equipment is not necessarily a business investment or capital expenditure that indicates a worker is an independent contractor.").

64. *Id.* at 9-10 (citations omitted).

65. *See id.* at 4 (explaining "no single factor is determinative").

66. *Id.* at 10 ("An analysis of the workers' investment, even if that investment is substantial, without comparing it to the employer's investment is not faithful to the ultimate determination of whether the worker is truly an independent business.").

67. *See id.*

68. *Id.*

69. *Id.*

70. *Id.*

looking at these special skills framed by initiative.[71] The DOL assumes that a worker will develop special skills, particularly those directly related to the performance of his job, and looks to the implementation of those special skills in the world.[72] Does the plumber operate on the bathrooms of the single office with the single employer or does the plumber operate on the bathrooms of all the offices in an area? The initiative methodology here looks at whether the worker has developed skills in a way that puts him in competition with other similarly skilled workers.[73] There are approximately two thousand presumably skilled plumbers on call in New York City, and it does not appear that any of them are your employee.[74] This represents an attempt by the DOL to actually tie the worker to a single employer.[75]

E. The Permanent or Indefinite Nature of the Relationship Between the Employer and the Worker

For this factor, the DOL is looking at whether the worker is on a project-by-project basis or something more stabilized, even if the relationship is relatively brief.[76] If a plumber is hired to outfit a new office building with sinks, he may be an independent contractor.[77] However, if a plumber is in-house and is hire to both install *and* maintain the water system for an office building, even if he is terminated after a month, he is likely to be considered an employee.[78] This allows for certain industry-specific variances,[79] such as a farmer's harvest season or a carwash in the winter.

F. What is the Nature and Degree of the Employers Control?

The final factor is concerned with the level of control that one party

71. *Id.* at 11 (citations omitted).

72. *See id.* (citations omitted).

73. *Fact Sheet #13*, *supra* note 53.

74. *See New York Plumber*, THE YELLOW PAGES, http://www.yellowpages.com/search?search_terms=plumber&geo_location_terms=New+York%2C+NY (last visited Nov. 22, 2016).

75. *See* DOL Note, *supra* note 10, at 11 ("Only . . . workers who operate as independent businesses, as opposed to being economically dependent on their employer, are independent contractors.").

76. *Id.* at 12.

77. *See id.* (citations omitted).

78. *See id.* (demonstrating the characteristics of an independent contractor that could be applied to a plumber).

79. *Fact Sheet #13*, *supra* note 53.

has over another.[80] Interestingly, this mirrors the new standard from the BFI case with regard to joint employers.[81] The DOL Note explains that the worker's lack of a traditional or typical work environment should not be the most heavily weighted factor when determining that individual's independence.[82] The DOL uses the example of a nurse working in a patient's home instead of a hospital and finds the situation capable of supporting either employee or independent contractor status should all surrounding factors align in just such a way.[83] The DOL seems to reduce the importance of this factor due to the nature of modern employment and the technologies that assist modern employment.[84] Again, the DOL favors a broad view, though the value placed on meeting this factor is diminished.[85] This, again, is interesting in light of the BFI decision, which revolves itself around employer control and there hangs the determination on "amorphous concepts" with no clearly defined shape or "tipping point."[86]

Concluding their Note, the DOL states "most workers are employees" under their reading of the FLSA through this six-part framework.[87] The DOL interpretation implies that favoring the employee is the correct classification in consideration of protection for the lower tier of the workforce.[88] Bending away from the average employer in order to favor the needy employee, the DOL Note has been characterized as creating a "presumption of employment."[89] The content of the DOL Note can be viewed as an attempt to remove court discretion.[90] It begins by discussing worker misclassification and the DOL's successful enforcement actions to remedy those issues.[91] It then

80. DOL Note, *supra* note 10 at 13.

81. *See* Browning-Ferris Indus. Of Cal., Inc., 362 N.L.R.B. No. 186, 15, 16 (Aug. 27, 2015).

82. *See* DOL Note, *supra* note 10, at 13.

83. *See id.* at 14-15.

84. *See id.* at 13-14.

85. *See id.* at 14-15.

86. *See* Dustin Stark, *Former NLRB Member Reemphasizes Confusion Created by Browning-Ferris Decision*, JD SUPRA BUSINESS ADVISOR (Oct. 19, 2015), http://www.jdsupra.com/legalnews/former-nlrb-member-reemphasizes-58602.

87. DOL Note, *supra* 10, at 15.

88. *Id.*

89. Michael J. Lotito et al., *How Broad is Broad? New DOL Guidance Determines "Most Workers are Employees,"* LITTLER (July 22, 2015), https://www.littler.com/publication-press/publication/how-broad-broad-new-dol-guidance-determines-most-workers-are-employees.

90. *See generally* DOL Note, *supra* note 10, at 1 (explaining the DOL's "misclassification initiative" and its efforts to bring more enforcement actions against employers).

91. DOL note, *supra* note 10, at 1.

concludes by providing courts with a new interpretation.[92] These two statements taken together certainly appear to remove court discretion in favor of a department mandate.

The DOL Note currently holds only advisory weight.[93] It is not an act of Congress, an Executive Order, or even a DOL *regulation.*[94] It has not been subject to the political rigor of legislative codification.[95] However, there have been many occasions where courts have adopted similar DOL memos and interpretations directly into law.[96] The Supreme Court, in the *Long Island Care at Home* case, absorbed a DOL memo directly into law stating that it wasn't so much an "interpretation" as "detail" on the operation of an existing statute.[97] In that case, a caregiver to the elderly and infirm sought to have her work declared "domestic service."[98] The Court concluded that the statutory term "domestic service" had been left undefined by Congress in the FLSA.[99] They chose to allow the memo to answer the principle question of what constitutes "domestic service."[100]

Further, there is a rebuttable presumption of deference to an administrator's interpretation when it is concerning a law that arises out of that administration.[101] This presumption carries the issue unless it is "plainly erroneous or inconsistent with the regulation."[102] Courts have also chosen to ignore widely ambiguous agency interpretations when they override existing circumstances that have been in place for a period of time.[103] "[W]hile it may be 'possible for an entire industry to be in violation of [a statute] for a long time without the []Department noticing,' the 'more plausible hypothesis' is that the Department did not think the industry's practice was unlawful."[104] The Court views this as

92. *See id.* at 15.

93. *See* Lotito et al., *supra* note 89, at 2 (describing how the DOL does not use a "rulemaking process" but that courts will consider the weight of the DOL's interpretations).

94. *See id.*

95. *See id.*

96. *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007) ("[C]onclud[ing] that the Department's interpretation of the two regulations falls well within the principle that an agency's interpretation of its own regulations is 'controlling' unless 'plainly erroneous or inconsistent with' the regulations being interpreted.") (citations omitted).

97. *Id.* at 173.

98. *Id.* at 164-66.

99. *Id.* at 165, 167-68.

100. *Id.* at 168-69.

101. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945).

102. *Id.* at 414.

103. *See* Christopher v. SmithKline Beecham Corp., 567 U.S. _, 132 S.Ct. 2156, 2167-68 (2012).

104. *Id.* at 2168 (citations omitted).

encroaching upon the general procedural concept of notice.[105] The general rule is "[d]eference is due when an agency has developed its interpretation contemporaneously with the regulation, . . . and when the agency's interpretation is the result of thorough and reasoned consideration."[106] Further, the DOL Note should be remembered as clarifying an act that comes out of President Roosevelt's New Deal in 1938.[107]

III. THE NLRB DECISION

The NLRB recently had an opportunity to review the test for joint-employer liability in the BFI decision.[108] The NLRB replaced an existing test that looked for a joint employer to "actually control" the terms of employment with a "broad and vague" test that looks only for the option to control the terms of employment.[109] The decision was split politically, with the two conservative members dissenting.[110]

The BFI case involves a recycling plant in California.[111] The company Browning-Ferris owns the plant and a second company, Leadpoint, staffs the laborers.[112] Leadpoint directs the activities of the laborers and is the traditional employer.[113] However, due to the NLRB's new broad interpretation, the laborers were allowed to sue Browning-Ferris as joint employers.[114]

The rule that arises out of the case states that a party is a joint employer "if they share or codetermine those matters governing the essential terms and conditions of employment."[115] The Board makes a determination as to whether the distant employer has a common law

105. *See id.* at 2167.

106. Sioux Valley Hosp. v. Bowen, 792 F.2d 715, 719 (8th Cir. 1986); *see also* Advanta USA, Inc. v. Chao, 350 F.3d 726, 731 (8th Cir. 2003) ("[The court] see[s] no reason to reject [one agency]'s contemporaneous explanation in favor of [another]'s *current* interpretation." (emphasis added)).

107. *See* Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV. 32 (Dec. 2000), http://www.bls.gov/opub/mlr/2000/12/art3full.pdf.

108. *See* Browning-Ferris Indus. Of Cal., Inc., 362 N.L.R.B. No. 186, 1 (Aug. 27, 2015).

109. *See NLRB's New Joint Employer Standard Creates Enormous Uncertainty*, *supra* note 17.

110. *Id.*

111. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 1-2; *see also NLRB's New Joint Employer Standard Creates Enormous Uncertainty*, *supra* note 17.

112. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 2-3.

113. *See id.* at 7.

114. *Id.* at 19-20.

115. *Id.* at 15.

employer relationship with the workers.[116] It then looks to whether the distant employer possesses sufficient power to determine the terms and conditions of employment.[117] The key difference out of this decision is the distant employer is not required to have exercised or attempted to exercise any of that control.[118] As the goal was to go broad and inclusive with the rule, it is sufficient that the authority exists to allow the distant employer to set terms.[119] The expected result of this is a collection of distant employers who are now direct employers.[120] Further, it is enough to judge the behavior of intermediaries when making a joint employer determination as opposed to looking at the actual behavior of the distant employer.[121] The NLRB's goal was to promote the act's "paramount policy" of more expansive collective bargaining.[122] The NLRB wishes to bring more parties to the table so that they may have the capacity to make a decision over the employment of workers.[123]

The dissent warns that this decision will negatively and fundamentally alter the workplace.[124] Two points are of particular note. First, many previously separated relationships are now just employer and employee relationships.[125] A notable example is franchisees.[126] Prior to the decision, a home franchise was considered to have little interaction with the satellite franchise, the home franchise is now a direct employer of the workers at the satellite.[127] McDonald's woke up with over a million new employees.[128] The same is true for other companies.[129]

116. *NLRB's New Joint Employer Standard Creates Enormous Uncertainty*, *supra* note 17.

117. *Id.*

118. *Id.*

119. *Browning-Ferris*, 362 N.L.R.B. No. 186, at 15.

120. *See id.* at 21 ("Today, in the most sweeping of recent major decisions, the Board majority rewrites the decades-old test for determining who the 'employer' is.").

121. *Id.* at 10, 16. The required authority under the new rule "can be either direct or indirect." *Id.* at 7.

122. *Id.* at 12.

123. *See id.* at 7.

124. *See id.* at 21.

125. *See id.* at 19.

126. *See id.* at 23. "Contrary to their characterization, the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act." *Id.*

127. *Id.* at 45 (stating that "[f]or many years, the Board has generally not held franchisors to be joint employers with franchisees, regardless of the degree of indirect control retained").

128. Ruth Alexander, *Which is the World's Biggest Employer?*, BBC (Mar. 20, 2012), http://www.bbc.com/news/magazine-17429786.

129. *See id.* (listing employers such as Walmart, the Chinese military, and the U.S. Department of Defense).

Uber has gone to substantial lengths to characterize away their relationship with their drivers; they are probably now all employees.[130] YouTube is likewise faced with similar issues.[131] YouTube was involved in a protracted series of litigations that hung almost entirely on the "safe harbor" provisions of the Digital Millennium Copyright Act ("DMCA") and the fact that uploaders were not traditional employees.[132] The distinction that allowed YouTube to survive was the court viewing uploaders more in the vein of consumers than as YouTube's primary workforce.[133]

YouTube is an interesting case in terms of franchising. YouTube makes the majority of its revenue from advertisements played before each video.[134] Their revenue will fluctuate based on how much of the advertisement is actually viewed.[135] Although plans have been enacted to change this business model to more mirror Netflix's subscriber system,[136] the primary money that comes in comes from ads.[137] Thus far, the only way to get people to watch these advertisements is by the promise that the content behind the ad is worth the small inconvenience at the front. That promise is effectuated by content providers. When Viacom was spending the second half of the 2000's suing YouTube, the suits claimed that a blind eye was being turned to copyright law.[138] YouTube's response was that they were just *there* when all those other people not being sued did all that infringing.[139] YouTube essentially argued they were incidental; they were the parking lot where the drug

130. Dan Rivoli, *Lawsuit Against Uber Seeks Pay and Benefits for 20,000 drivers*, N.Y. DAILY NEWS (Sept. 10, 2015, 8:49 PM), http://www.nydailynews.com/new-york/lawsuit-uber-seeks-pay-benefits-20-000-drivers-article-1.2356251.

131. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 39 (2d Cir. 2012) (discussing how similarly to Uber, YouTube has gone to substantial lengths to distinguish two different types of employees: (1) service providers who offer transmission routing or provide connections; and (2) those who provide online services and operate the facilities).

132. *Id.* at 28-29.

133. *See id.* at 38-39.

134. Andrew Beattie, *How Youtube Makes Money Off Videos*, INVESTOPEDIA (May 30, 2015, 1:12 PM), http://www.investopedia.com/articles/personal-finance/053015/how-youtube-makes-money-videos.asp.

135. *See id.*

136. *See id.*

137. *Id.*

138. *Viacom Int'l, Inc.*, 676 F.3d 19, 34-35 (citations omitted). "A person is 'willfully blind' or engages in 'conscious avoidance' amounting to knowledge where the person 'was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" *Id.*

139. *See id.* at 36 (explaining "the provider must know of the particular case before he can control it").

deal happened.[140]

Under BFI, all those other people doing all that infringing are now employees.[141] The first prong of BFI is to determine if there is a common law employment relationship.[142] Even mid-opinion, the NLRB notes that "multifactor common-law inquiries are inherently nuanced and indeterminate: . . . [T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[143] The content providers in this situation drive revenue and receive some profit sharing with the company down the line that almost looks like a paycheck.[144] Additionally, YouTube has recently declared its intention to subsidize legal fees for content creators subject to copyright litigation.[145]

The second prong looks at whether the employer has "control" over the worker's continued employment.[146] With YouTube, the company may, at any time, turn off a worker's channel and delete their content.[147] If one were to conjecture a vicarious liability claim, as opposed to the willful blindness copyright claim that was actually brought, it is reasonable to assume, if nothing else, Viacom would survive a summary judgment motion and make it to a court room for the merits.[148] This is the sort of open door BFI leaves behind.[149]

The second great catastrophe according to the BFI dissents waits in the great mass of existing contracts that are all changed.[150] What was offered and accepted for consideration has been altered in a way that was not contemplated at the time of signing due to the broadening of the

140. *See id.*

141. *See* Browning-Ferris Indus. of Cal., 362 N.L.R.B. 186, 1, 19 (Aug. 27, 2015).

142. *See id.* at 2, 18.

143. *Id.* at 16.

144. *See* Stephen Chapman, *How to Make Money Online with Youtube: A Comprehensive Guide*, ZDNET (Oct. 1, 2012, 3:00 AM), http://www.zdnet.com/article/how-to-make-money-online-with-youtube-a-comprehensive-guide.

145. Lisa Shuchman, *YouTube to Offer Posters Legal Support to Defend Fair Use of Videos*, CORP. COUNS. (Nov. 23, 2015), http://www.corpcounsel.com/home/id=1202743121227?intcmp=concierge.

146. *Browning-Ferris*, 362 N.L.R.B. 186 at 18-19.

147. *See Frequently Asked Questions*, YOUTUBE, https://support.google.com/youtube/answer/2797449 (last visited Nov. 6, 2016).

148. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 26 (2d Cir. 2012) (vacating the order granting summary judgment).

149. *See Browning-Ferris*, 362 N.L.R.B. 186, at 21 (explaining the "change will subject countless entities to unprecedented new joint-bargaining obligations").

150. *See id.* at 44.

pathways from employee to employer.[151] This is just a mountain of paperwork that needs to be re-read. Further, when viewed in light of the DOL Note, workers who were thought to be independent contractors may have employee rights from all of these brand new employers.

The pushback against the BFI decision has been substantial.[152] For example, Georgia Senator Johnny Isakson refers to the decision as a "policy created by unelected bureaucrats who are attempting to crush the American Dream of owning a business."[153] Senator Isakson continued that he was concerned for hundreds of thousands of small businesses and seventeen million employees that might be affected negatively by BFI.[154] Senator Isakson further co-sponsored the Protecting Local Business Opportunity Act, which is specifically designed to reverse BFI.[155] The bill itself is quite interesting in that the list of senatorial sponsors is currently longer than the actual text of the proposed law.[156] The text of the bill reads, "[n]otwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act only if each employer shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate."[157] Only two cases have had an opportunity to employ BFI, and both quickly distinguished their facts.[158]

IV. THE IRS TEST

The IRS has a mechanical formula it applies when distributing tax forms to workers that makes a statistical guess as to employee status.[159]

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151. *See id.*

152. *See* News Release, Isakson on Labor Board's Joint-Employer Ruling: 'Making the Big Guys Bigger and Putting the Small Guys out of Business,' U.S. Senator Johnny Isakson Serving Georgians (Oct. 6, 2015) (on file with author), http://www.isakson.senate.gov/public/index.cfm/2015/10/isakson-on-labor-board-s-joint-employer-ruling-making-the-big-guys-bigger-and-putting-the-small-guys-out-of-business.

153. *Id.*

154. *See id.*

155. *See id.*; *see also* Tim Devaney, *Republicans Take Aim at NLRB's 'Joint Employer' Ruling*, THE HILL (Sept. 9, 2015, 4:27 PM), http://thehill.com/regulation/legislation/253116-gop-legislation-targets-joint-employer-ruling.

156. Protecting Local Business Opportunity Act, H.R. 3459, 114th Cong. §§ 1-2 (2015).

157. *Id.* at § 2.

158. *See* Nardi v. ALG Worldwide Logistics, Inc., 130 F. Supp. 3d 1238, 1247 (N.D.Ill. 2015) (holding, "for purposes of this case, there appears to be no significant difference between the test articulated in [BFI]" and the existing precedent in the jurisdiction); Planned Parenthood Southeast, Inc. v. Bentley, 141 F. Supp. 3d 1207, 1224 n.10 (M.D. Ala. 2015) (holding BFI was not on point).

159. *See Independent Contractor (Self-Employed) or Employee?*, IRS,

This guess is based on a weighted combination of various questions and factors presented on tax documents.[160] The goal is to categorize wage earners in order to deduct appropriate taxes.[161] Although applying mathematical evaluation to the variance in worker situations might seem incompatible with modern labor law, it deserves some analysis.

The IRS initially allows the worker to characterize themselves, but, as previously stated, the DOL Note does not view self-characterization as dispositive of employment status.[162] If the worker remains unsure of how to characterize themselves, that individual can use form SS-8, created by the IRS, to make the determination for him.[163] It contains five categories of questions: "general information"; "behavioral control"; "financial control"; "relationship of the worker and the firm"; and "for service providers or salespersons."[164] While the courts are performing employee-balancing tests pursuant to the direction of the DOL, the IRS's solution resembles a standardized test.[165] Questions include: "[w]ho is the worker required to contact if problems or complaints arise and who is responsible for their resolution?"; "[w]hom does the customer pay?"; followed by checkboxes for "Firm" and "Worker"; and "[c]an the relationship be terminated by either party without liability or penalty?"[166] There are fifty-seven such questions, many with subparts, over a tidy four page form.[167] The IRS collects data and makes a decision. While the DOL Note is represented over the course of Form SS-8, the IRS form is dramatically more comprehensive.[168] An accountant is going to use this form, not a judge, and no room remains for discretion or interpretation. Both the worker and the employer are permitted to use Form SS-8 in order to determine how to classify their relationship.[169] However, if the completion of this

https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee (last visited Dec. 20, 2016).

160. *See Form SS-8, How should you Handle Worker Classification?*, *supra* note 25 (applying an "economic realities test").

161. *See id.*

162. *See* DOL Note, *supra* note 10, at 4 (listing the factors used).

163. *Form SS-8, How should you Handle Worker Classification?*, *supra* note 25.

164. *Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, IRS, https://www.irs.gov/pub/irs-pdf/fss8.pdf (last visited Dec. 20, 2016).

165. *See, e.g., id.* Form SS-8 asks questions to determine status suggesting this test's resemblance. *Id.*

166. *Id.*

167. *Id.*

168. *See id.*

169. *Id.*

form results in a change of status from what was previously reported to the IRS, a tax audit will likely follow.[170]

When looking over Form SS-8, parallels to the DOL Note seem to appear.[171] The first DOL factor, which concerns itself with the integral nature of the worker's performance,[172] is not specifically addressed in Form SS-8.[173] The form seems to make a final determination of this factor by the weight of its fifty-seven questions combined.[174] The IRS compiles, analyzes, and characterizes. The second DOL Note factor concerns itself with managerial authority,[175] and here the IRS form circles the issue. The second factor asks, "[w]ho determines the methods by which the [work] is performed"; "[h]ow does the [the employer] represent the worker to its customers"; "[w]hat are the worker's responsibilities in soliciting new customers"; and "[d]oes the worker establish the level of payment for the services provided or the products sold?"[176] These are all questions about control but they do not specifically address the issue the DOL note feels compelled to highlight with regard to administrative capacity. The impetus behind Form SS-8, unlike the DOL Note, is not a need to articulate the IRS's intent,[177] but instead to classify wage earners and collect the appropriate taxes pursuant to that classification.[178] It quietly exists on the tax code,[179] divorced from the outcry garnered by the DOL Note and the BFI decision.

While the first two factors take a broader approach, the next three are of much clearer interest to the IRS.[180] The third DOL note factor

170. *Form SS-8: How Should You Handle Worker Classification*, *supra* note 25.

171. *Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, IRS, https://www.irs.gov/uac/about-form-ss8 (last visited Jan. 8, 2016) (showing parallels in questions concerning the evaluation of the employee-employer relationship, employer control, and the worker's opportunity for financial loss); *cf.* DOL Note, *supra* note 10 (coincidentally similar to the IRS Form SS-8).

172. DOL Note, *supra* note 10, at 6.

173. *See generally Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171 (demonstrating its difference from the DOL Note).

174. *See id.*

175. *See* DOL note, *supra* note 10, at 7.

176. *Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171.

177. *See* DOL Note, *supra* note 10, at 1.

178. *See Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171.

179. *Id.*

180. *See* DOL Note, *supra* note 10, at 4.

involves relative financial investments.[181] This is a matter of apparent concern for the IRS as the form directly addresses it.[182] There are several questions regarding the worker's capacity to farm out work to its own subcontractors and, in those situations, the ability to obtain reimbursement from the original employer.[183] There are also questions directly aimed at general reimbursement for *any* work expenses.[184] Additionally, specifics are requested in regard to "supplies, equipment, materials, and property provided by each party."[185] There are also various inquiries into the insurance coverage carried by the worker for the employee.[186] The IRS is clearly counting the eggs in this particular basket.

There is a parallel question in Form SS-8 to the fourth factor—which concerns skills and exclusivity—in the DOL Note.[187] The first question past the general information section is "What specific training and/or instruction is the worker given by the firm?"[188] Later, the form addresses the ability of the worker to "perform similar services for others" and the existence of any non-competition clauses in the work agreement.[189] The fifth factor, which is concerned with the permanence of the working relationship,[190] is addressed in two ways.[191] First, the IRS looks to determine the length and continuity of the present working relationship.[192] Then it looks at the legal ramifications of the conclusion of that relationship.[193] If the relationship is severed, is there a "liability or penalty?"[194] In other words, does an unexpected end of the working

181. *Id.*

182. *See Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171 (addressed in the section entitled "Financial Control").

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Compare* DOL Note, *supra* note 10, at 10 (dealing with worker's business skills, judgment, and initiative to determine economic status), *with Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171 (referring to the questions posed within the document concerning skills and exclusivity).

188. *Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171.

189. *Id.*

190. DOL Note, *supra* note 10, at 4.

191. *See Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171.

192. *Id.*

193. *Id.*

194. *Id.*

relationship result in a lawsuit?

The final DOL Note factor to consider, the level of control of the employer over the worker,[195] is more similar to the first two than the fact-centric inquiry of the middle three when related to the Form SS-8.[196] Most of the questions are about this level of control but do not ask directly about it.[197] It appears, in fact, that this factor is rolled into the relationship permanence previously discussed.[198] Whereas the BFI decision concerned itself almost entirely with attenuating this factor,[199] the IRS needs more concrete facts.[200]

The takeaway from Form SS-8 is its methodical search for grounded data. The DOL Note, mentioned above, tells courts to envision working relationships more broadly.[201] The BFI decision, mentioned below, tells courts to join entities more readily.[202] Both approaches request a factfinder to make a consideration of facts in hopes of producing the best guess possible on employment status.[203] The IRS is doing math. The IRS is going to take people's money. It wants to be exactly certain it is taking the correct amount of people's money. This is a dramatically different approach.

V. THE IMMEDIATE IMPACT

Two corporations in particular—Uber and McDonalds—were immediately subject to additional scrutiny following the BFI decision.[204]

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195. DOL Note, *supra* note 10, at 4, 13.

196. *See Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171 (inferring the degree of control exercised by an employer off of the specific questions asked in reference to the third, fourth, and fifth factors).

196. *Id.*

197. *See id.*

198. *See supra* text accompanying notes 190-194.

199. *See* Browning-Ferris Indus. of Cal., 362 N.L.R.B. 186, 1-2 (Aug. 27, 2015).

200. *See Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171 (asking questions regarding the "Behavioral Control" and "Financial Control" the employer has over the worker and making inferences from those answers).

201. *See generally* DOL Note, *supra* note 10, at 2-4, 15 (encouraging the courts to use the FLSA's broad scope of employment relationships when applying the economic realities factors).

202. *See Browning-Ferris*, 362 N.L.R.B. 186, at 18.

203. *See id.*; *see also* DOL Note, *supra* note 10, at 15.

204. *See* Danielle Corley and David Madland, *Unwarranted Outcry: NLRB* Browning-Ferris *Decision Re-establishes Employer Responsibility*, CTR. FOR AM. PROGRESS ACTION FUND (Dec. 9, 2016), https://www.americanprogressaction.org/issues/economy/news/2015/12/09/126868/unwarranted-outcry-nlrb-browning-ferris-decision-re-establishes-employer-responsibility; Marisa Kendall, *Uber Battling More Than 70 Lawsuits in Federal Court*, MERCURY NEWS,

Uber has already been a magnet for lawsuits in its short history.[205] New York City and the Taxi and Limousine Commission were sued for allowing the proliferation of Uber in the public transport dependent city.[206] The federal equal protection suit "accuse[s] the [city] of violating yellow cab drivers' exclusive right to pick up passengers on the street by letting Uber drivers who face fewer regulatory burdens pick up millions of passengers."[207] The existence of Uber in the city had decimated the taxi industry and led more than twenty taxi businesses into foreclosure.[208] The New York taxi medallion is the culmination of a series of regulatory hurdles and the large out lay of cash that Uber has somehow managed to sidestep by just using a cellphone application.[209]

With that claim still hanging over its head, Uber recently paid a $28.5-million-dollar settlement to escape a class-action suit over the company's apparent lack of safety initiatives.[210] Although the payout to the actual class members amounts to less than a dollar due to legal fees, the amount paid for the company remains $28.5 million.[211] Part of the settlement involved the company performing actual background checks, the cost of which are passed onto the customer as a "booking fee."[212] This settlement came after the merger of various cousin litigations, over Uber's facial claims, were not able to meet the actual factual basis of their background checks.[213]

With all of that cost hanging on Uber's head, there remains the eventual class-action law suit by Uber's drivers.[214] Uber fought for some time to prevent the class certification of its employees and is

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http://www.mercurynews.com/2016/07/04/uber-battling-more-than-70-lawsuits-in-federal-courts (last updated Aug. 11, 2016, 10:53 PM).

205. *See* Kendall, *supra* note 204; *see also* Heather Kelly, *Uber's Never-Ending Stream of Lawsuits*, CNN MONEY (Aug. 11, 2016, 10:30 AM), http://money.cnn.com/2016/08/11/technology/uber-lawsuits.

206. Reuters, *Taxi Owners, Lenders Sue New York City Over Uber*, CNBC (Nov. 17, 2015, 11:06 PM), http://www.cnbc.com/2015/11/17/new-york-city-sued-over-uber-by-taxi-owners-say-livelihood-under-threat.html.

207. *Id.*

208. *Id.*

209. *See id.*

210. *See* Joel Balsam, *Uber Agrees to Settle $28.5M Class-Action Lawsuit Over Safety Claims*, ASKMEN (Feb. 11, 2016), http://www.askmen.com/news/tech/uber-agrees-to-settle-28-5m-class-action-lawsuit-over-safety-claims.html.

211. *Id.*

212. *See* Mike Isaac, *Uber Agrees to Settle Class-Action Suit Over Safety Claims*, N.Y. TIMES (Feb. 11, 2016), http://www.nytimes.com/2016/02/12/technology/uber-settles-class-action-suit-over-safety-background-checks.html?_r=1.

213. *See id.*

214. UBER LAWSUIT, http://www.uberlawsuit.com (last visited Dec. 21, 2016).

currently attempting to characterize those same employees as contractors in a "sharing economy."[215] Uber's "sharing economy" is present in over 100 cities in the United States and even more across ten countries.[216] The company reported having over 160,000 drivers in the United States alone.[217]

For better or worse, Uber is a company ended by this labor trend. At first glance, looking at both the BFI decision and the DOL Note together with the number of individuals who under those two items are considered misclassified as "independent contractors," as opposed to "employees," it appears that the landscape would be ripe for labor-related lawsuits on this exact issue. But these positions are also ones that may not survive being classified as an employment position after undergoing litigation under the NLRB's standard. One class action suit is concerned with Uber paying certain expenses like gas and maintenance, as well as back pay for money lost to Uber's no-tip policy.[218] Success could mean Uber cutting a check for gas to 160,000 employees. Unionization would make the resultant Uber union almost as large as National Nurses United (hereinafter "NNU"), "the largest union and professional association of registered nurses in U.S. history."[219] It should be noted that NNU has no central employer linked to their 180,000 members, whereas Uber would be a single unit with more employees than Apple.[220] The employee benefits lawsuits facing Uber are coming in staggered, with the separate claims "interested in riding the coattails of one successful suit."[221]

McDonald's has existed in some form since 1940.[222] Their official

215. *See* Cyrus Farivar, *More Uber Drivers File Labor Lawsuits: One Claims He Makes Only $80 Per Week*, ARSTECHNICA (Feb. 11, 2016, 9:51 AM), http://arstechnica.com/tech-policy/2016/02/more-uber-drivers-file-labor-lawsuits-one-claims-he-only-makes-80-per-week/.

216. *See generally Find a City*, UBER, https://www.uber.com/cities (last visited Dec. 21, 2016) (listing Uber locations).

217. Emily Badger, *Now We Know How Many Drivers Uber Has—and Have a Better Idea of What They're Making*, WASH. POST (Jan. 22, 2015), https://www.washingtonpost.com/news/wonk/wp/2016/01/20/now-we-know-many-drivers-uber-has-and-have-a-better-idea-of-what-theyre-making/?utm_term=.708c11752bd2.

218. *See* UBER LAWSUIT, *supra* note 214.

219. *About NNU*, NAT'L NURSES UNITED, http://www.nationalnursesunited.org/pages/19 (last visited Dec. 21, 2016).

220. *See Apple's Number of Employees in the Fiscal Years 2005 to 2015 (in 1,000s)*, STATISTA, http://www.statista.com/statistics/273439/number-of-employees-of-apple-since-2005/ (last visited Dec. 21, 2016) (explaining that Apple only has 80,000 full-time equivalent employees).

221. Farivar, *supra* note 215.

222. *McDonald's History*, MCDONALD'S, http://www.aboutmcdonalds.com/mcd/our_company/mcdonalds-history.html (last visited Dec. 21, 2016).

website notes the restaurant's availability in over 100 countries, but omits all statistics indicating the number of workers employed by McDonald's and instead focuses on franchise numbers.[223] This is an important distinction because in a franchise system, the parent company licenses various elements of a brand: a logo, recipes, operational methods.[224] The party with the franchise contracts for the use of those materials, but retains the "independently owned business and benefits or risks loss based on his own performance and capabilities."[225] Under the traditional view, if a party is injured in a McDonald's in Hempstead, New York, that person would sue the owner of the location in Hempstead, not the corporate office of the parent company. The franchisor and franchisee have a contractual relationship with each other over the use of the brand and assorted trademarks, but the business itself is independently owned.[226] As of 2014, the employees working for McDonald's as staff in various franchises in more than 35,000 locations and over 100 countries is approximately 1.9 million.[227] And, again, due to the nature of the franchise agreement, the vast majority of those workers are not employees of the parent company.[228]

Despite the traditional nature of the franchise agreement, and emboldened by the recent decisions of the NLRB, workers at a Virginia McDonald's included the parent McDonald's company in a workplace discrimination suit against a local franchise through vicarious liability.[229] This claim followed a recent complaint filed against parent McDonald's by the NLRB for interference by the home office with the labor and unionization attempts of the workers at various franchises.[230] The NLRB's claim treats the parent McDonald's as a "joint employer" along with the franchisee.[231] In a statement of defense to the NLRB suit, a spokesperson tried to reiterate the separation between franchisor and

223. *Our Company*, MCDONALD'S, http://www.aboutmcdonalds.com/mcd/our_company.html (last visited Dec. 21, 2016).

224. *See What is a Franchise*, INT'L FRANCHISE ASS'N, http://www.franchise.org/what-is-a-franchise (last visited Dec. 21, 2016).

225. *Id.*

226. *See id.*

227. *How Many Employees Does McDonald's Have?*, ASK, http://www.ask.com/business-finance/many-employees-mcdonald-s-511b2af5d945387f (last visited Dec. 21, 2016).

228. *See What is a Franchise*, *supra* note 224.

229. *See* Victor Luckerson, *Why This New McDonald's Lawsuit Could Be Big Trouble for Fast Food*, TIME (Jan. 22, 2015), http://time.com/3678710/mcdonalds-lawsuit-fast-food-strikes/.

230. *See* Daniel Weissener, *U.S. Labor Agency Files Complaints Against McDonald's*, REUTERS (Dec. 19, 2014), http://www.reuters.com/article/us-usa-employment-mcdonalds-idUSKBN0JX21Y20141219.

231. *Id.*

franchisee by stating, "[t]hese allegations are driven in large part by a two-year . . . campaign that has targeted the McDonald's brand and impacted McDonald's restaurants."[232] Care is taken to separate the brand and the restaurants. The response from trade organizations and labor lawyers was summed up as "this is chaos."[233] It was further suggested that continued litigation that drags parent corporations in might signal the end of the entire franchise model.[234] While that might sound positive if the goal is putting bodies at the bargaining table, it might signal an end to unskilled labor employment for 8.5 million workers in the United States.[235]

The goal of the NLRB is to put bodies in seats at the proverbial bargaining table, but that may be difficult if an entity is suddenly flooded with nearly two million new employees.[236] The discrimination claim against the Virginia franchise has been called the "tip of the iceberg" in terms of franchise litigation.[237] Similar to Uber, one settlement or completed claim against the parent company could lead to a deluge of litigation.[238] The structure of these corporations has been left one way for too long to transfer to the NLRB's new standard without absolute chaos.

The opening policy section of the National Labor Relations Act ("NLRA") consists of five paragraphs, each of which revolves around "bargaining."[239] The NLRA was passed in 1935.[240] The Supreme Court shortly thereafter had an opportunity to reflect on the act, stating that "[t]he fundamental purpose of the [NLRA] is to protect interstate and

232. *Id.*

233. *Id.* (quoting Michael Lotito) ("Trade groups said the decision to treat McDonald's as a joint employer would lead to uncertainty about how employment agreements are enforced and when companies can be sued for labor violations.").

234. *See id.*

235. *See id.*

236. *See How Many Employees Does McDonald's Have?*, *supra* note 227.

237. Luckerson, *supra* note 229.

238. *See* Olivia Becker, *Uber Lawsuit May Signal Big Changes in the 'Gig Economy'*, VICE NEWS (Sept. 3, 2015, 2:05 PM), https://news.vice.com/article/uber-lawsuit-may-signal-big-changes-in-the-gig-economy ("The rise of companies employing their workers as contractors rather than staff has led to several employee misclassification cases, which in turn has triggered more lawsuits."); *see also* Daniel Kitzes, *Driving Uber Crazy: Worker Class Actions Lawsuits Ramp Up*, LEXOLOGY (Feb. 11, 2016), http://www.lexology.com/library/detail.aspx?g=dc626b3a-a819-4585-b911-8a452f64728c ("In June 2015, the California Labor Commissioner determined that Uber drivers were indeed employees . . . [t]his news led to a flood of claims and litigation across various states. . . .").

239. *See* 29 U.S.C. § 151 (2012).

240. *National Labor Relations Act*, NLRB, https://www.nlrb.gov/resources/national-labor-relations-act (last visited Dec. 21, 2016) (citation omitted).

foreign commerce from interruptions and obstructions caused by industrial strife."[241]

VI. SOLUTION

The primary issue here is one of overlapping coverage between separate arms of the federal government.[242] It is essentially an issue of jurisdiction.[243] Agency overlap is an issue that has been dealt with previously by the Supreme Court.[244] Typically, a Court will look to Congressional intent in forming a particular agency when determining which agency rule is applicable in a particular instance.[245] In *Arcadia*, both the Securities Exchange Commission and the Federal Energy Regulatory Commission felt they had conflicting duties under the Federal Power Act.[246] The Court found that while both agencies were empowered to regulate a particular third party, they were regulating different ends of the party,[247] and for different purposes.[248] One might infer that the Court did not find a conflict because the smooth operation of government will not allow them to find a conflict.

Here, the conflict appears to arise out of the NLRB, the DOL, and the IRS.[249] The NLRB has a stated goal to "protect[] the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions."[250] The IRS has a stated goal to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law

241. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 237 (1938).

242. *See, e.g.*, Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 82-84 (2013) ("There is no single federal agency that has primary responsibility for regulating proper worker classification. Instead, several federal agencies are responsible for ensuring that workers receive the benefits and protections to which they are entitled as employees.").

243. *Id.* at 69 ("The lack of adequate definition of employee presents difficulties for many parties. . . . Administrative agencies must wrestle with the question of whether they are permitted to regulate the relationship between employer and worker, as most employment regulations apply only to employees. Courts must question their jurisdiction, as statutes and common law often limit the power of the court to employees only.").

244. *See, e.g.*, Arcadia v. Ohio Power Co., 498 U.S. 73 (1990) (describing that the Respondent "is subject to the overlapping regulatory jurisdiction" of the SEC).

245. *See, e.g.*, *id.* at 77.

246. *Id.* at 75, 87.

247. *See id.* at 84-85.

248. *See id.* (Stevens, J. concurring) at 87.

249. *See* Pivateau, *supra* note 242 and accompanying text.

250. *Who We Are*, NLRB, https://www.nlrb.gov/who-we-are (last visited Dec. 21, 2016).

with integrity and fairness to all."[251] When dealing with a corporation, "[i]t is the responsibility of the IRS to determine whether the corporate taxpayer in completing its return has stretched a particular tax concept beyond what is allowed."[252] There, the Court demonstrated deference and reinforced the idea that it is the IRS's job to classify. When dealing with non-profit organizations, "the IRS has the responsibility . . . to determine whether a particular entity is 'charitable'. . . ."[253] Again, the Court shows deference to the IRS's right to classify.[254] When dealing with the IRS's authority to classify, "[t]he IRS is charged with responsibility to determine the civil tax liability of taxpayers. To this end, it conducts examinations or audits of taxpayers' returns and affairs."[255] There, over a procedure claim, the Court found the Tax Court to be a sort of sovereign entity to complete determinations without needing any connection to the standard Civil Court.[256] The Tax Court does not require the muscle of the Federal Court system to enforce its decisions.[257] Even more simply stated, "the IRS . . . [has an] institutional responsibility to determine and to collect taxes and civil fraud penalties."[258] The key word there being "determine."[259] The Court once again demonstrated the IRS's role as one of classification.[260] The IRS gets to put people into columns and, more than that, gets to determine the contours of the columns. This collection of Supreme Court language clearly demonstrates the IRS's "responsibilities" to include autonomous and explicit classification of citizens for the purpose of tax collection.[261]

The DOL presents a more complex issue. The DOL's own mission statement declares that it exists "[t]o foster, promote, and develop the welfare of wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights."[262] The DOL

251. *The Agency, Its Mission and Statutory Authority*, IRS, https://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority (last updated July 27, 2016).

252. United States v. Arthur Young & Co., 465 U.S. 805, 815 (1984).

253. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 597-98 (1983).

254. *See id.* at 599.

255. United States v. Baggot, 463 U.S. 476, 478 (1983).

256. *See id.* at 479.

257. *Id.* at 481.

258. United States v. LaSalle Nat'l Bank, 437 U.S. 298, 298-99 (1978).

259. *Id.* at 299.

260. *See id.* at 298-99, 311, 314.

261. *See id.* at 298-99; *Baggot*, 463 U.S. at 478; *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) ("[T]he IRS reached the correct conclusion in exercising its authority.").

262. *Our Mission*, U.S. DEP'T OF LAB., https://www.dol.gov/general/aboutdol/mission (last

is unlike the NLRB, which is sort of a court of limited jurisdiction defined by the NLRA,[263] but similar to the IRS in that it is an agency that "administers and enforces more than 180 federal laws."[264] This includes the FLSA on wages and hours, the Occupational Health and Safety Act, workers' compensation rights, the Employment Retirement Income Security Act, the Labor-Management Reporting and Disclosure Act on employee and union relationships, various whistleblower laws and protections against retaliation, the Family and Medical Leave Act on employee absences, and regulation of government contracts, grants and financial aid.[265] To accomplish these tasks the DOL works closely with various government agencies including the EEOC and the NLRB.[266]

The DOL Note at issue here is proposing to clarify the FLSA.[267] The DOL views the FLSA as "establish[ing] minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments."[268] Looking at the statute, there are definitions for both "employer" and "employee."[269] An "'employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ."[270] Additionally an "'employee' means any individual employed by an employer."[271] These definitions seem circular, an employee is someone who works for an employer and an employer is someone who employs employees. It is interesting that the FLSA includes a provision allowing the DOL to "define[] and delimit[]" the definition of one particular worker, the "outside salesman."[272] This Congressional grant of discretion to the DOL to categorize this subset of workers is interesting in that a similar grant is not tied to employees in general.[273] Instead of Congress giving a "define[] and delimit[]" clause

visited Dec. 21, 2016).

263. *See* Frequently Asked Questions—NLRB, NLRB, https://www.nlrb.gov/resources/faq/nlrb#t38n3220 (last visited Dec. 21, 2016).

264. *Summary of the Major Laws of the Department of Labor*, U.S. DEP'T OF LAB., https://www.dol.gov/general/aboutdol/majorlaws (last visited Dec. 21, 2016).

265. *Id.*

266. *Id.*

267. DOL Note, *supra* note 10, at 1.

268. *Wage and Hour Division*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/flsa (last visited Dec. 21, 2016).

269. 29 U.S.C. § 203(d)-(e) (2012).

270. *Id.* § 203(d).

271. *Id.* § 203(e)(1).

272. *Id.* § 213(a)(1); Christopher v. SmithKline Beecham Corp., 567 U.S. _, 132 S.Ct. 2156, 2162 (2012).

273. *See* 29 U.S.C. § 213(a)(1); *Christopher*, 132 S.Ct. at 2162.

in the definitions section of the FLSA, it chose to place one in a small corner of the exceptions section.[274] It seems reasonable to assume there is no such provision attached to the definition of employee because Congress did not intend the FLSA to serve as a statute that categorized employees, but, instead, one meant to establish rights.[275]

"The principle congressional purpose in enacting the [FLSA] was to protect all *covered* workers from substandard wages and oppressive working hours. . . ."[276] "[T]he FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee *covered* by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of "overwork" as well as "underpay."'"[277] The Supreme Court's reading of the FLSA clearly demonstrates an intent to provide *coverage* to workers, not to define or characterize workers.[278] It is a one step process of defining rights, not a two-step process of defining workers and *then* defining rights. Further, a reading of the FLSA as being solely aimed at employees ignores provisions directly aimed at the preservation of competitive balance between distinct employers.[279] "While improving working conditions was undoubtedly *one* of Congress' concerns, it was certainly not the *only* aim of the FLSA."[280] "[T]he Act's declaration of policy . . . reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions."[281] The FLSA is not meant to define workers, it is meant to promote fair commerce in the marketplace.

As the Supreme Court has not had ample opportunity to address any conflict between the two agencies, it is only a matter of conjecture as to how the distinction may be drawn between the phrases "join together" and "tax responsibilities." The Supreme Court has held that the "collective-bargaining processes . . . are the subject of the NLRA."[282] The inclusion of the word "processes" seems to imply that the parties have already sat down at the table. They are wearing their name tags.

274. *See* 29 U.S.C. § 213.

275. *Wage and Hour Division*, *supra* note 268.

276. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981) (emphasis added).

277. *Id.* at 739 (emphasis added) (quoting Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942)).

278. *See id.* at 741 (emphasis added) (citations omitted).

279. *See* Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987).

280. *Id.*

281. *Id.*

282. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985).

They are ready to bargain. Although the IRS does have some varied authorities and abilities, they are essentially a responsibility factory. The IRS tells you who you are, and because of that, what you owe. For purposes of illustration, the IRS checks your ID at the door before they let you into the room to collectively bargain.

There is a similar concept where statutes or statue language conflicts. The Court has dealt with this issue over the many years of Congresses passing statutes and has endeavored to "harmonize[] the provisions" because "[t]he construction given to a statute . . . is always entitled to the most respectful consideration."[283] This is important because "'a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.'"[284] The Court has *always* been "'reluctan[t] to treat statutory terms as surplusage' in any setting."[285] *Moore* is an ancient case where a naval doctor was promoted to surgeon and sued for back pay relating to an apparent conflict over when his promoted wages began.[286] His new salary either started "after the date of appointment" or "from such date" of the appointment, highly similar phrases in different statutes that appear to overlap and leave the plaintiff's wages in an undefined gray period.[287] The Court found no overlap by choosing to harmonize as opposed to making a determination that one phrase was valid and the other was not.[288] The Court takes a moment to dance in a circle around the conflicting language noting, "[a] thing may be within the letter of a statute, and not within its meaning; and it may be within the meaning, though not within the letter."[289] In other words, *we will untangle this mess for you.*

Similar to the naval doctor's predicament in *Moore*, by the actions of the NLRB, a similar mess may have been created. Since the IRS's job is to tell you who you are, and the NLRB's job is to tell you what bargaining processes that identity opens up, harmonizing to leave both intact will likely erase the sort of broad determinations made in BFI and the DOL note. The IRS has always told a citizen what his responsibilities were based on his tax identity.[290] The NRLB and NLRA

283. United States v. Moore, 95 U.S. 760, 763 (1877).
284. Duncan v. Walker, 533 U.S. 167, 174 (2001) (citations omitted).
285. *Id.* (quoting Babbitt v. Sweet Home Chapter, 515 U.S. 687, 698 (1995)).
286. *See Moore*, 95 U.S. at 761-62.
287. *Id.* at 762.
288. *See id.* at 763.
289. *Id.* (citations omitted).
290. *See The Agency, Its Mission and Statutory Authority*, *supra* note 251.

have always told a worker what processes he may invoke based on that same identity.[291] The solution to the issues raised by the NLRB's recent actions may be overlooked, but exists already. The IRS has a tax form to tell you whether you are an employee or an independent contractor.[292] The IRS compartmentalizes you and then tells you what that designation means monetarily.[293]

VII. PREEMPTION

It is important to look at a series of similar doctrines in American law. Preemption as a legal concept does not exist between two federal agencies.[294] Conflict there is usually considered in terms of jurisdiction.[295] However, the legal theory behind preemption is pervasive and can be used to describe the conflict—and solution—when two federal agencies overlap in jurisdiction.[296]

Preemption is a commonly implemented legal doctrine accepted by all but one of the current Supreme Court Justices.[297] Preemption comes out of "the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."[298] The Supremacy Clause provides the federal government with "a decided advantage in [a] delicate balance" of governmental powers.[299] The Supremacy Clause states, "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land"[300] In *Gregory v. Ashcroft*, the Supreme Court was presented with the task of resolving a conflict between a state constitution and federal law.[301]

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291. *See National Labor Relations Act*, *supra* note 240 (citation omitted).

292. *See Independent Contractor (Self-Employed) or Employee?*, *supra* note 159.

293. *See, e.g.*, *Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171.

294. *See, e.g.*, Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1057-58 (2012) (explaining the two types of preemption frequently articulated by the Supreme Court).

295. *See, e.g.*, J. Clay Smith Jr., Overlapping Jurisdiction Equal Employment Opportunity Commission and the National Labor Relations Board (May 5, 1980), *in*, Digital Howard @ Howard University, ABA-1 (J. Clay Smith Jr. Collection, Selected Speeches, Paper 2).

296. *See, e.g.*, *id.*; *see Preemption as Purposivism's Last Refuge*, *supra* note 294, at 1058.

297. *See Preemption as Purposivism's Last Refuge*, *supra* note 294, at 1058.

298. Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

299. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

300. U.S. CONST. art. VI, cl. 2.

301. *Gregory*, 501 U.S. at 456. The issue of the claim was a mandatory retirement age for judges written into the Missouri Constitution that plaintiffs claimed was invalid under the Equal Protection Clause of the Fourteenth Amendment as well as the Age Discrimination in Employment

> As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.[302]

Essentially, the preemption doctrine states that "state laws that conflict with federal law are 'without effect.'"[303] "The purpose of Congress is the ultimate touchstone" when making a final determination on preemption.[304]

Generally, there are two types of recognized preemption.[305]

> First, the Court has found pre-emption "where compliance with both federal and state regulations is a physical impossibility. . . ."[306] Second, the Court has determined that federal law pre-empts state law when, "under the circumstances of [a] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[307]

In labor law, these are called the Garmon Preemption[308] and Machinist Preemption.[309] Garmon Preemption, the aforementioned first version, is when a federal law covers a particular territory and leaves no room for state law on the same matter.[310] This preemption comes from the *Garmon* case, where an employer sued over an employee picket.[311]

Act. *See id.* at 455.

302. *Id.* at 460.

303. Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

304. Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963).

305. *See* Wyeth v. Levine, 555 U.S. 555, 589 (2009).

306. *Id.* (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

307. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

308. *Garmon Preeption Law & Legal Definition*, U.S. LEGAL, INC., http://definitions.uslegal.com/g/garmon-preemption/ (last visited Dec. 21, 2016).

309. *Machinists Preemption Law & Legal Definition*, U.S. LEGAL, INC., http://definitions.uslegal.com/m/machinists-preemption/ (last visited Dec. 21, 2016).

310. *See* Amalgamated Ass'n of St., Electric Ry. and Motor Coach Emps. of America v. Lockridge, 403 U.S. 274, 276, 302 (1971).

311. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 237-38 (1959).

The NLRB declined to assert jurisdiction under the NLRA to adjudicate the matter.[312] With the labor agency disinterested in hearing the claim, plaintiffs pressed their claim in state court.[313] The central issue for the Court was jurisdiction: whether the state court was empowered to step in after the federal agency stepped aside.[314] The Court held that the realm of labor law was so comprehensively given to the NLRB in the NLRA that no room was left for the state to regulate, even where the NLRB had declined involvement in a particular matter.[315]

Machinist Preemption is the second type of labor law preemption.[316] It "focus[es] upon the crucial inquiry whether Congress intended that the conduct involved be unregulated [and] left 'to . . . the free play of economic forces.'"[317] This is best explained by examining the *Machinist* case that gives the doctrine its name. In *Machinist*, the employer and the union are in the middle of collectively bargaining a new agreement when the employer unilaterally implemented new overtime rules.[318] The union responded by telling its members to cease working overtime.[319] The employer filed a complaint with the NLRB who then dismissed the charge for lack of any cognizable violation under the language of the NLRA.[320] Undeterred, the employer filed a charge with the state labor board, reasoning that the activity was outside the NLRA because it was not specifically mentioned in the NLRA.[321] The Supreme Court disagreed and held that while certain undefined areas of a federal law are meant to be left to the states to develop,[322] some gaps in the law are intentional.[323] This is Machinist Preemption. The Court reasoned that Congress wanted this gap in the law to serve as an economic weapon for unions in their collective bargaining negotiations.[324] In other words, not every activity requires statutory language to show that Congress considered the activity.

312. *Id.* at 238. The Court conjectures that "the [NLRB] declined jurisdiction, [] because . . . [the matter] did not meet the Board's monetary standards in taking jurisdiction." *Id.*

313. *See id.*

314. *Id.* at 238-39.

315. *Id.* at 244-45.

316. *See Machinists Preemption Law & Legal Definition*, *supra* note 309.

317. Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Relations Comm'n, 427 U.S. 132, 140 (1976).

318. *See id.* at 134.

319. *Id.* at 134.

320. *Id.* at 135.

321. *See id.* at 135.

322. *See id.* at 136-37.

323. *See id.* at 140 n.4.

324. *See id.* at 143 (citation omitted).

A related, but distinct, doctrine is the concurrent jurisdiction doctrine.[325] "[The Supreme Court] has consistently held that state courts . . . are . . . presumptively competent[] to adjudicate claims arising under the laws of the United States.[326] '[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever . . . they are competent to take it.'"[327] Essentially, if the state constitution grants a court general jurisdiction, it can hear whatever claim is brought before it.[328] However, "[t]his deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim."[329] This is a kind of jurisdictional preemption. What is important to recognize is that concurrent jurisdiction, preemption, and the Supremacy Clause all work in the background of government.[330] Everything is fine until there is a conflict and then this hierarchical structure kicks in to clarify.

Preemption is almost exclusively a matter between a federal and state law.[331] The next section of this Note will deal with "preemption" between existing federal laws, although this is not technically termed "preemption." The rarity of conflict between federal laws is not something that currently has a name. The use of "preemption," in this Note, is just a short hand way of evoking the concept of overlap between two federal laws or agencies attempting to cover the same ground with conflicting results.

Often preemption will be shaped to harmonize conflict.[332] The previously discussed *Gregory* case involved overlap between the ADEA, the Tenth Amendment, and the Equal Protection Clause of the Constitution.[333] Although primarily a case involving a *Garmon* preemption,[334] all of those federal elements had to work in concert against the Missouri Constitution.[335] Making a discrimination statute harmonize with the Equal Protection Clause is not a complicated matter, however, it is the first step in this analysis.

325. *See* Tafflin v. Levitt, 493 U.S. 455, 458 (1990).
326. *Id.* at 458.
327. *Id.* at 459.
328. *See id.*
329. *Id.*
330. *See id.* at 470.
331. *See* Altria Group v. Good, 555 U.S. 70, 76-77 (2008).
332. *See Preemption as Purposivism's Last Refuge*, *supra* note 294, at 1072.
333. *See* Gregory v. Ashcroft, 501 U.S. 452, 455, 463 (1991) (citations omitted).
334. *See id.* at 464.
335. *See id.* at 467-70.

In the *Medtronic* case, the Court had to consider overlap between the Food and Drug Administration ("FDA") and the Medical Device Amendments of 1976 ("MDA").[336] The FDA has rigorous requirements that must be met before a medical device may be brought to market.[337] The FDA, as a functioning government organization, predates the MDA by 128 years.[338] The MDA serves to classify medical devices.[339] The MDA absorbs some of the responsibilities of the FDA by its specialized nature.[340] Although the MDA is not an amendment to the FDA, the Court viewed it as working for the same goal as the FDA.[341] The overlap there was viewed as being parallel to one another, instead of being in conflict.

In *Hoffman Plastics*, however, the Court was finally called upon to resolve a direct conflict between two agencies.[342] There, the NLRB had awarded back pay to a foreign national who had been working without valid work authorization.[343] The Supreme Court found that action to be "foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA)."[344] The first issue the Court addresses is the scope of the NLRB's responsibilities.[345] Although these responsibilities are "broad," the nature of the claim requires the Court to immediately note their limitations.[346] Based on the facts in the case, that limitation came directly as a result of the IRCA.[347] The IRCA was enacted to "prohibit[] the employment of illegal aliens in the United States."[348]

Hoffman Plastics has certain parallels to the BFI decision; for example, the NLRB is looking to classify a foreign national as an employee in order to award him back pay, and the Court is specifically

336. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 476-77 (1996).

337. *See id.* at 477.

338. *See History*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/aboutfda/whatwedo/history/default.htm (last visited Dec. 22, 2016); *see also Medtronic*, 518 U.S. at 476.

339. *Medtronic*, 518 U.S. at 476-77.

340. *See id.* at 490.

341. *See id.* at 491-92 (discussing that same goal being "the safety of those who use medical devices.").

342. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).

343. *Id.*

344. *Id.*

345. *See id.* at 142 (explaining the NLRB has "discretion to select and fashion remedies for violations of the NLRA").

346. *See id.* at 142-43.

347. *See id.* at 145, 147, 151.

348. *Id.* at 147.

telling the Board that classification is another agency's job.[349]

> [Respondent] was never lawfully entitled to be present or employed in the United States, and . . . he has no right to claim backpay. . . .[350] [W]here the [NLRB]'s chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield. . . . [I]t is precisely the situation today.[351]

The IRCA made it impossible for an unauthorized foreign national to obtain valid employment in the United States.[352] It was therefore equally impossible for the NLRB to award back pay for a job that was never legal in the first place.[353] Although the Court does not use the term, this is clearly preemption.

The NLRB has had two very recent cases that also pit the Board against another federal agency. In *D.R. Horton* and *Murphy Oil*, which are factually mirrored cases, the NLRB has found itself on the opposite side of the decision in the Fifth Circuit, having been preempted by the Federal Arbitration Act ("FAA").[354] In both cases, the NLRB argued their congressional mandate preempted the FAA.[355] However, the Fifth Circuit held that the "NLRA should not be understood to contain a congressional command overriding application of the FAA."[356] The court held that an arbitration agreement that prohibited an employee from filing an unfair labor claim would violate the NLRA, but the mere act of signing away class certification rights did not.[357] The court employed a territorial view, similar to the outcome in *Hoffman Plastics*, listing the purpose and responsibility of the FAA and holding that area back from the regulation of the NLRA.[358] The language in the FAA is already highly deferential to determinations made by other courts.[359]

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349. *See id.* at 151.

350. *Id.* at 146.

351. *Id.* at 147.

352. *Id.* at 148.

353. *Id.* at 149.

354. *Compare* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 360 (5th Cir. 2013) *with* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1018-1021 (5th Cir. 2015).

355. *See D.R. Horton*, 737 F.3d at 357; *Murphy Oil USA*, 808 F.3d at 1018.

356. *D.R. Horton*, 737 F.3d at 362.

357. *See id.* at 363.

358. *See id.* at 364-65.

359. *See, e.g., id.* at 365 (citations omitted) ("giv[ing] the Board judicial deference in interpreting an ambiguous provision of a statute that it administers").

Had the Fifth Circuit found for the NLRA, it would have been effectively directing one statute to consume the other.[360] This is essentially the *Garmon* preemption on the federal level with the facts split.[361] Where in *Garmon*, a state court wanted to step in after the federal court declined, in *D.R. Horton*, the NLRB wants to mandate that the FAA decline.[362] In the end, the Fifth Circuit saw preemptive logic, but found for the FAA.[363]

VIII. CONCLUSION

The issue created by the NLRB in the BFI decision and the DOL Note may have the best interest of the worker at heart. However, that good intention brings with it a far reaching negative implication. The BFI decision and DOL Note serve to remove clarity from an existing standard and to overstep jurisdictional bounds.[364] When the best advice of a corporate counsel is "reread all your contracts," clarity is not a demonstrated priority. The long ranging impact on many existing and ingrained companies may serve to wipe them out of the economy entirely. This unrest is taking form now by way of Uber and McDonald's and was narrowly averted in the past by YouTube.[365] Many new lawsuits will survive summary judgment possibly until the Supreme Court takes the time to officially resolve the matter. And legislators are already crafting attempts to codify express rejections of these policies.[366]

Most importantly, the decisions represent the DOL and NLRB's intention to solve a problem already solved by the IRS.[367] Moreover, these decisions represent the intent to move even further beyond that by reaching into the jurisdiction of the IRS to effectively override their existing authority on the matter. The political theory behind preemption

360. *See id.* at 362.

361. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959).

362. *See D.R. Horton*, 737 F.3d at 360.

363. *Id.* at 364.

364. *See* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186, 1, 48 (Aug. 27, 2015); *see also* DOL Note, *supra* note 10, at 15.

365. *See* Connor D. Wolf, *Are Uber, McDonald's And FedEx Really Misclassifying Workers For Tax Purposes?*, DAILY CALLER (July 2, 2015 11:06 AM), http://dailycaller.com/2015/07/02/are-uber-mcdonalds-and-fedex-really-misclassifying-workers-for-tax-purposes/.

366. *See* Devaney, *supra* note 155.

367. *Compare Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, *supra* note 171, *with Browning-Ferris*, 362 N.L.R.B. No. 186, at 48, *and* DOL Note, *supra* note 10 at 15.

supports this conclusion.[368] This jurisdictional grab is more akin to *Hoffman Plastics* than *Medtronic.* The DOL and the NLRB want to tell a worker what kind of worker he is. The long-standing, well-established role of the IRS is just this sort of classification.[369] And the IRS has responded to this responsibility with Form SS-8 which resolves the issue.[370] The NLRB is meant to show an employee the rights to which he is entitled. The DOL, through the FLSA, is meant to preserve the fairness of commerce. Neither has the jurisdiction or Congressional mandate to characterize an employee.[371] The decisions of the NLRB and DOL serve only to incite new lawsuits that would be best handled by the fifty-four question sheet the IRS has been using since 2011.

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368. *See supra* Part VII.

369. *See, e.g., Form SS-8: How Should You Handle Worker Classification*, *supra* note 25 (explaining the IRS approach).

370. *See Form SS-8, Independent Contractor (Self-Employed) or Employee?*, *supra* note 159.

371. *See* Pivateau, *supra* note 242 and accompanying text; *see also Wage and Hour Division*, *supra* note 268 and accompanying text.

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