SEYFARTH SHAW

Seyfarth Shaw LLP

# How Will *Browning-Ferris* Change the Test for Joint-Employer Status for Union and Non-Union Employers?

## August 31, 2015

Richard Alfred
Marshall Babson
Jeffrey Berman
Lisa Damon
Bradford Livingston

# Agenda

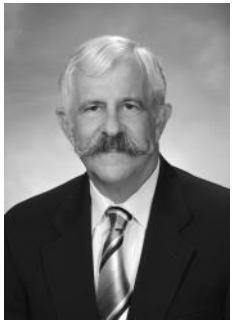
- Introduction
- Case Background
- Holding and Dissents
- Impact on Other Agencies
- Potentially Affected Industries, Proactive Steps, and What Might Lie Ahead
- Questions

# Introduction

# Our Panel

Richard Alfred
ralfred@seyfarth.com

Marshall Babson
mbabson@seyfarth.com



Jeffrey Berman
jberman@seyfarth.com

Lisa Damon
ldamon@seyfarth.com

Bradford Livingston
blivingston@seyfarth.com

# Case Background

# *Hearst* and Taft-Hartley Amendments

- In 1947, the Taft-Hartley Amendments instructed that in determining who is an employee and **who is an employer** under the Act, the Board is **constrained** by **common law principles of agency**.
- Designed to overrule the Supreme Court's earlier decision in *NLRB v. Hearst Publications* ("*Hearst*"), 322 U.S. 111 (1944), which affirmed a Board decision finding "independent contractors" could be treated as "employees" under the Act.
- In *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968), the Supreme Court acknowledged the "**obvious purpose . . .** was to have the Board and the courts apply **general agency principles** in distinguishing between employees and independent contractors under the Act.

# *Laerco Transportation*, 269 NLRB 324 (1984) ("*Laerco*")

- To support a joint-employer finding, the employer must possess **sufficient indicia of control** over the petitioned-for employees.
- Requires the employer to **meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.**

# *TLI, Inc.*, 271 NLRB 798 (1984) ("*TLI*")

- Adopts Third Circuit analysis in *NLRB v. Browning-Ferris Industries*: where two entities codetermine matters governing **the essential terms and conditions of employment**, they are joint employers.
- Reiterates *Laerco* standard that an employer must **meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction**.

# *Airborne Freight Co.*, 338 NLRB 597, n.1 (2002)

- The "essential element in [the joint employer] analysis is whether a putative joint employer's control over employment matters is **direct and immediate**."
- Also noting, "indirect control" test "was abandoned" two decades earlier, and refusing to "disturb settled law" by reverting back to such a test.

# GC's Proposed Test

- Joint employment relationship could be found where an entity:

> "Exercises **direct or indirect** control over working conditions, has the **unexercised potential to control working conditions**, or where '**industrial realities**' otherwise make it **essential to meaningful bargaining**."

# Board's Invitation to File Briefs

**Three Questions Presented:**

1. Under the Board's current joint-employer standard, as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984), is Leadpoint Business Services the sole employer of the petitioned-for employees?

2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?

3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

# Holding & Dissents

# The Majority Opinion: Overview

- **3 to 2, Along Party Lines:** the majority "restates" the joint-employer test derived from the Third Circuit standard in *NLRB v. Browning-Ferris Industries of Penn.*
  - **Third Circuit standard**: Joint employers of the same employee if "share or codetermine those matters governing the essential terms and conditions of employment." Third Circuit test adopted by Board asks:
    - Does a common-law employment relationship exist?
    - If so, does the alleged joint employer "possess sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."
- **Board no longer requires that a joint employer**:
  - Possess and exercise actual control over key terms and conditions of employment. Reserved authority is relevant.
  - Exercise such control directly and immediately. Control exercised indirectly is sufficient.
- Now, Board says that **reserved authority** (e.g., by contract) **and indirect control** (e.g., exercised by control over a contractor) **is sufficient**
- Board claims old test out of step with changing economic circumstances, particularly growth of contingent workforce.

# The Majority Opinion: New Board Test

- **New Board test:**
  - Do employers “share” OR “co-determine” important employment terms
    - Examples include (but are not limited to) hiring, firing, discipline, supervision, direction, wages, hours, benefits, number of workers, scheduling, seniority, overtime, discipline, and work assignments
  - Look to see if a “right” to control, whether or not actual exercise.
    - Has the user retained the contractual right to set a specific term or condition of employment of the supplier employer’s workers.
    - Does not matter that ceded because has the right to exercise.
  - Control need not be exercised directly and immediately
    - Two layers of control where user controls the premises, dictates the nature of the job, imposes operational contours, and the supplier employer makes employment decisions based on the user’s general guidance.
- **User employer required to bargain over terms and conditions over which it possesses the authority to control.**

# The Dissenting Opinion

## Five Major Problems With The Majority Decision

1. Board test encompasses business relationships well beyond what historically has been understood to be true joint-employer relationships.

2. Majority inaccurately claims that subcontracting, outsourcing and contingent relationships are a new phenomenon requiring Board action.

3. While Board can react to allegedly changing workplace, it cannot change the common law's traditional requirement that indirect control does not create a joint-employer relationship.

4. The former direct control requirement was more certain. The indirect control test is vague and standardless

5. The Board's attempt of correct a perceived inequality of bargaining leverage resulting from complex business relationships must be addressed, if at all, by Congress, and not the Board.

# The Potential Impact of *Browning-Ferris* on Other Agencies

# Impact on Other Agencies

- *Browning-Ferris* does not govern joint-employer determinations under statutes other than the NLRA, but it is likely to influence and encourage other agencies to try to expand joint-employer status under laws they enforce.
- Joint-employer determinations will impact, not only businesses in the traditional economy but will also affect companies in the rapidly growing contingent and on-demand sector.
- Federal agencies we are focused on:
  - DOL/WHD
  - EEOC
  - DOL/OSHA
  - DOL/EBSA
  - DOL/OFCCP

# Impact on Other Agencies: DOL/WHD

- WHD likely to interpret *Browning-Ferris* as support for broader joint-employer doctrine under FLSA
  - Even though NLRA and FLSA embody different tests (common law v. economic realities), Supreme Court has stated: "*Decisions that define the coverage of the employer-employee relationship under the [NLRA] are persuasive in the consideration of a similar coverage under the FLSA*."
  - NLRB majority struggled to square expanded joint-employer doctrine with NLRA's common-law right to control test. Its new test is rooted in economic reality test of FLSA and exceeds potential breadth of even FLSA's joint employer standard.
  - NLRB's back-door application of economic realities to reframe joint employment under NLRA may be used by WHD to broadly expand FLSA's joint-employer test.

# Impact on Other Agencies: DOL/WHD

- According to WHD guidance last month regarding independent contractors:
  - Right of control is a less important indicator of employment
  - Whether services are integral to company's business is "compelling"
- By focusing on integration of services provided by independent contractor in the business of the entity receiving them, WHD has already de-emphasized the degree of control required for an employment relationship much as NLRB has now done by including indirect control.
- WHD poised to apply joint-employer concept to target **"fissured industries":** industries in which large companies benefit from services by individuals whom they do not employ, such as:
  - On-line retailer staffing product distribution center with staffing company employees
  - National hotel company contracting with local management companies to operate hotels
  - Restaurant company using franchise model under which franchisees employ workers
- High-risk business relationships: supplier-user (e.g., staffing companies), lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, creditor-debtor, contractor-consumer, predecessor-successor

# Impact on Other Agencies: EEOC

- EEOC's amicus brief with NLRB states:
  - Board's joint-employer standard will influence Title VII joint-employer standard
  - changing workplace calls for "recogniz[ing] more, not fewer, joint employers"
  - EEOC's joint-employer standard is more flexible than Board's prior standard
- EEOC seems intent on re-characterizing its own standard, which has always been focused on control, as something broader
- EEOC's description of its standard in its amicus brief is questionable:
  - The Supreme Court described the EEOC's determination of employment status as "focus[ed] on the common law touchstone of control."
  - EEOC Compliance Manual: Two employers are joint employers when they are genuinely separate entities but they "each exercise sufficient control of an individual to qualify as his/her employer."
- Expanded EEOC concept of joint employment would allow for investigations, charges and lawsuits against a broader circle of business relationships such as those just described

# Impact on Other Agencies: DOL/OSHA

- OSHA has recently issued internal memo to help its inspectors determine when there is “joint responsibility” for worker health and safety at a particular location
- Unexercised potential to control working conditions, in a manner similar to the Board’s new test, may be sufficient to make a company a joint employer of another company’s employees
- Could create OSHA liability for same types of high risk business relationships listed above

# Impact on Other Agencies: DOL/EBSA

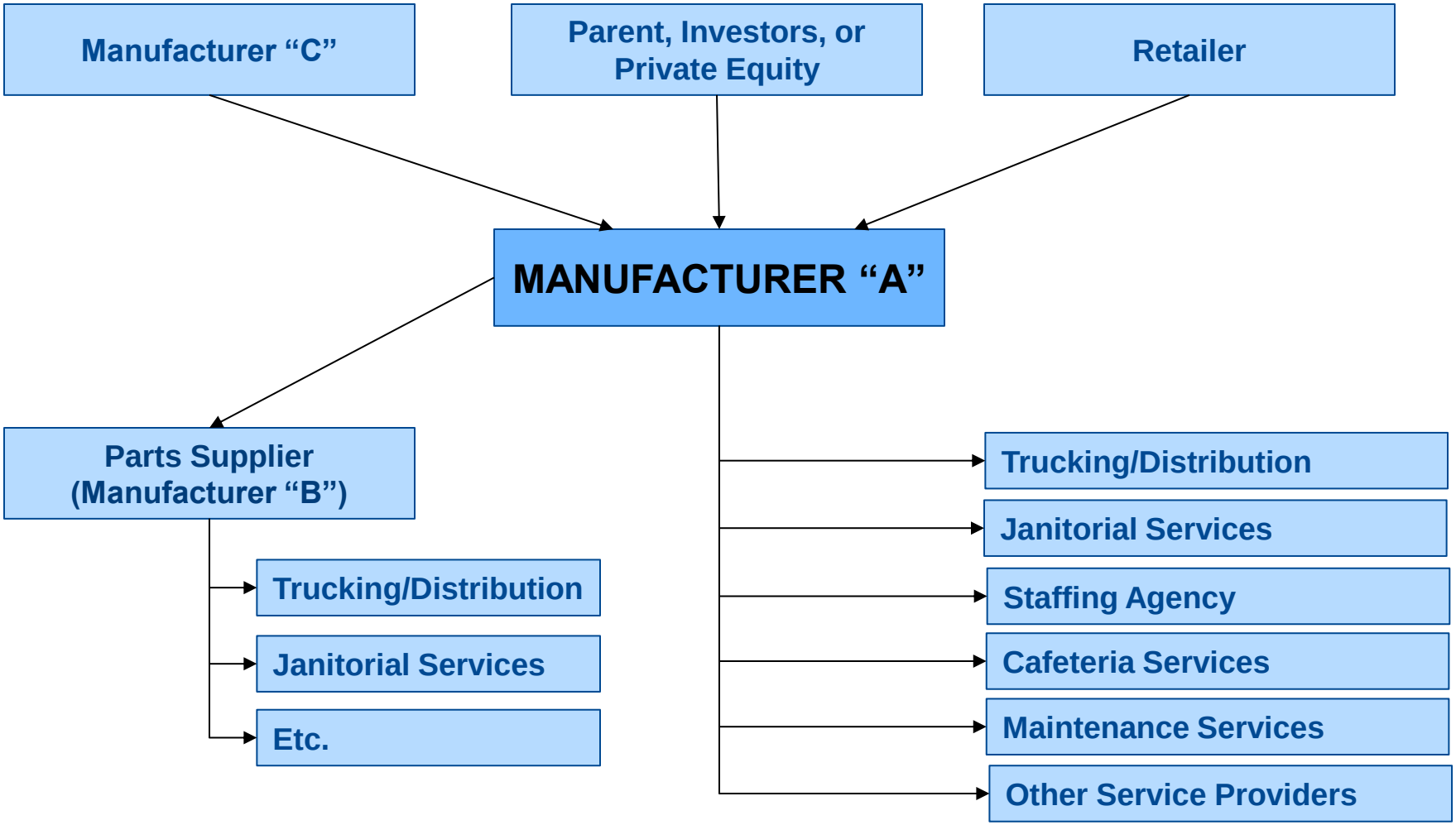
- Employee Benefits Security Administration and Pension Benefit Guaranty Corporation responsible for enforcing ERISA
- ERISA contains definitions of “employee” and “employer”
- Employment relationship under ERISA based on right to control test.
- NLRB’s broad joint-employer test could affect:
  - Duty to provide health insurance coverage
  - Pension liability
- The Board’s new joint-employer test could conceivably be used to attempt to expand multi-employer withdrawal liability.

# Impact on Other Agencies: DOL/OFCCP

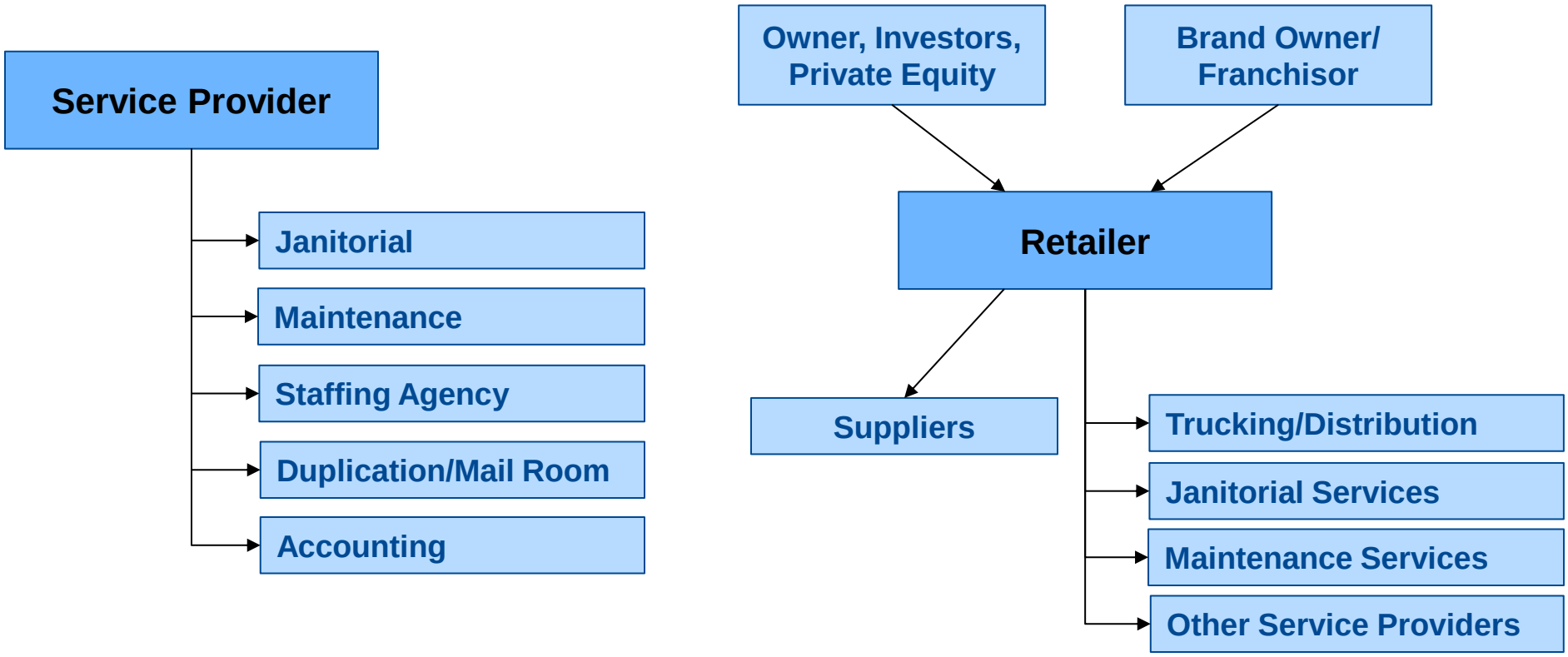
- The OFCCP will likely use the NLRB's new joint-employer test to bolster the standard it uses to "hook" companies that do not themselves hold federal contracts into being federal contractors.
- Three of OFCCP's five factors are implicated:
  - De facto Exercise of Control
  - Unity of Personnel Policies Emanating from a Common Source
  - Dependency of Operations
- The OFCCP has aggressively pursued jurisdiction over entities that do not hold federal contracts based on the "single-entity" test. We expect them to take an even more aggressive approach in light of the Board's *Browning-Ferris* decision.

# Potentially Affected Industries, Proactive Steps, and What Might Lie Ahead

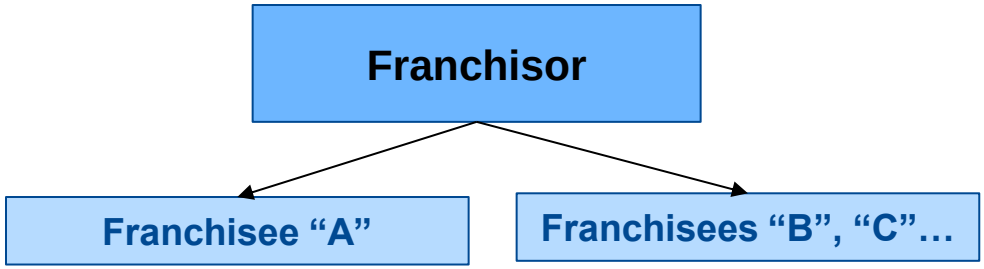
# Potentially Affected Industries

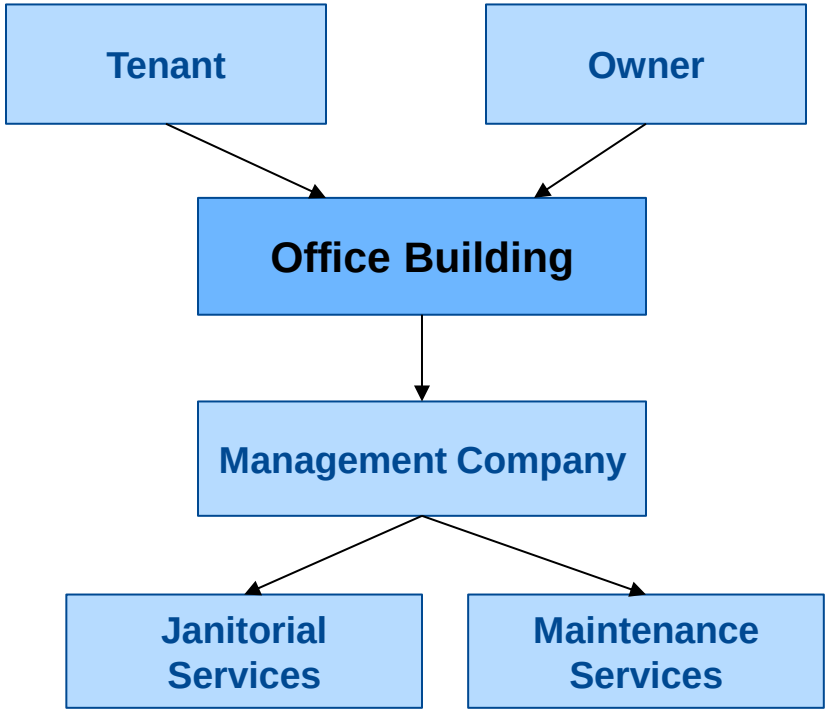


# Potentially Affected Industries

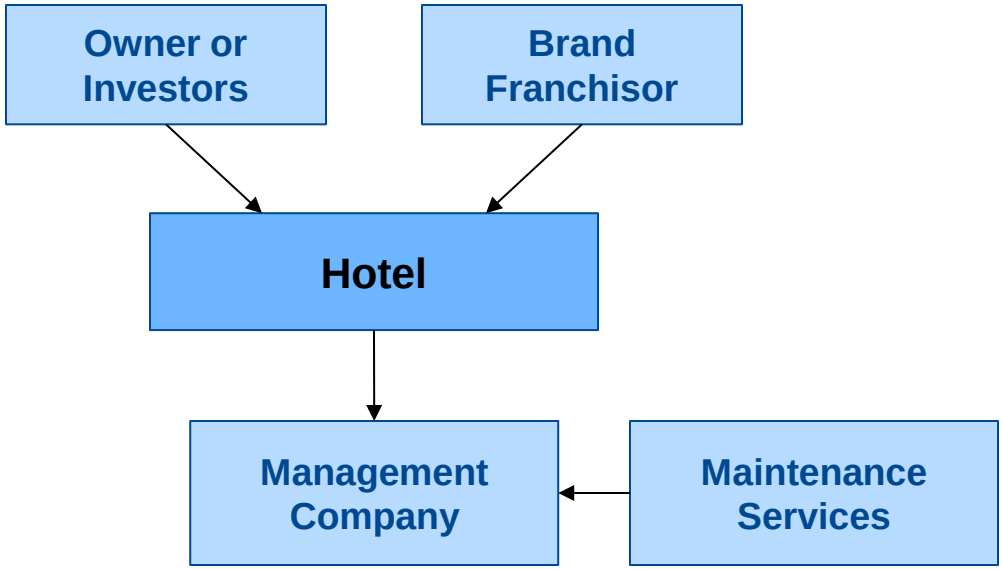


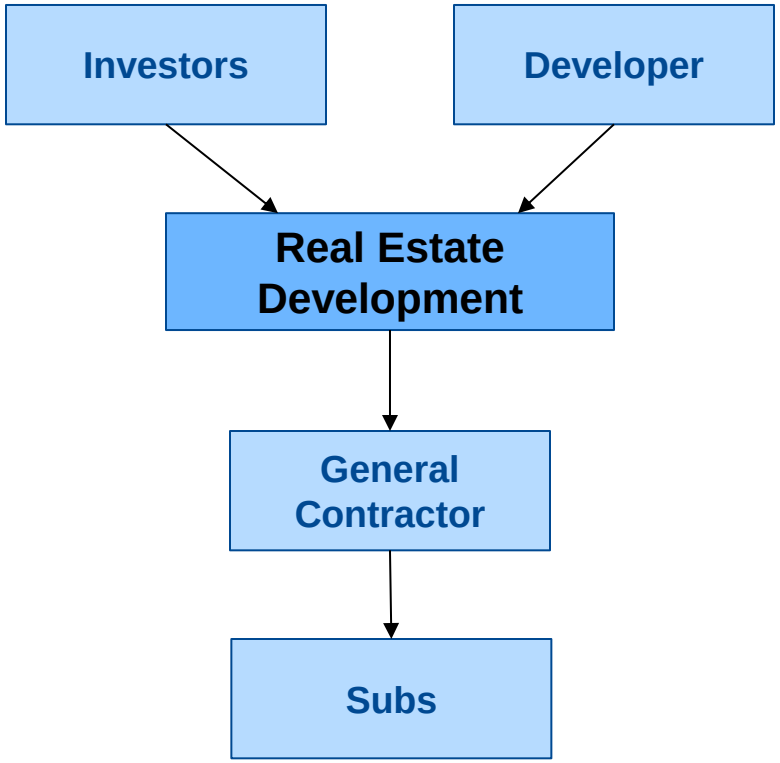
# Potentially Affected Industries



# Potentially Affected Industries



# Proactive Steps

- Currently navigating in the dark; fact-specific and no bright line test
- Each situation is unique; thoughtful analysis required

1. Consider *all* business relationships
2. This includes your business partners' business partners!
3. Assess direct, "indirect," and "potential" control
4. Assess influence (whether exercised or not) over third-party employees' "essential" terms of employment
5. Review contracts carefully
6. Address the ends, not the means
7. Train your managers and supervisors

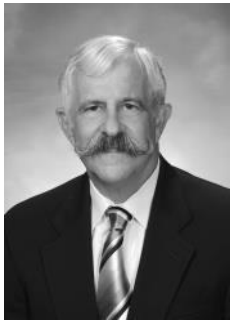
# Questions?

**To join our dedicated *Browning-Ferris* mailing list, please email**
**seyfarthshaw@seyfarth.com**
**with “Browning-Ferris” in the subject line**

# Thank You!

Richard Alfred
ralfred@seyfarth.com

Marshall Babson
mbabson@seyfarth.com



Jeffrey Berman
jberman@seyfarth.com

Lisa Damon
ldamon@seyfarth.com

Bradford Livingston
blivingston@seyfarth.com