

# Pipelines, Roads, and Buildings: The Impact of Potential Joint Employer Liability on Infrastructure Projects



**This webcast will begin promptly at 12:00 PM Eastern**

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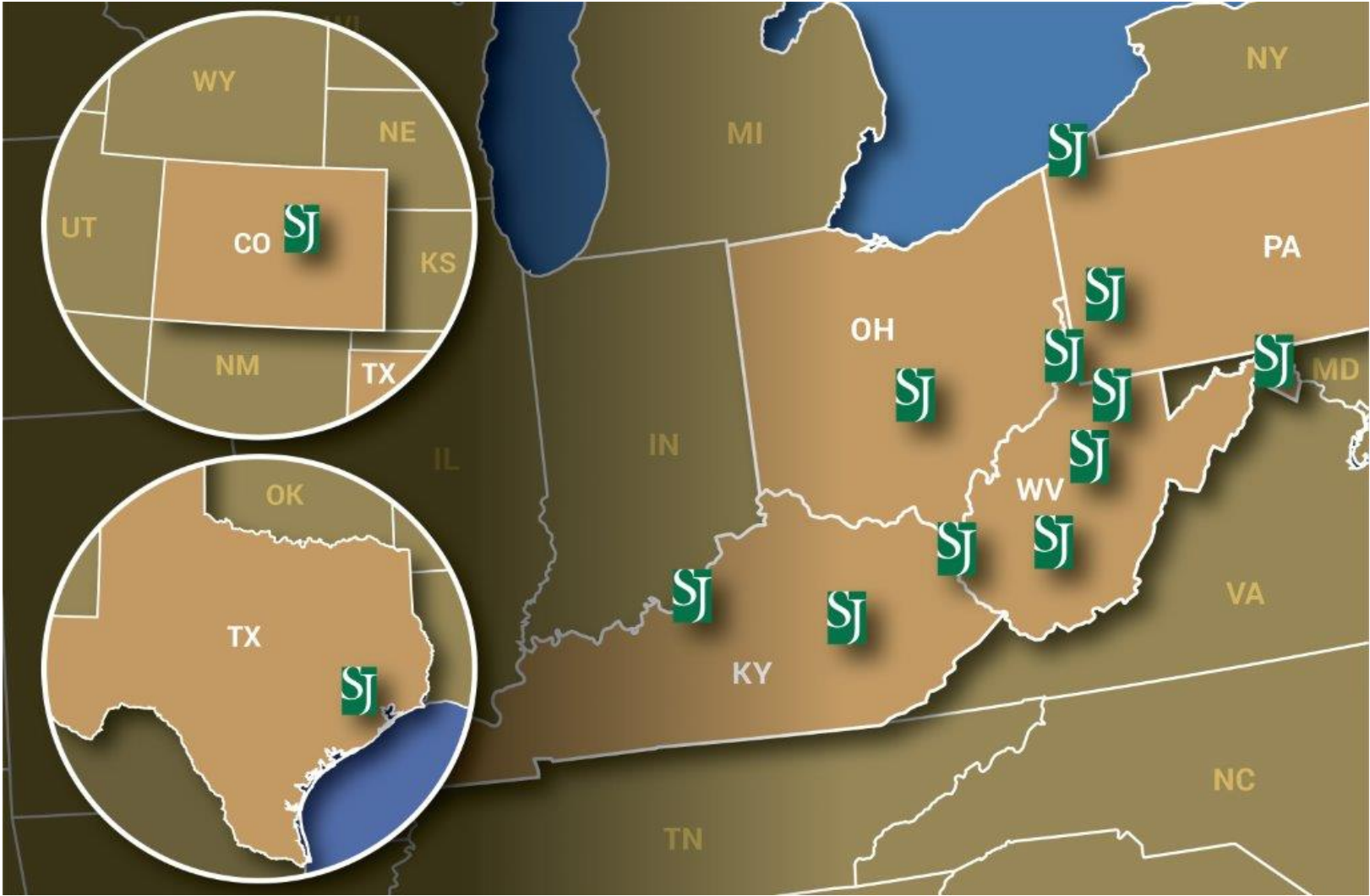


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# Welcome



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# Today's Presenters



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**John R. "Jack" Merinar Jr.**

**MEMBER**

**Bridgeport, WV**

**(304) 933-8135**

**[jack.merinar@steptoe-johnson.com](mailto:jack.merinar@steptoe-johnson.com)**



**Allison B. Williams**

**MEMBER**

**Bridgeport, WV**

**(304) 933-8144**

**[allison.williams@steptoe-johnson.com](mailto:allison.williams@steptoe-johnson.com)**

# Today's Agenda

- Briefly review the Joint Employer Doctrine
  - In the traditional labor context
  - In the wage payment context
  - In the employment discrimination context
- Discuss how the Joint Employer Doctrine has been applied in construction
- Cover what you can do as a construction employer involved with infrastructure projects to protect yourself
- Questions?



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# What is the Joint Employer Doctrine?

- Employee formally employed by one employer (the primary employer) may be deemed constructively employed by another employer (secondary employer) if that secondary employer exercises sufficient control over the employee's terms and conditions of employment.
- If a joint employer relationship exists, the secondary employer is a joint employer of the primary employer's employee over which it exercises sufficient control.



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# *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.* 691 F. 2d 1117 (3d. Cir. 1982)



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- BFI used drivers employed by Brokers
- TEST: Do two or more employers share or co-determine those matters governing the essential terms and conditions of employment?
- Control must be actual, direct, and substantial
- Factors considered:
  - BFI could hire and fire drivers
  - BFI established work hours
  - BFI provided uniforms
  - BFI determined compensation along w/Brokers



# NLRB Test – 2015



## ***NLRB v. Browning Ferris Industries of California, Inc.* 362 NLRB No. 186 (Aug. 2015)**

NEW TEST: We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint employment inquiry. Control can be indirect.



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# NLRB Test – 2015

## Factors Considered:

- Leadpoint provided people to sort out recyclables
- Labor Services Agreement gave BFI the right to:
  - Set hiring standards
  - Demand removal of employees
  - Limit Leadpoint employees' wages to not exceed BFI employees' wages



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# NLRB Test – 2017



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## ***Hy-Brand Industrial Contractors, Ltd.*** 365 **NLRB No. 156 (Dec. 2017)**

Back to the OLD *Browning-Ferris* Test:

- Do two or more employers share or co-determine these matters governing the essential terms and conditions of employment? Control must be actual, direct, and substantial.



# But Wait...

As of February 2018

- We're back to the 2015 *Browning-Ferris* Test
- *Hy-Brand* decision withdrawn due to appearance of conflict of interest on the part of one board member
- There is a motion pending to reverse the withdrawal
- There are three pending cases which give the opportunity to address (again) the joint employer doctrine



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# Significance of the NLRB's *Browning-Ferris* Test



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- Duty to bargain? Description
- Whether and to what extent you can be picketed
- Whether you are “the employer” for purposes of organizing campaign
- Other agencies as well as courts tend to rely on the NLRB’s view of what makes an employer a “joint employer”
  - Wage and hour cases
  - EEO cases (sexual harassment and all other forms of discrimination against persons protected by Title VII and state laws)

# Joint Employer Doctrine in Wage and Hour Law

- FLSA
  - Minimum wage & OT Law
  - Defines “employ” as:
    - “to suffer or permit to work”
    - Any person acting directly or indirectly in the interest of an employer in relation to an employee
- Familiarity with FLSA and state specific wage payment laws.
  - In most states, GC is responsible for unpaid wages of subcontractors
  - Joint employer doctrine is much broader. It is not limited to GC-Sub relationship.
  - If one employer your company is working with closely misclassifies employees as independent contractors, or fails to pay OT, the joint employer doctrine can come into play



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# Joint Employer Doctrine in Wage and Hour Law



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Are you a joint employer in the eyes of these courts?

- Third Circuit (PA)
  - “Enterprise Test”
  
- Fourth Circuit (WV)
  - *Salinas* Test
    - “not completely disassociated”

# FLSA Joint Employer Test



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***Enterprise Rent-A-Car Wage and Hour  
Employment Practices Litigation, 683 F. 3d. 462  
(3d. Cir. 2012)***

“Economic reality rather than technical concepts”  
*Browning-Ferris* is the starting point indirect, but  
significant control is sufficient

# Enterprise Factors

- Authority to hire and fire
- Authority to promulgate work rules and assignments
- Authority to set conditions of employment (wages, benefits, hours, for example)
- Day-to-day supervision, including employee discipline
- Control of employee records

**NOT AN EXHAUSTIVE LIST**



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# Potential for Issues for Companies Working on Big Infrastructure Projects



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1. Lots of different companies can be involved
  - Owner(s)
  - Architect
  - Construction Manager
  - Subcontractors
  - General Contractor
2. Coordination is essential
3. Actual, direct, substantial control is risky
4. Even reserved, indirect control is somewhat risky

# FLSA Joint Employer Test Applied in Construction

## *Salinas v. Commercial Interiors, Inc.* (4<sup>th</sup> Cir. 2017)

- *Salinas* was employee of a drywall subcontractor.
- The subcontractor worked almost exclusively for *Commercial Interiors*.
- *Commercial Interiors* told the subcontractor how many people it needed at each site.



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# Salinas, Con't.

- *Commercial Interiors* required the subcontractors' employees to fill out time sheets.
- *Commercial Interiors* required the subcontractors' employees to attend scope of work and safety meetings.
- *Commercial Interiors* told the subcontractors' employees to tell anyone who asked that they worked for *Commercial Interiors*.
- Subcontractor employees wore hard hats and vests with *Commercial Interiors* logo.
- A *Commercial Interiors* foreman threatened to fire a subcontractor employee.



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# The *Salinas* Test

- Shared supervision?
- Shared power to hire/fire or change working conditions?
- The degree of permanency of the relationship between the companies
- Shared administration of payroll, workers' compensation, payroll taxes, etc.



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# DOL Administrative Interpretation – 2016-01



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- This was withdrawn in July 2017
- Nevertheless reveals how DOL thinks about joint employer issues in construction
- Construction industry listed first as example where the “traditional employment relationship of one employer employing one employee is less prevalent.”
- “Certainly, not every subcontractor, farm labor contractor, or other labor provider will result in joint employment...”
- Construction scenario was the first example provided of how a joint employer relationship may arise

# 2016-01 Construction Example

ABC drywall subcontractor hires and pays laborers. ABC laborers work on a project run by a general contractor. The general contractor:

- Provides training
- Provides the materials
- Pays WC insurance
- Is responsible for project safety
- Can remove ABC employees from the project
- Controls the schedule of ABC employees
- Provides assignments on site
- Supervises the work of ABC drywallers

**“These facts are indicative of a joint employer relationship”**



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# Title VII Joint Employer Test

*Nationwide Insurance, Inc. v. Darden*, 503 U.S. 318 (1992)

“We consider the hiring party’s right to control the manner and means by which the product is accomplished.”



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# *Darden* Factors

- The skill required
- The source of instrumentalities and tools
- The location of work
- The duration of the relationship
- The right to assign additional projects
- Extent of discretion over when and how long to work
- Method of payment
- Whether work is regular part of the business
- Benefits
- Tax treatment



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# Dealing with the Joint Employer Doctrine



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- Are your subcontractors and contract labor providers complying with the law?
- Are they keeping up with the differences in each state in which they work?

# Things You Can Do

1. Carefully Review Your Contracts
  - Do they disavow intent to be joint employers?
  - Do they include expectation that the parties will comply with applicable laws?
  - Do they state that each employer will control the work of and supervise its own?
  - Is there an indemnification clause? Insurance requirement? Employees?
2. Ask Subs For Their Personnel Policies



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# Things You Can Do



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3. Follow Up By Asking Questions About:
  - OSHA (a given)
  - WC (a given)
  - EEO Compliance
  - Unfair Labor Practices
  - Retaliation Cases
4. Train Managers, Supervisors, and Foremen
  - They do not supervise or discipline other employers' employees. Instead, they discuss problems about contract compliance with the other employer (safety exception).
  - Rely as much as feasible on the other employer's supervisors to straighten out problem employees
5. Don't Become the Exclusive, Long-Term Source of Work for Your Subs

# Things You Can Do

6. Don't get involved in determining pay and benefits of sub's employees
  - Difference between setting an hourly rate for labor and determining what that laborer will be paid.
  
7. Avoid, where feasible, directing the sub how to staff a project
  - Difference between contracting for 160 hours of drywall work per week and contracting for four employees of the sub to work 40 hours each, from 8:00am until 4:30pm with ½ hour for lunch.
  
8. Where feasible, don't provide all the tools for other employers' employees.



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# Things You Can Do

9. Where feasible, don't transport employees, tools, or equipment of other employers to remote worksites, unless compensated to do so.
10. Where feasible, don't let employees of other employers use your company's housing, food service, computers, telephones, etc. unless compensated to do so.
11. Train employees of other employers when it is essential to do so, but not more. Ideally the written contract will include some compensation for training provided.



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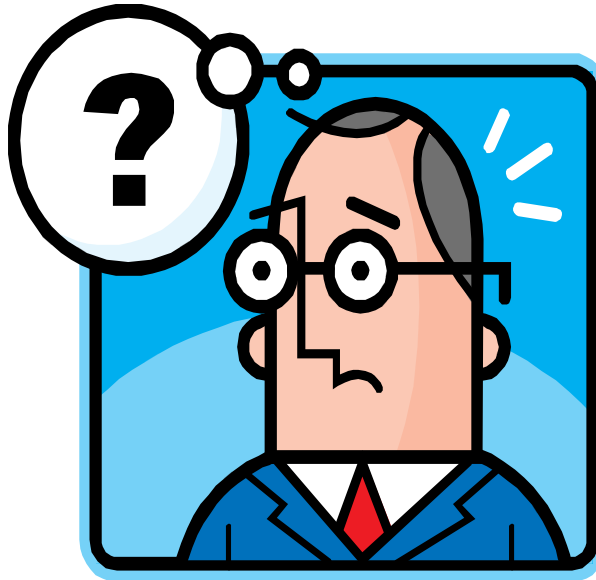


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# QUESTIONS?



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# Thank You!



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**John R. "Jack" Merinar Jr.**

**MEMBER**

**Bridgeport, WV**

**(304) 933-8135**

[jack.merinar@steptoe-johnson.com](mailto:jack.merinar@steptoe-johnson.com)



**Allison B. Williams**

**MEMBER**

**Bridgeport, WV**

**(304) 933-8144**

[allison.williams@steptoe-johnson.com](mailto:allison.williams@steptoe-johnson.com)

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