

Widening the Scope of Worker Organizing

Legal Reforms to Facilitate Multi-Employer
Organizing, Bargaining, and Striking

Report by
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Executive Summary

For legal, social, and economic reasons, it is difficult for worker organizations to organize, bargain, and strike across entire contractual supply chains, networks, industries, occupations, or regions.

This paper proposes four large-scale reforms to diminish these difficulties and actively facilitate organizing and striking across multiple employers:

First, an entity should be deemed an “indirect” employer of multiple “direct” employers’ workforces if it has “sufficient bargaining power” to determine the standards of all the employees in question, even if the entity does not currently exercise such power. By organizing and bargaining with that single entity, a worker organization would effectively organize and bargain with what is currently deemed a multi-employer association.

Second, the law should authorize worker organizations to unilaterally choose multi-employer units. And, if a government agency is called upon to select among differing units chosen by different worker organizations, then the agency should define units based on the criterion of “maximum potential worker empowerment.”

Third, legal reform should authorize bargaining units that are defined not only by employer boundaries but also by such categories as geographic region, production-and-distribution network, occupation, or industry.

Fourth, bargaining rights or the substantive terms of collective agreements should extend across multiple employers even if only a minority of unit workers has affirmatively shown support for the organization.

Each of these reforms would require large-scale legislative transformation and zealous enforcement that are only imaginable in the event of deep progressive renewal in our politics. The four reforms could be enacted separately but would, if concurrently implemented, be mutually reinforcing.

Introduction

Recent transformations in U.S. capitalism call for organizing, bargaining, and striking across multiple corporations. The ambitions of worker organizations—traditional unions, worker centers, and others—have answered the call. Yet multi-employer organizing faces some hard economic, political, and legal realities. This paper proposes several deep reforms to the legal structure of multi-employer organizing, bargaining, and striking—reforms that aim both to loosen the constraints on, and to affirmatively amplify, the hard-won successes that activists and organizers have already achieved.

Despite a remarkable array of innovative organizing efforts in recent years, today only 11.1 percent of all workers, and only 6.6 percent of workers in the private sector, are union members.¹ These are smaller percentages than in the 1920s, before the great upsurge in industrial unionism of the 1930s and 1940s. Another, much smaller percentage is organized by worker centers.

These stark figures are indicators of a social and political crisis—a crisis that’s been chronic for 40 years. The attrition of worker organizations causes, and is caused by, many variables, including managers’ unrelenting retaliation against workers who support collective action; the general political shift to the right; intensified competition in product markets resulting from deregulation and globalization;

chronically heightened levels of unemployment; and changes in corporate structure to which current strategies of multi-employer organizing are a response.ⁱⁱ

There are many proposals to strengthen the deterrence of employers' retaliation through high monetary penalties or expedited court orders to reinstate fired workers. There are also prominent proposals to simply extinguish the opportunity for retaliation by eliminating anti-organizing campaigns leading up to secret-ballot elections and instead recognizing worker organizations based on workers' signing membership cards.ⁱⁱⁱ

This paper doesn't rehearse these and other possible proposals to protect workers who try to organize or engage in other collective action. Instead, the paper begins with two heroic assumptions, each of which is necessary to the practical success of this paper's policy proposals: first, that legal reform can and will end employer intimidation of workers, and, second, that workers and organizers can and will undertake the difficult task of organizing multi-employer bargaining structures if deep legal reforms for widening the scope of organizing and bargaining are put in place. This paper focuses only on the latter reforms.^{iv}

The paper proceeds as follows: The first section sets out the kinds of political changes that would be necessary preconditions to enactment of the paper's reform proposals. The second section then steps back and describes several patterns of contractual and non-contractual relationships among "disintegrated" corporations in the contemporary economy. In subsequent sections, these patterns serve as illustrations of the ways the proposed policy reforms would work in practice. The third section discusses the existing legal obstacles to multi-employer organizing and bargaining. The fourth section is the heart of the paper, and presents the proposed policy reforms. The fifth section discusses the definitions of "sufficient bargaining power" and "maximum potential for worker empowerment," two of the key concepts in the proposed legislative reforms. The sixth section, a brief conclusion, presents incremental steps that point in the direction of deeper reforms. Appendix A contains model legislation that codifies some of the proposed reforms. Appendix B further illustrates how the proposed reforms would apply to complex networks of corporations.

Large-Scale Reform and Political Reality

Before I discuss the proposed reforms, a quick word to the reader about "getting from here to there" is in order—about the path through which such large-scale policy reforms might come about.

Simply put, while some elements of existing law point in the direction of the proposed reforms, the latter could not be fully implemented through re-interpretation of existing statutes by courts and administrators. The proposals would instead require major new Congressional legislation. Under foreseeable political alignments in upcoming electoral cycles, such legislation is hardly imaginable.^v

The paper's goal, ambitious enough, is to set out broad ideas that might expand the horizons of current discourse about what our labor policy should become in the event that, in the longer term, the political stars align for progressive legislative transformation. Before that political moment arises, it's important for progressives to have extended debate about deep but workable institutional transformation. This paper is intended as a provocation for that debate.

Achievement of the full-blown reforms is conceivable only if there is a renewed progressive movement committed to re-empowering workers. And, once in place, the legislation would succeed only if that movement applied sustained pressure to ensure that courts and deeply reformed administrative agencies interpret and enforce the legislation in the spirit in which it is offered here. The three enormous

questions—how to revitalize the progressive movement, to maintain pressure on government officials, and to reform administrative systems—are not addressed in this policy brief.

Contractual and Non-Contractual Patterns among Disintegrated Employers

Two conspicuous economic transformations in recent decades are especially relevant to this paper.

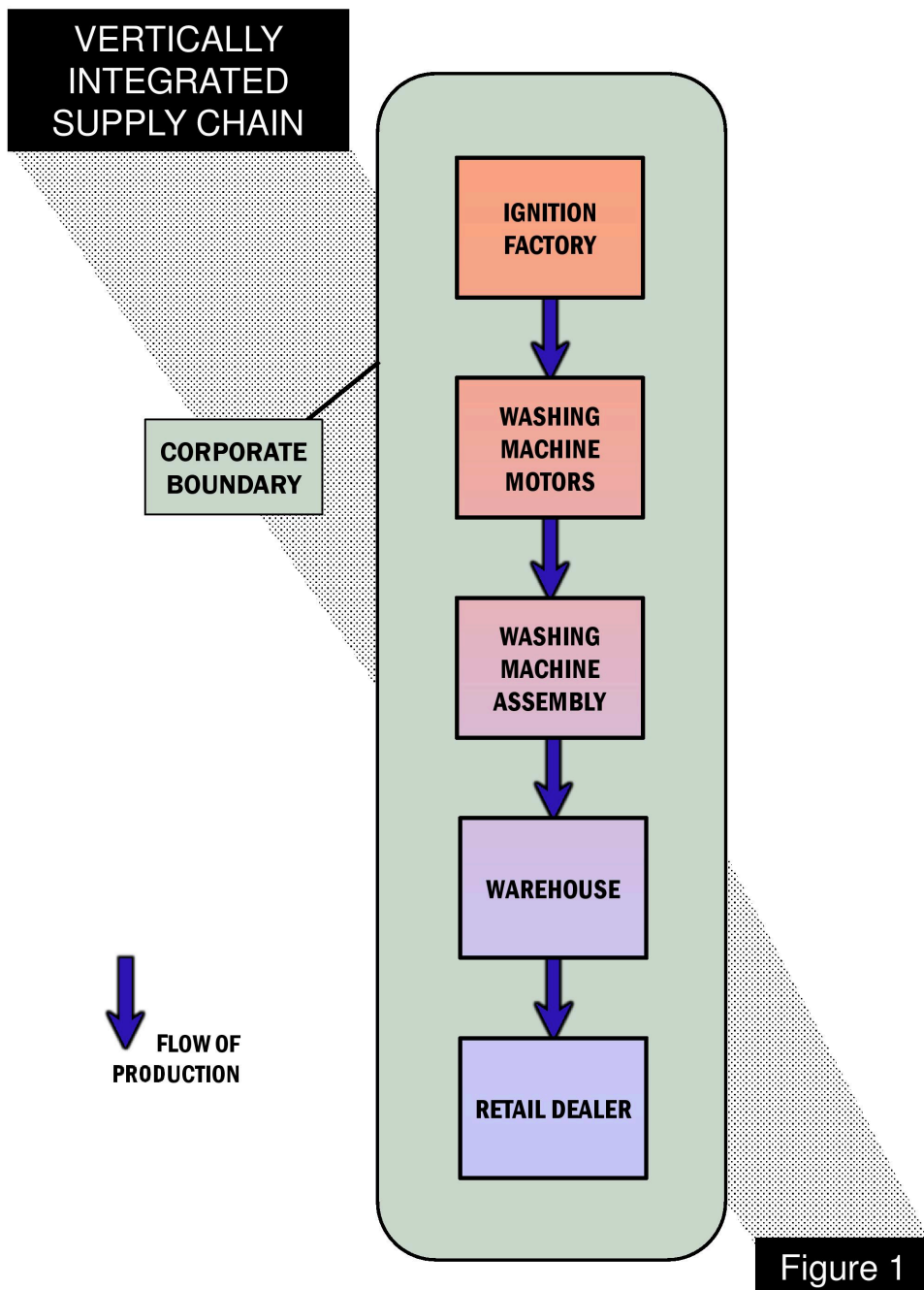
The first transformation is the decentralization and fragmentation of collective bargaining, when, that is, collective bargaining persists at all.^{vi} Bargaining that once spanned multiple employers in an industry has often disintegrated into single-employer units. And bargaining that once spanned multiple facilities of a single employer has often disintegrated into single-division or single-facility units. Call this the “disintegration of bargaining structures.” It results from many of the same factors that account for the overall decline in union density.

The second feature, closely related to the first, is the decline of the large, vertically integrated corporation.^{vii} Call this the “disintegration of employers.” Work that was once done in-house is increasingly scattered across multiple employers interconnected by a chain or network of contracts. This disintegration has several causes, including employers’ drive to escape or prevent unionism and to avoid legal responsibility for employment standards. And it has many baleful consequences, including the swelling of the precarious, low-wage labor market. Not coincidentally, low-wage workers shoulder much of current efforts to organize across multiple employers.

In the various ecosystems of disintegrated employers, there are at least four patterns of contractual interconnection among multiple employers.

First is the supply chain. Imagine, for example, a single washing-machine manufacturer and distributor that once housed (1) factories producing the primary parts for washing machines, such as ignitions for washing-machine motors, (2) factories assembling secondary components for washing machines, such as washing-machine motors, (3) factories assembling the secondary components into washing machines, (4) warehouses and trucks for storing and transporting parts and assembled products, and (5) retail dealerships selling the washing machines. (See Figure 1.) Suppose the corporation then spins off stages (1), (2), (4), and (5) into independent corporations, but continues to own and operate the final assembly stage, and suppose the five separate corporations are linked by exclusive supplier-purchaser contracts. (See Figure 2.) The five corporations would constitute five links in a single supply chain.

In the second and more common pattern of interconnectedness, a single supply chain interweaves with others to form a production-and-distribution network. For example, some of the goods sold by Walmart, Target, and Kmart may be produced in the same factories, transported by some of the same shipping companies to some of the same ports, unloaded by some of the same stevedoring companies, transported by some of the same trucking companies, stored in some of the same warehouses, and transported again by some of the same trucking companies to the Walmart, Target, and Kmart stores. (See Figure 3.) All of these companies are nodes in the network pattern.



EXCLUSIVE SUPPLIER-PURCHASER CONTRACTS (DISINTEGRATED CORPORATION)

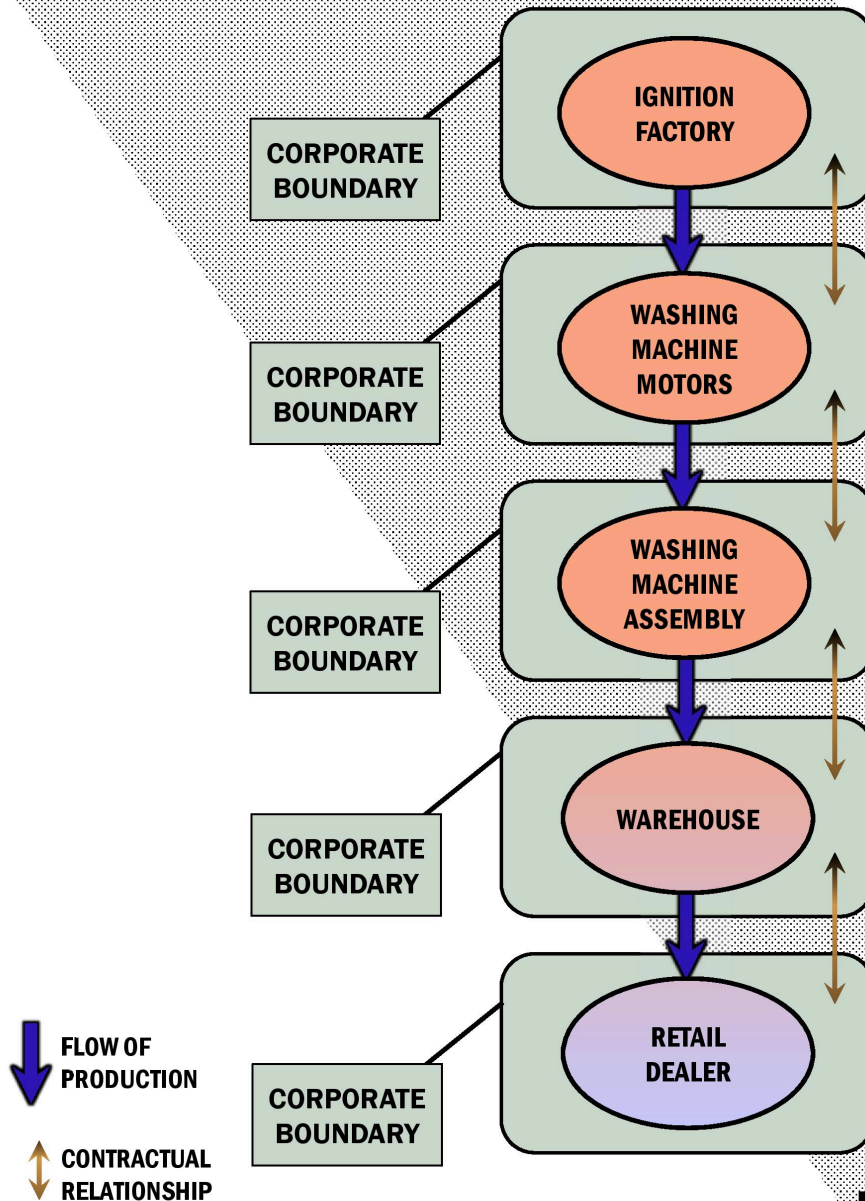


Figure 2

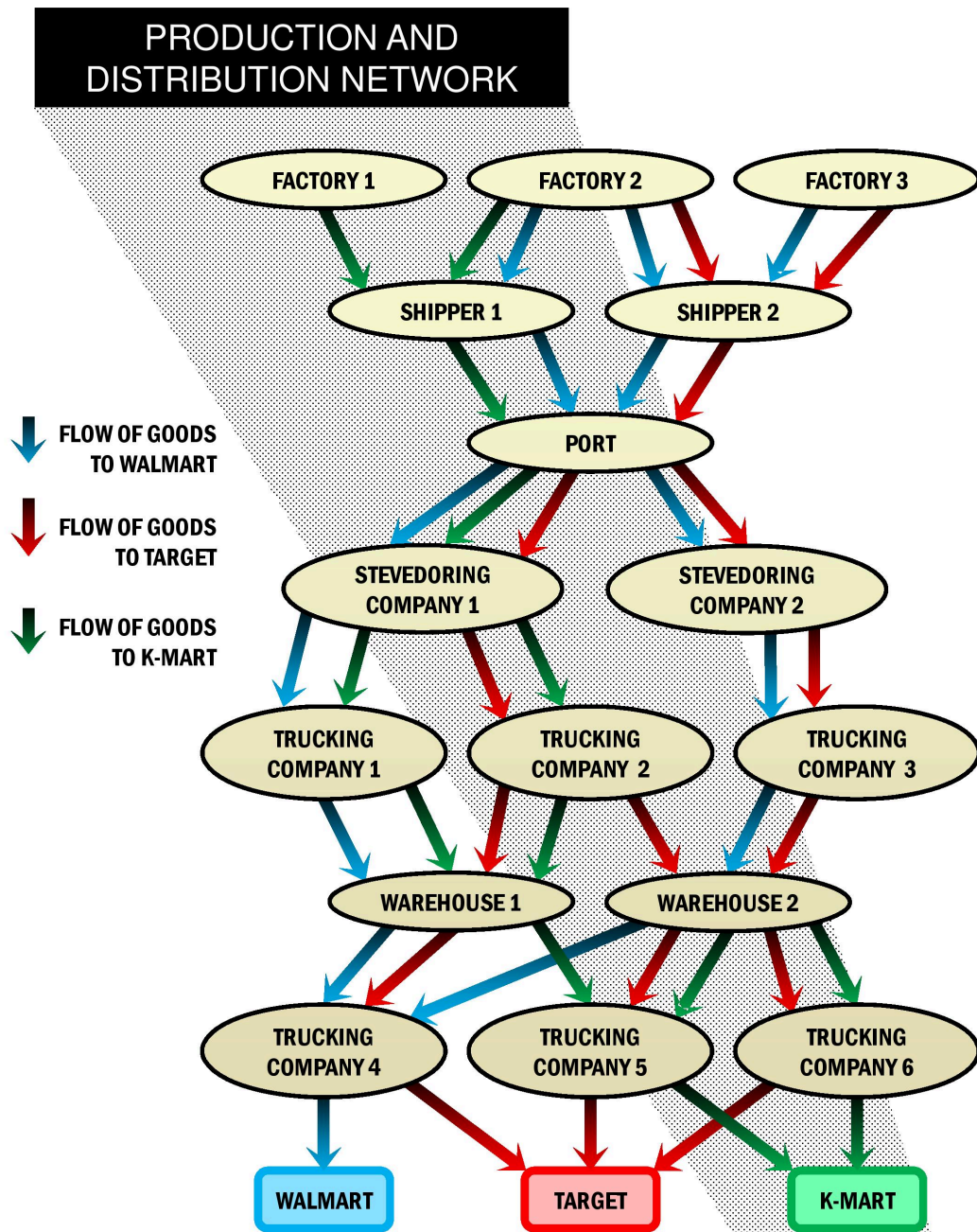


Figure 3

A third pattern is a hub-and-spoke wheel of contracts. A building owner, for example, is the hub, and enters into contracts with cleaning companies, security companies, landscapers, insurers, tenants, and others. (See Figure 4.)

A pyramid is a fourth pattern. A fast-food company, for example, stands at the pinnacle of a hierarchy and franchises the many small restaurants at the bottom. (See Figure 5.)

A fifth pattern exhibits no contractual interconnection among corporations but is simply a horizontal group of independent businesses in a given sector—for example, a retail sector made up of small, separately owned stores. (See Figure 6.)

Obviously, in the real world there are many variations and combinations of these stylized patterns.^{viii} For example, each Hilton Hotel is the downstream link in a supply chain, but is also a node in a network, a hub in a wheel of contracts, and an entity (either franchised or company-owned) at the bottom of a pyramid beneath the pinnacle Hilton Hotels and Resorts Corporation. (See Figure 7.)

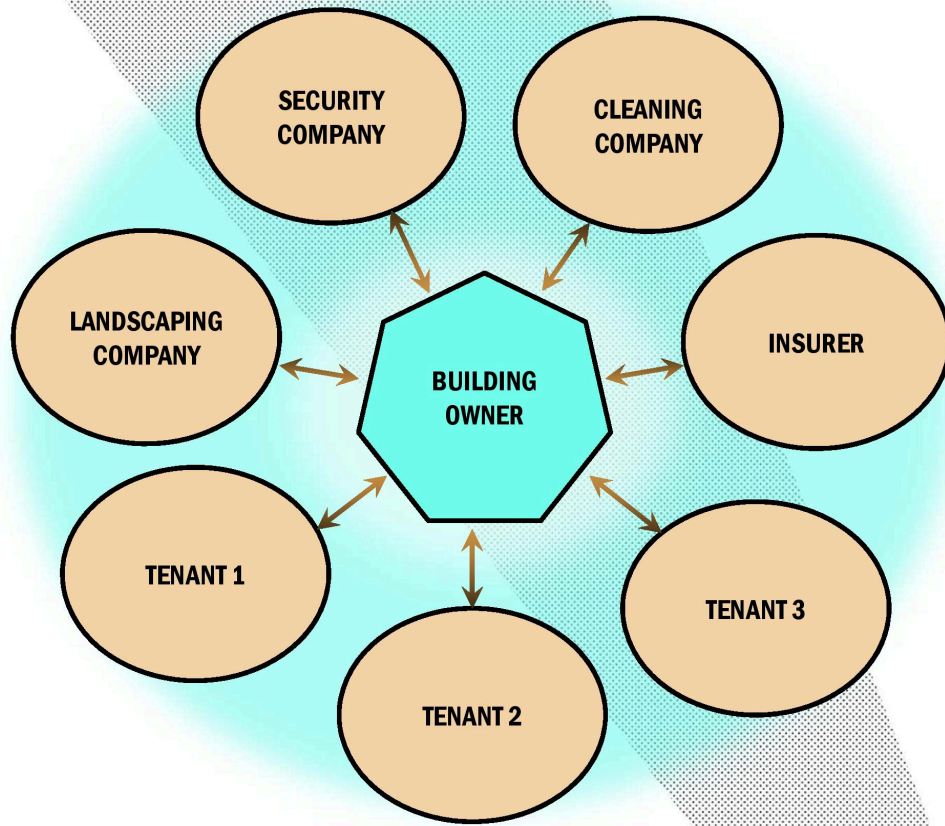
Many organizations and activists are engaged in creative modes of organizing and hard work aimed at patterns such as the five just mentioned. The Restaurant Opportunities Centers (ROC) are organizing workers in pyramids and horizontal groups.^{ix} The Service Employees International Union (SEIU) has tackled the various building services companies that are the spokes of contractual wheels in which building owners and tenants are the hubs.^x Change to Win (CTW) has its sights set on major supply chains feeding into big-box retailers.^{xi}

Can we imagine deep policy reforms that would work in tandem with such organizing on the ground—policy reforms that would allow, affirmatively encourage, or even mandate organizing across entire supply chains, networks, hubs and spokes, pyramids, and horizontal sectors? That is, what large-scale changes in the legal infrastructure of organizing might dramatically promote multi-employer organizing, bargaining, and striking?

Of course, our thinking about policy reform need not spring full-blown from our imagination. We can draw on the recent practical innovations by organizers; the long history of multi-employer bargaining in the U.S. and other countries; existing legal rules that prefigure more radical policies; and the decades of intensive debate and writing among thousands of labor-law and labor-relations scholars and practitioners.

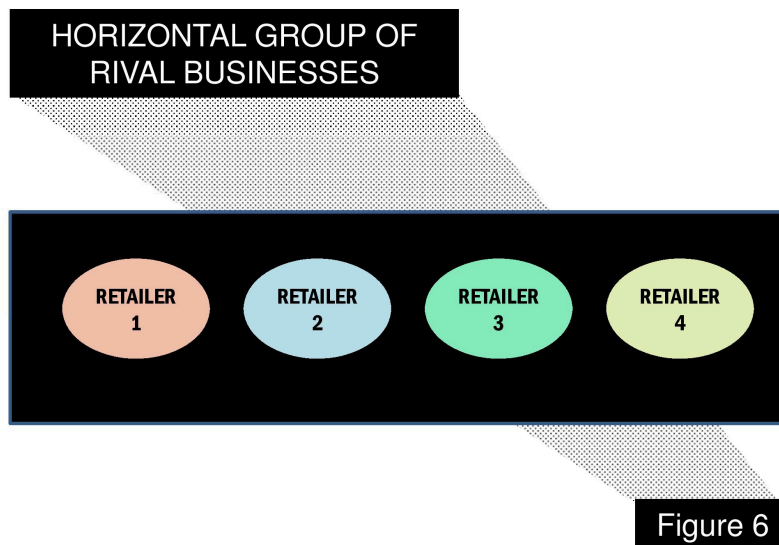
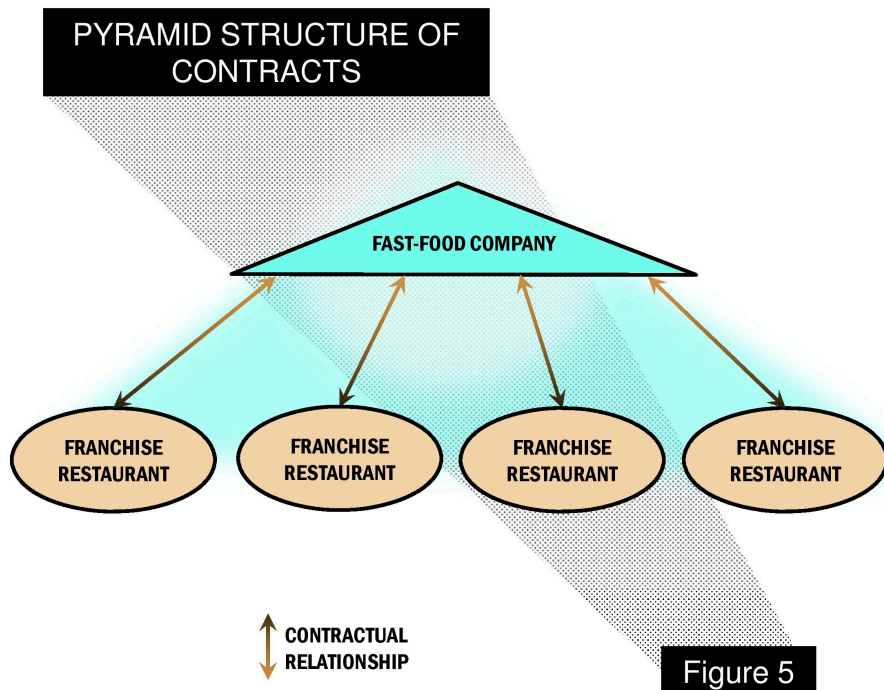
The sections below start with existing legal rules and then canvass the pros and cons of alternative or complementary proposals.

HUB-AND-SPOKE WHEEL OF CONTRACTS



↑
↓
CONTRACTUAL
RELATIONSHIP

Figure 4



COMBINATIONS OF CONTRACTUAL PATTERNS

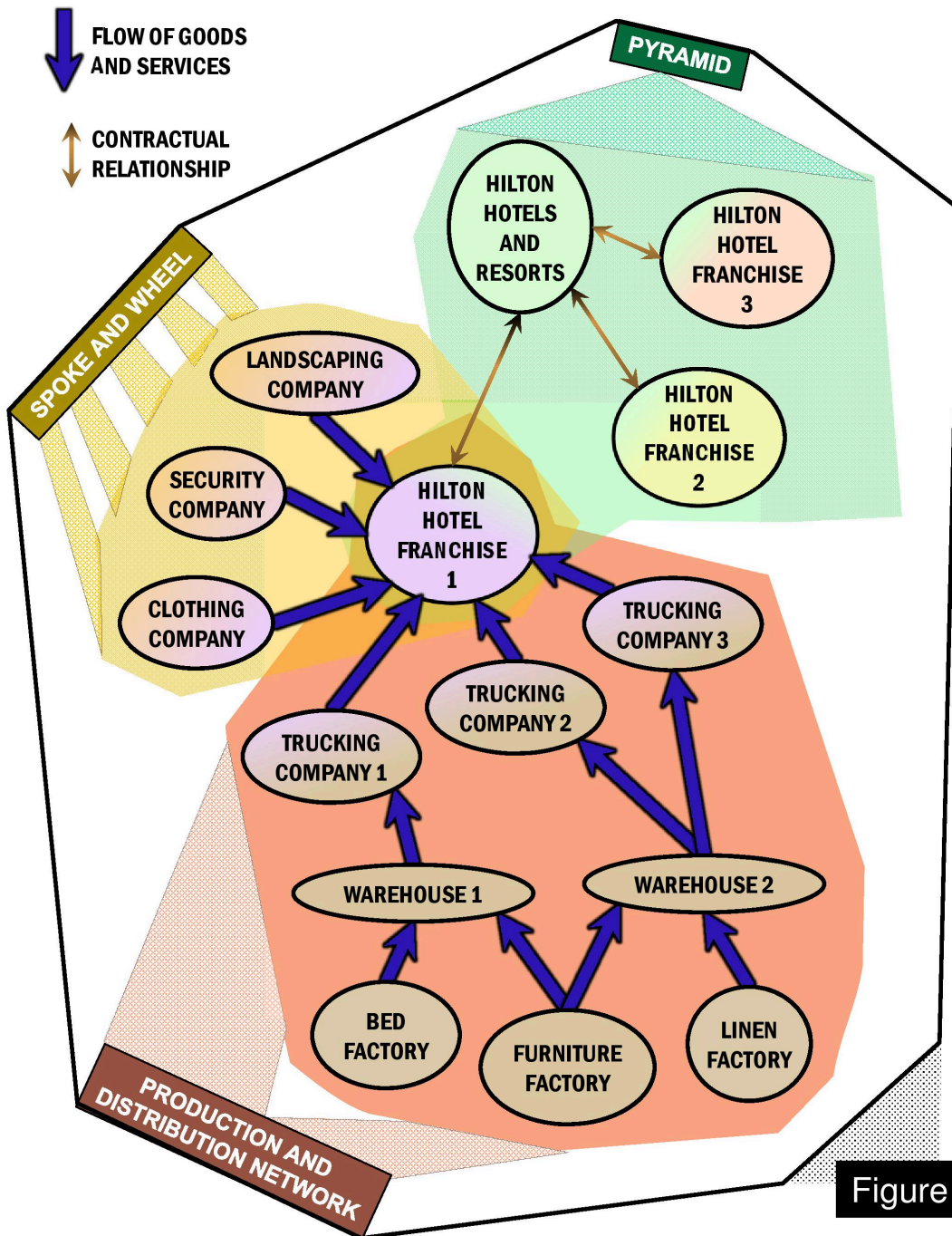


Figure 7

The Existing Framework of Multi-Employer Organizing and Bargaining

The Key Legal Obstacles to Multi-Employer Organizing and Bargaining

The existing legal framework creates at least seven key obstacles to effective multi-employer organizing and bargaining:

- First, the framework makes it difficult for worker organizations to initially organize a majority of workers in large bargaining units that span multiple employers.
- Second, even if the worker organization has majority support among the combined workforces of multiple employers, in most contexts the organization must first demonstrate majority support in each employer-wide or sub-employer-wide unit.
- Third, if a worker organization succeeds in initially organizing several units that are each no larger than a single employer, the framework does not authorize the National Labor Relations Board to mandate the merger of the units.
- Fourth, the framework does not allow the worker organization either to unilaterally mandate merger of the units or to strike to force a merger of the units. The worker organization may only request that the employers voluntarily consent to merge the units.
- Fifth, the worker organization may not strike in one employer unit (say, a warehouse) in order to apply pressure for better terms and conditions or for employer recognition on a not-yet-organized employer (say, a big-box retailer).
- Sixth, a worker organization and employer may not sign an agreement requiring the employer to contract exclusively with organized suppliers, buyers, or other contracting parties^{xii} in a way that would leverage organizing across multiple employers in a supply chain, network, contractual wheel, or pyramid.
- Finally, a worker organization and one or more employers may not sign an agreement that commits the organization to impose the substantive terms of the collective agreement on other employers. And a worker organization may not picket a non-organized employer for the purpose of forcing it to agree to those terms, although it may engage in area-standards picketing demanding that the employer incur equivalent labor costs.

A Brief Explanation of the Legal Obstacles

This subsection explains to non-labor-lawyers the legal obstacles to multi-employer structures just listed. Readers less interested in the legal technicalities might skip to the reform proposals in the following section.

Our fundamental labor law in the private sector is the 1935 National Labor Relations Act (NLRA).^{xiii} As interpreted by the National Labor Relations Board (“Board”) and by the courts, the NLRA creates severe roadblocks to multi-employer organizing.

The NLRA is based on the principle of majority rule. If a majority of workers in an “appropriate” unit designates a bargaining representative, that representative is the exclusive collective bargaining representative for all workers in the unit.

Section 9(b) of the NLRA states that the Board must decide in each case whether an appropriate unit of bargaining shall be an employer unit, craft unit, plant unit, or a subdivision of these. There may be more than one appropriate unit. When a union and employer voluntarily agree to a unit, the Board will generally defer to the parties unless the unit in some way violates other provisions of the Act.

Why does the NLRA include textual restriction to units no broader than the boundaries of a single employer?^{xiv} It was simply an accident of history,—an accident with momentous consequences. From 1933 to 1935, before the 1935 enactment of the NLRA, new unions such as the Auto Workers demanded recognition from industry-leading corporations such as General Motors, Ford, and Chrysler. Each corporation refused, arguing that its internal system of employee representation (a classic “company union”) was the genuine representative of the company’s or individual factory’s workforce. So, Senator Robert Wagner and his aides traveled the country and arranged elections among the workers—corporation by corporation, or factory by factory—to demonstrate whether a majority supported an outside union such as the Auto Workers, the company union, or neither. In order to hold a majority-rule election, Senator Wagner had to define a “unit” of eligible voters; and the “natural” unit was company-wide or factory-wide, since the fight on the ground was between the outside union and the company union. And, to ensure that multiple unions did not act as a continuing wedge against genuine unions, the NLRA banned company unions and stipulated that the winner of elections supervised by the new NLRB would be the exclusive representative of all workers in the bargaining unit, those who voted for and those who voted against the union. Thus was born the legal infrastructure of bargaining units, majority-rule elections, exclusive representation, and the ban on employer-dominated labor organizations.

For Senator Wagner, these elections were merely public demonstrations of what he knew to be almost always true: that the workers genuinely supported the outside unions. And he believed that industry-wide (i.e., multi-employer) bargaining was the desired and inevitable goal. So why, when he drafted the NLRA, was he content with company-wide or factory-wide units? He and his aides believed that workers would pour into such units, and the units would then quickly merge into multi-employer units that would conduct industry-wide bargaining.^{xv}

Alas, Wagner did not anticipate two things: unremitting employer opposition to both unionization and merging of unionized units, and NLRB and court decisions that create hurdles to legal authorization of multi-employer units.

What are the existing hurdles?

Suppose a group of workers wants to engage in bargaining to achieve a collective contract with multiple employers. The workers might aim to organize across one of the five multi-employer patterns described above, or across combinations of two or more patterns. For example, organizers may target an entire supply chain or network, or a supply chain whose dominant downstream node is also the hub in a wheel of contractors. Suppose, too, that the organizers and workers want to exert the pressure of a strike or threatened strike against the employers, either to gain initial recognition by multiple employers or to make their subsequent collective bargaining or other collective activities meaningful.

Under existing law, getting to multi-employer bargaining, striking, or other collective action is typically a two-step process. During the first stage, initial organizing, a majority of workers within each of the

multiple units must designate a worker organization as their collective bargaining representative. Second, at the stage of creating a bargaining structure, the worker organization must merge the units that span multiple employers.^{xvi}

Under existing legal rules and the prevailing practice of worker organizations and employers, the initial units are in most cases no larger than a single employer. In fact, the initial units are typically no larger than a single facility of a single multi-facility employer or than specific categories of workers of a single employer.

Why are initial units almost always limited to a single employer?

First, as mentioned, the text of section 9(b) of the NLRA states that units shall be no broader in scope than an “employer unit.” This tilts the Board toward refusing to certify multi-employer units (although, as discussed below, the Board has interpreted other language in the Act to permit multi-employer units in particular contexts).

Second, the Board has announced a presumption that the initial unit is limited to a single facility of a single employer.^{xvii} The Board may find that the presumption is rebutted when: multiple facilities of a single employer are located near each other; employees move among the facilities; the facilities are operationally integrated; or when other criteria are met. But even if the Board determines that a multi-facility unit is appropriate, it is still a single-employer and not a multi-employer unit.

Third, worker organizations find it difficult to organize a majority of workers in larger units, in light of employers’ ferocious anti-organizing campaigns, compounded by the intrinsic logistical difficulties of organizing workers across scattered locations.^{xviii} If an employer rejects a worker organization’s demand for recognition in a small unit on the grounds that the organization lacks majority support in a larger unit, the organization must petition the Board for an election in the smaller unit. The employer may then ask the Board to rule that the smaller unit is not an appropriate unit, measured by the “commonality of interest” of relevant workers.

If the worker organization wins the Board election—whether in a smaller or larger unit within a single employer—the organization may then seek to merge the unit with others that it or other worker organizations have organized, to create multi-facility or multi-employer bargaining structures. If any employers agree to join a multi-employer unit, they will typically form an “association” that bargains on their behalf.

At this second stage, the worker organization(s) may not strike or threaten to strike to pressure employers to join a multi-employer bargaining unit.^{xix} This is a critical point. Multi-employer bargaining proceeds only if each of the pertinent groups of employers agrees voluntarily to do so. And, even if employers agree to do so, any employer is free to leave the multi-employer arrangement so long as it clearly announces its intention in advance of a new bargaining round.^{xx} The exiting employer must still bargain with the worker organization on an individual basis, since majority support for the organization by the individual employer’s workforce is imputed.

As mentioned, despite the statutory bias against Board designation of multi-employer units, in special cases the Board has been willing to certify multi-employer units, even at the initial stage. Although section 9(b) says the Board must choose a bargaining unit no larger than an employer, the Board has ruled that the term “employer” includes associations of multiple employers since such associations are agents of the constituent employers.^{xxi}

At the initial stage, the Board designates a multi-employer association as an appropriate “employer unit” only if one of two preconditions is met. First, the Board may certify a multi-employer unit based on a clear history of stable collective bargaining between the union and the multi-employer association in question.^{xxii} From that history, the Board in effect infers (a) that each employer in the association has consented to multi-employer bargaining, and (b) that when the worker organization consented to multi-employer bargaining, it had majority support in the workforce of each constituent employer and was therefore legally capable of consenting on behalf of each workforce to merge the single-employer units.

Second, in the absence of a history of multi-employer bargaining, the Board may still certify a multi-employer unit at the initial stage if the worker organization and all employers consent and if the worker organization has majority support in the workforce of each employer and is therefore capable of consenting on behalf of each workforce. In effect, the usual two-stage process is collapsed into one.^{xxiii}

Once the Board certifies the multi-employer unit, however, the relevant legal question is no longer whether the worker organization has majority support within each constituent workforce. Rather, the question is whether a majority of workers in the larger unit designates the organization as its unit representative. More concretely, employees cannot petition for an election to decertify the worker organization as the legally recognized representative of the workforce of just one employer in the multi-employer unit.^{xxiv} A decertification petition must instead call for a majority-rule election among the workforce of all employers in the multi-employer unit. Obtaining such an election may be a tall order, since the Board will hold such an election only if 30 percent of the combined workforces calls for one. From the worker organization’s point of view, this is one of the big advantages of a multi-employer unit.

True, prior to a new bargaining round, an individual employer may withdraw its consent to multi-employer bargaining, and the Board will conduct a decertification election if 30 percent of that employer’s workforce calls for such an election.^{xxv} But the multi-employer unit will otherwise remain intact. In any event, once in a multi-employer association, an individual employer is deterred from exiting by withdrawal penalties exacted by the association; by the renegade employer’s loss of access to the association’s strike fund; by the union’s power to strike the renegade without facing a lockout by the rest of the association; and by other formal and informal costs.

Deep Policy Reforms

What legal reforms might loosen these constraints and actively facilitate organizing and striking across multiple employers? This section discusses four deep reforms. Each reform could be enacted alone, but this section also discusses the ways they would, if concurrently implemented, be mutually reinforcing. The reforms are first capsulized and then explained in greater detail:

- Legal reform could redefine “employer.” An entity would be deemed an employer of multiple workforces if it has “sufficient bargaining power” to determine the terms and conditions of all the employees in question, even if the entity is not currently exercising such power. By organizing and bargaining with that single entity, a worker organization would effectively organize and bargain with what is currently deemed a multi-employer association.
- Legal reform could authorize worker organizations to unilaterally choose the scope of bargaining units, including multi-employer units. And, if the Board is called upon to select among differing units chosen by different worker organizations, the Board should define units based on the criterion of “maximum potential worker empowerment.”

- Legal reform could authorize bargaining units that are defined not only by employer boundaries (whether single or multiple employers) but also by such categories as geographic region, production-and-distribution network, occupation, or industry. Often, the particular employers that fall within such units would change over time.
- Legal reform could eliminate the rule that worker organizations must demonstrate the support of a majority of workers in a given unit. Instead, bargaining rights or the substantive terms of employment would extend across multiple employers even if only a minority of unit workers had affirmatively shown their support for the organization.

Redefining “Employer”

The challenge of multi-employer bargaining rests on a bedrock feature of the current legal landscape: For legal purposes, most employees have only a single employer. The entity that actually hires, pays, and controls the employee in question (or has the “right to control” the employee) is typically deemed the sole employer. Call this entity the “direct employer.”

Think again of the various patterns of contractual relations among disintegrated employers: supply chain, network, hub-and-spokes, and pyramid. The nodes in these patterns constitute separate employers only because the law defines them as distinct employers. Labor and employment law do not passively conform to, but instead actively construct, the vertical disintegration of the corporation by designating the disintegrated entities as distinct “employers” of their respective direct workforces.

While there is much recent discussion about redefining “employer” for purposes of improving the enforcement of such labor standards as minimum wages,^{xxvi} the strategy of redefining “employer” to widen the scope of collective organizing, bargaining, and striking is more novel.

The core of the proposed reform is to radically redefine “employer” to encompass a much wider set of entities than direct employers and the Board’s limited, existing set of joint employers. Under the proposed reforms, an entity would be deemed an “indirect employer” of a given employee if it has “sufficient bargaining power” (vis-à-vis the direct employer) to determine the employee’s terms and conditions of employment. (The definition of this key concept, “sufficient bargaining power,” is discussed below in section five.) Critically, the entity may have such bargaining power even though the entity has no existing “right of control” over those terms and conditions, in the sense that no existing contract or corporate structure authorizes the entity’s managers to march into the employee’s workplace and dictate the terms and conditions.

To put it differently: An entity is an indirect employer if, assuming it had the will to do so, it could approach the direct employer and successfully insist that the direct employer agree to terms and conditions of employment specified by the entity.

Under this proposed reform, the legal obligations of an indirect employer would be equivalent to those of the direct employer. The direct and indirect employers would be deemed “joint employers” of the direct employer’s workforce. They would be legally required to bargain jointly with the representative of the direct employer’s employees.^{xxvii} If one of the joint employers violated the workers’ right to organize, the multiple employers would each be fully liable, and would litigate among themselves to apportion the damage payments.^{xxviii}

Some of the Board's current rules take steps toward the proposed reform, but only small steps. The Board does recognize that two or more employers may be joint employers of the same workforce. The Board deems two entities to be joint employers if they "share or codetermine those matters governing the essential terms and conditions of employment."^{xxix}

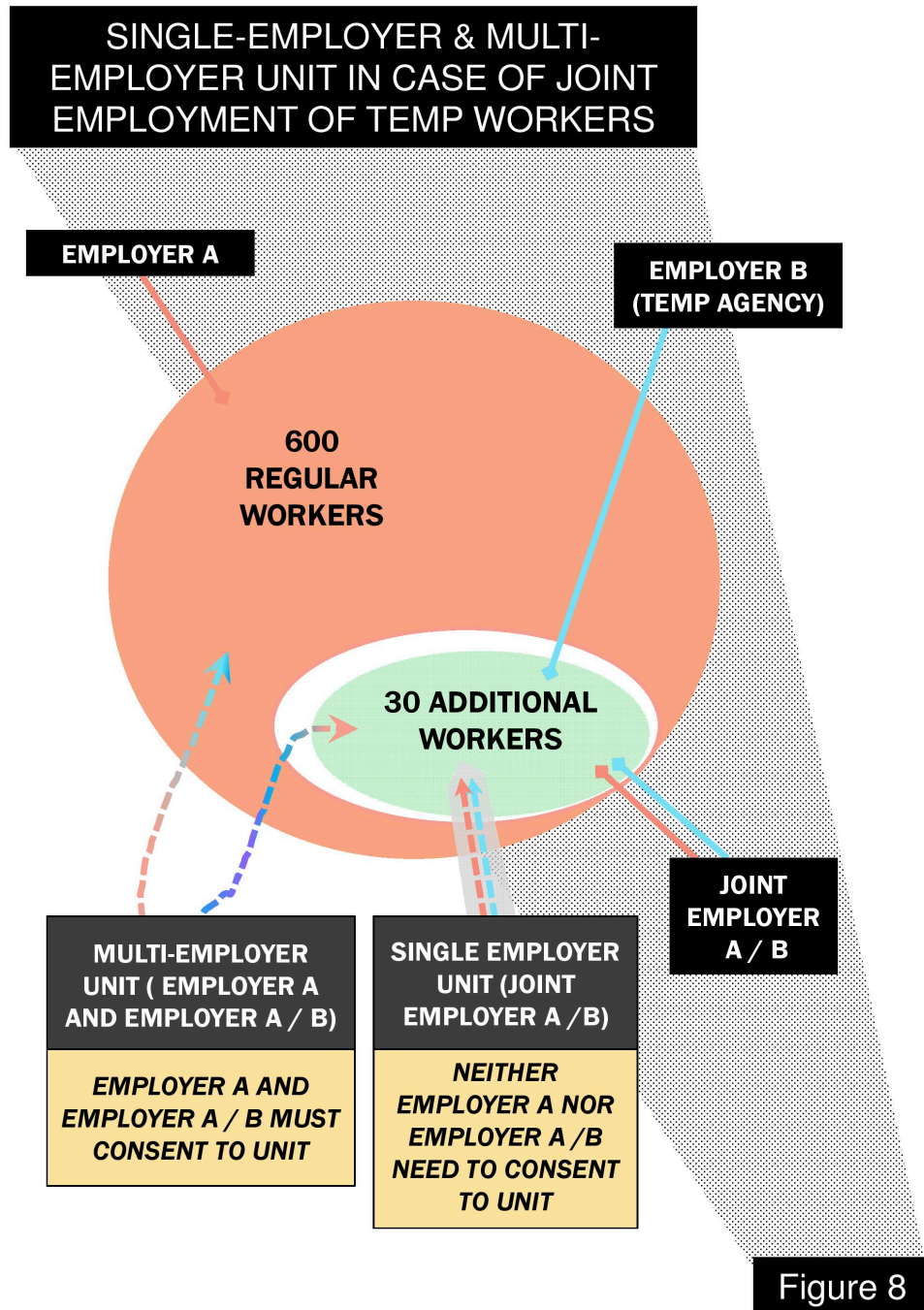
And, if one of the joint employers actively commits an unfair practice (such as discharging an employee for anti-union reasons) while the other plays no role in that action, then the latter employer may be jointly liable if (1) it knew or should have known of the first employer's unlawful action and (2) the non-acting employer did not protest or exercise any contractual right to resist the action.^{xxx}

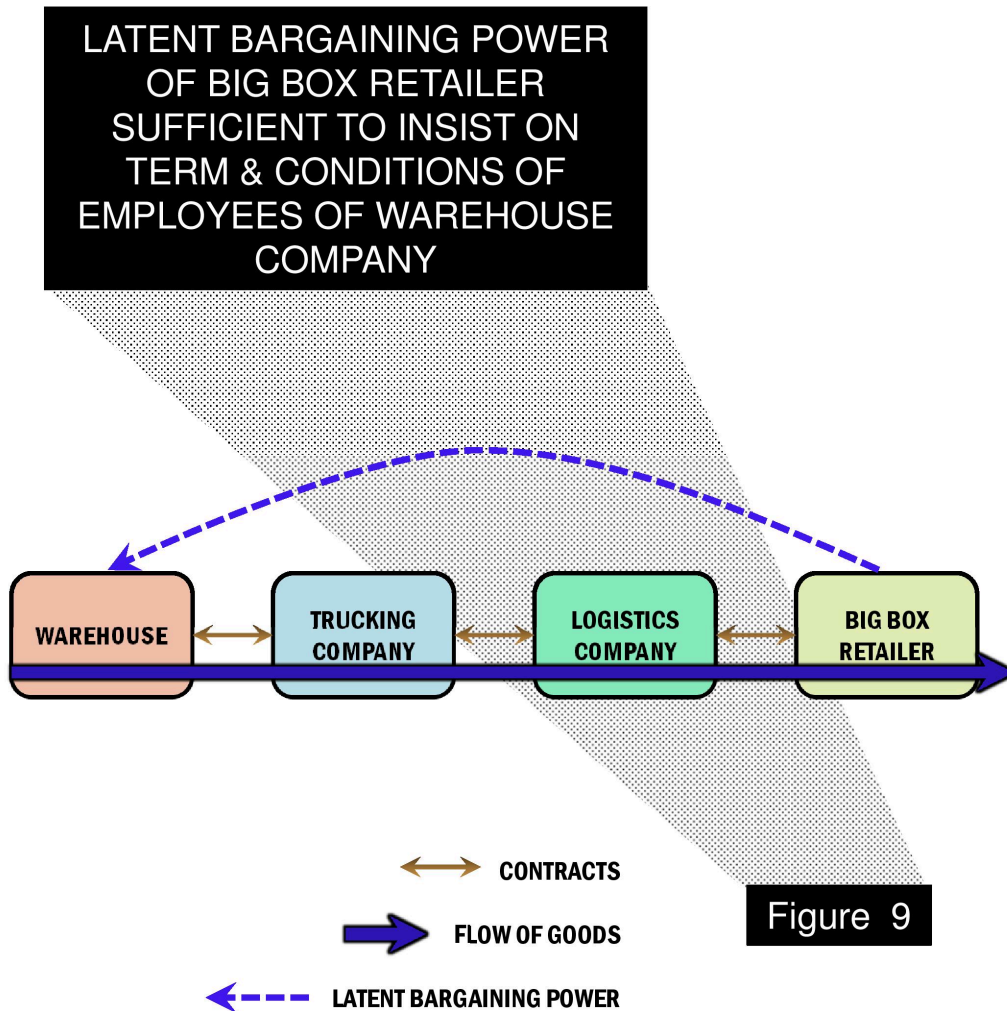
By contrast, under this paper's definition, one employer may be a joint employer of another employer's workforce even if the former currently plays no role whatsoever in determining the terms and conditions of the workforce and has no pre-existing contractual right to determine those terms and conditions. And the former employer is jointly liable for any unfair labor practice committed by the latter employer, even if the former is a non-acting employer and neither knew nor should have known of the latter's unlawful action.

And, under existing Board law, if a unit includes workers jointly employed by two employers in addition to employees of just one of the two employers, the Board deems the unit to be a multi-employer unit. The Board will therefore certify that unit only if both employers consent.^{xxxi} (See Figure 8.) Under this paper's proposals, the Board would certify the unit without the consent of either employer. Since, under the proposed reforms, there is one employer that either directly or indirectly employs all the workers in question, the unit would be a single-employer unit.

If the law adopted this new definition, then organizers and workers would not face the current two-step process of first organizing the separate entities and then merging the entities into a single bargaining structure. Worker organizations could instead organize the enlarged single-employer unit, comprising the indirect employer's workforce, and bargain and strike in that unit. The two-step process would be compressed into one.

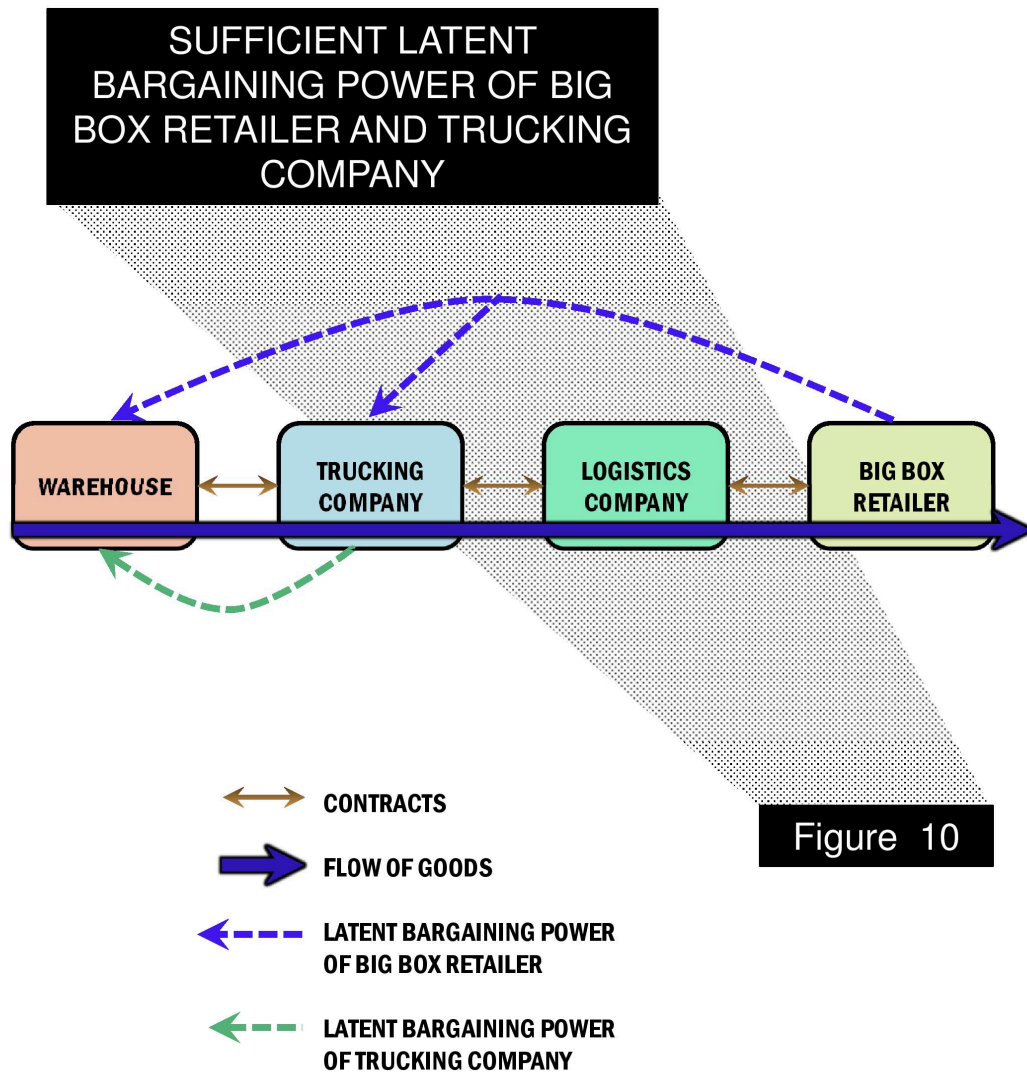
To illustrate how this expanded definition would work in practice, a big-box retailer would be deemed a direct employer of its retail workers and an indirect employer of workers of any warehouse that stores the retailer's goods—if, that is, the retailer has the power to insist that the warehouse meets employment standards demanded by the retailer. The retailer need not, under its existing commercial arrangements, "actually control" those employment standards. And the retailer need not have the "right to control" those employment standards in the sense that the retailer's existing contracts or corporate structure give it such controlling authority. The retailer need not have any direct contract or corporate relationship at all with the warehouse that directly hires, pays, and controls the employees in question. And it is irrelevant whether the retailer knows or should have known about the warehouse or about the warehouse employees' terms and conditions. (Suppose, for example, that the retailer contracts with a logistics company to manage the flow of the retailer's goods from factories to warehouses to the retailer's stores. And suppose that, pursuant to that contract, the logistics company, rather than the retailer, selects and enters into contracts with trucking companies and warehouses. The retailer need not know of the terms of conditions of employment in the trucking companies or warehouses, or even know of their existence or identities.) Rather, the retailer would be deemed the employer of the warehouse workers so long as it could, assuming it had the will, approach the warehouse company and negotiate a contract requiring the latter to provide





its workers with better terms and conditions of employment. (See Figure 9.)

Under the new definition, there may well be more than two indirect employers of a given workforce. To revisit the warehouse workers example, assume that both the retailer and a nation-wide trucking company (that contracts with the logistics company to transport goods to the retailer's stores from warehouses storing those goods) meet the definition of indirect employer. That is, assume each of them has sufficient bargaining power to ensure that the workers in the warehouse storing the retailer's goods enjoy certain terms and conditions. The retailer, trucking company, and warehouse would therefore be joint employers of the warehouse workers, and they must jointly bargain with a worker organization designated by a majority of the warehouse workers. (See Figure 10.)



Now suppose that the retailer has sufficient bargaining power to insist on the terms and conditions not only of the warehouse workers and the retail workers, but also of the truck drivers in the fleets transporting the retailer's goods. Suppose further that the workers who support the worker organization comprise a majority of the combined workforces of the warehouses storing the retailer's goods, the trucking fleets transporting the retailer's goods, and the direct employees of the retail stores to which those goods flow. (For ease of exposition, subsequent references to "truck drivers" refer only to those truckers employed in fleets transporting the retailer's goods, not to all truck drivers employed by the nation-wide trucking company. Likewise, references to "warehouse workers" refer to the workers employed at the warehouse facilities storing the retailer's goods, and not to workers employed at other warehouses owned by the same warehouse company. And "retail workers" refers only to workers in the particular stores receiving goods from those warehouse facilities and fleets. To further simplify exposition, the intermediary "logistics company" is removed from the various scenarios and figures below.) Even if the worker organization is designated by only a minority of the retail workers, a minority of the combined retail workers and warehouse workers, and a minority of the combined retail workers and truck drivers, the worker organization would be the legally authorized representative for all the workers directly hired by the relevant warehouses, the relevant trucking fleets, and the retailer. (See Figure 11.)

**SINGLE-EMPLOYER BARGAINING UNIT, WHERE
MAJORITY OF COMBINED WORKFORCES (IN
WAREHOUSE, TRUCKING FLEETS, AND RETAILER)
DESIGNATE ORGANIZATION X AS THEIR
COLLECTIVE REPRESENTATIVE**

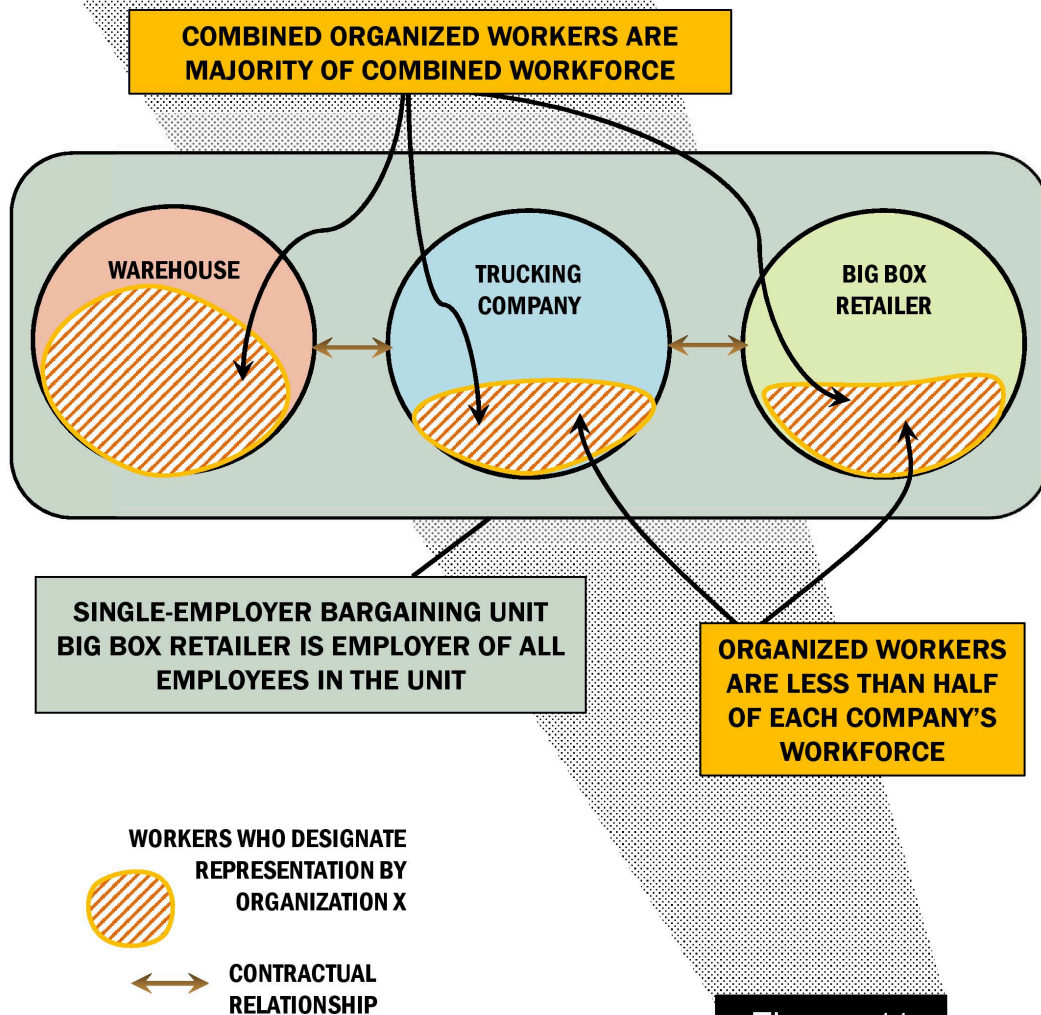


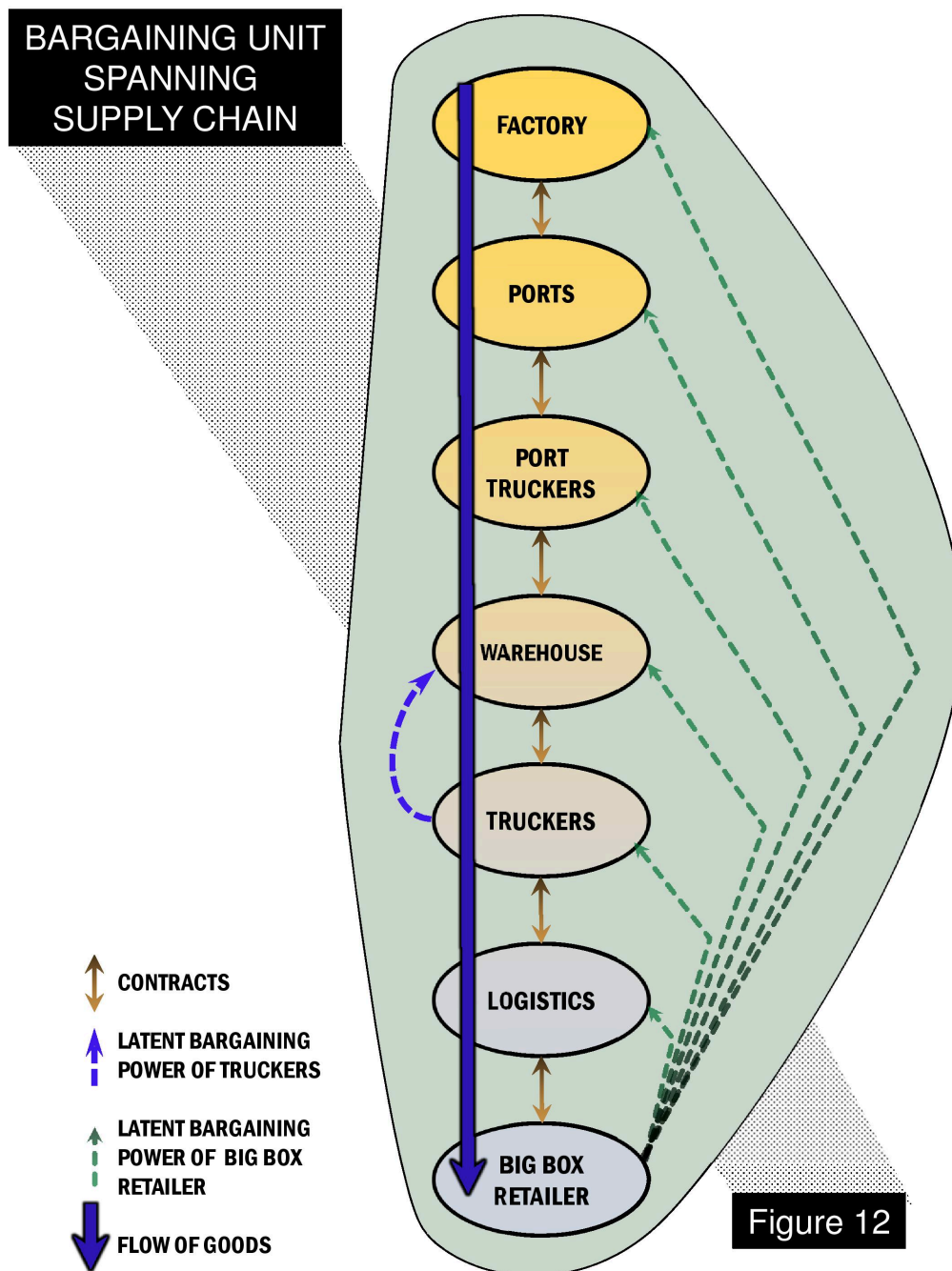
Figure 11

That is, all those workforces would be organized by virtue of the majority-rule principle applied to the retailer, which is deemed the employer of all those workers. This would, under existing law, be considered a multi-employer unit that could not be certified by the Board if any of the direct employers withheld consent. But even if all direct employers consented, under existing law the Board could not certify the

multi-employer unit since, in the absence of designation of a worker organization by a majority of retail workers, a worker organization could not consent to multi-employer bargaining on behalf of that workforce. As just explained, however, under the proposed reform, we would have an organized single-employer unit—that is, the unit of the retailer’s overall workforce, which includes the retail workers, truck drivers, and warehouse workers. Since it would be a single-employer unit, no employer need consent; and an organization designated by a majority of the combined workforce could consent on behalf of the combined workforce. The warehouse company and trucking company would sit at the bargaining table alongside the retailer. The retailer is an employer of all workers in the unit; the trucking company is an employer of the truck drivers and warehouse workers in the unit; and the warehouse is an employee of the warehouse workers in the unit.

In this same scenario, a strike by warehouse workers seeking to change terms and conditions of the direct employees of the big-box retailer or the direct employees of the trucking company would not, as under current law, be an illegal secondary strike. Since the strikers are employees of the retailer and trucking company, albeit indirect employees, the strike is a primary strike. Note that section 8(e) of the NLRA authorizes garment unions to picket and strike against a manufacturer and the subcontractors that work on the manufacturer’s goods—picketing and striking that would otherwise be prohibited as secondary actions. That section does not directly expand the definition of “employer,” nor does it cover the length of supply chains or breadth of networks potentially covered by the proposed new definition. Nonetheless, it points toward the more expansive legal reform just discussed.

The expanded definition of “employer” serves a crucial purpose: It brings to the same bargaining table all parties with the resources and capacity to ensure improvement in the terms and conditions of the workforce in question. This is precisely what is meant by the concept of “sufficient bargaining power” that defines the indirect employer. Under existing law, the warehouse must bargain only with the warehouse workers (if a majority of those workers designates a collective representative); the trucking company must bargain only with the truck drivers (if a majority of truck drivers designates a collective representative); and the retailer must bargain only with the retail workers (if a majority of retail workers designates a collective representative)—even though the retailer effectively controls the resources flowing up the supply chain to the other two employers and could, assuming it had the will, improve the terms and conditions of all those employees, and even though the trucking company decisively influences the resources flowing to the warehouse and could, assuming it had the will, improve the terms and conditions of the warehouse workers. Indeed, under the proposed reform, the retailer would have obligations to bargain with representatives of workforces even further upstream in the supply chain—such as factory workers, dock workers, port truckers, and logistics workers—if the retailer has sufficient bargaining power (vis-à-vis the relevant direct employers) to improve the terms and conditions of their employment.^{xxxiii} (See Figure 12.)

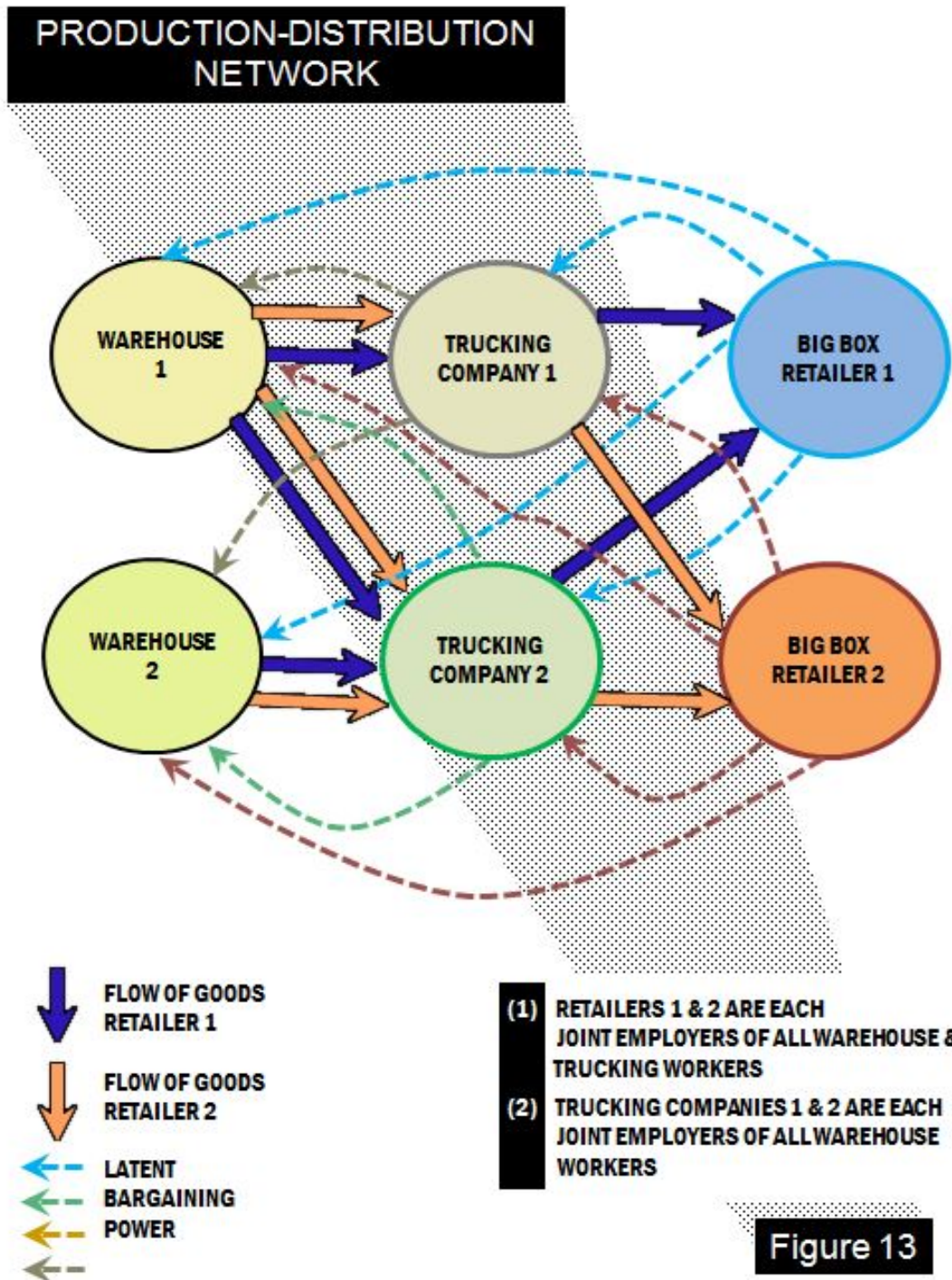


The examples just discussed assume a simple supply-chain pattern—that is, one chain of employers connected by contracts. Suppose instead the employers are arrayed in a network pattern. Imagine, for example, that there are two big-box retailers making use of the same trucking fleets and the same

warehouses; that particular fleets are owned by separate, multiple trucking companies; and that particular warehouses are owned by separate, multiple warehouse companies. Suppose now that each retailer has sufficient bargaining power to insist on the terms and conditions of employment in the warehouses that store the retailer's goods and in the trucking fleets that transport the retailer's goods; and suppose that each trucking company has sufficient bargaining power to insist on the terms and conditions of employment in each of the warehouses. In this case, both retailers would be deemed indirect employers of the warehouse workers and truck drivers; and the trucking companies would be deemed indirect employers of the warehouse workers. (See Figure 13.) If the warehouse workers organize, then the warehouse companies, trucking companies, and both retailers would jointly bargain with the worker organization over the terms and conditions of the warehouse workers. And, again, a strike by the warehouse workers would not be deemed a secondary strike even if the strike aimed to change the terms and conditions of the truck drivers or one or both of the retailers' direct workforces. (More complex network configurations, producing large overlapping single-employer units that might be merged into even larger multi-employer units, are presented in Appendix B.)

In the face of such an expanded definition of "employer," businesses would likely try to game the system in predictable ways. For example, suppose a big-box retailer deliberately divides its inventory among many different warehouse companies that also hold inventory of other retailers. And suppose that, as a result, the big-box retailer would lack the bargaining power to insist on improved terms and conditions for the warehouse workers employed by any particular company. It could then assert that it has no obligation to bargain with the warehouse workers' organization.

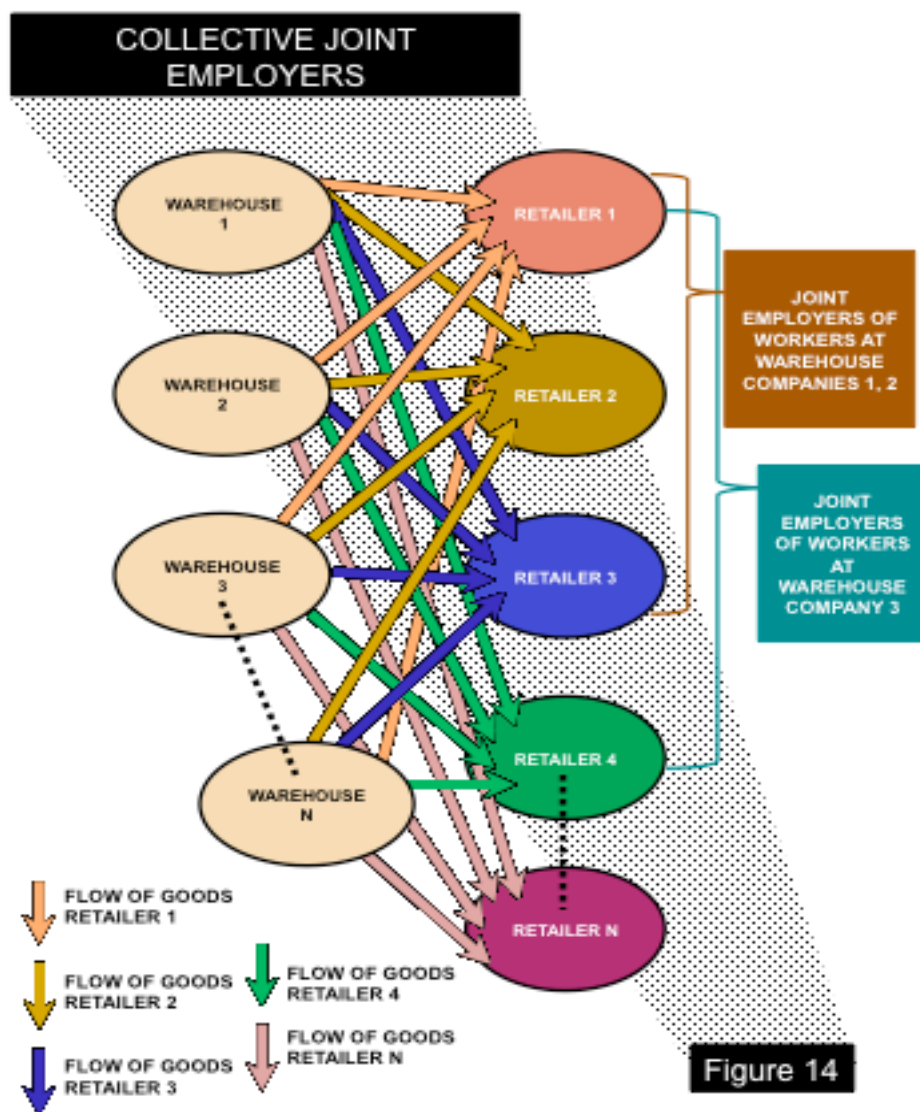
Ancillary legal reforms could preempt this gambit. The law could stipulate that, for purposes of identifying joint employers, the inventory of the several largest users of any given warehouse would be cumulated. Suppose, for example, that the three largest users of the warehouse would, if they bargained as a bloc, have sufficient collective power vis-à-vis the warehouse company to effectively insist that the warehouse provide certain terms and conditions to its employees. Those three would therefore be deemed joint employers of the warehouse workers. If cumulating the inventory of the largest three would still not give them sufficient collective power, then the law would cumulate the inventory of the largest four, and so on, until the law identified a group of retailers whose combined inventory provided sufficient collective power.



These scenarios are shown in Figure 14 (which, for ease of exposition, leaves out any logistics companies, as well as the trucking companies that transport goods from the relevant warehouses to the relevant retail stores). Assume that Retailer 1 stores the most goods in each warehouse, Retailer 2 stores the second most goods in each warehouse, and so on. Assume further that none of the individual retailers has sufficient bargaining power to insist on the terms and conditions of employment in any of the four warehouse companies. And assume that, if the goods stored in Warehouse Companies 1 and 2 by Retailers 1, 2, and 3 were cumulated, then those three retailers would have sufficient collective power to insist on the terms

and conditions of employment in each of those two warehouses. Retailers 1, 2, and 3 would therefore be joint employers of the workers in the warehouses owned by Warehouse Companies 1 and 2.

Now assume that if the goods stored in a warehouse of Warehouse Company 3 by Retailers 1, 2, and 3 were cumulated, those three retailers would still not have sufficient collective power to insist on the terms and conditions of employment in that warehouse. But assume further that if the goods stored in Warehouse Company 3 by Retailers 1, 2, 3, and 4 were cumulated, then those four retailers would have sufficient collective power to insist on the terms and conditions of employment in that warehouse. Retailers 1, 2, 3, and 4 would therefore be joint employers of the workers in the warehouse owned by Warehouse



Company 3. As a matter of efficient inventory control, it would be difficult for a large retailer to disperse its inventory over so many warehouses that it would not fall within the coverage of this rule of cumulation. If the retailer nonetheless found that the gains from avoiding the warehouse workers organization exceeded the costs of inefficient inventory control, legal reform could respond with a backstop. The law could stipulate that any business

that dispersed the production or distribution of its goods or services with the intent of avoiding the rule of cumulation would stand in violation of labor law and be adequately penalized. Alternatively, rather than applying a test of “subjective intent,” the law could authorize the Board or court to apply an “objective efficiency” analysis.^{xxxiii} If the Board or court finds that non-dispersed production or distribution is in fact equally or more efficient than the entity’s dispersed production or distribution, the entity would be deemed the employer of the employees in question regardless of the entity’s intent in dispersing inventory.

To sum up the argument thus far: The expanded definition of “employer” ensures that the most financially and administratively powerful entities are made responsible for securing the labor standards of the employees in question. This reform effectively reintegrates into a single employer the legal responsibilities of the various employer entities spun off by the disintegrated corporation. Such a reform will often do the work that, under existing law, is the primary purpose of multi-employer bargaining structures.

But the expanded definition of “employer” will not always do the job. There are many settings in which there is no powerful, well-capitalized, centralized entity standing in a commercial relationship—at one or at several contractual removes—with the workers in question. In those settings, there may be no entity with sufficient bargaining power to insist that direct employers improve the terms and conditions of their direct employees. Think, for example, of a small, independent retail store that contracts with various service providers, such as a cleaning company, payroll company, insurance company, and so on. Although the store is the hub in a contractual wheel, it may not have sufficient bargaining power to dictate the terms and conditions of those companies’ employees.^{xxxiv}

Revising the legal rules that regulate the formation and operation of multi-employer units should therefore complement the expanded definition of “employer;” and such reforms are discussed in the following subsection.

To clarify the relationship between the reforms discussed above and those proposed in the subsection immediately below: The reforms proposed above would make it easier for worker organizations to form multi-employer bargaining units. If the new definition of “employer,” discussed above, were not implemented, then the multi-employer unit would include two or more direct employers or joint employers, as narrowly defined in existing law, each of which has been organized prior to or concurrent with the formation of the multi-employer bargaining unit. (See Figure 15.) However, if the reforms to the definition of “employer” were implemented, then the multi-employer unit would include two or more direct or enlarged indirect employers, each of which has been organized prior to or concurrent with the formation of the multi-employer bargaining unit. (See Figure 16.)

POTENTIAL MULTI-EMPLOYER BARGAINING UNITS UNDER EXISTING LAW

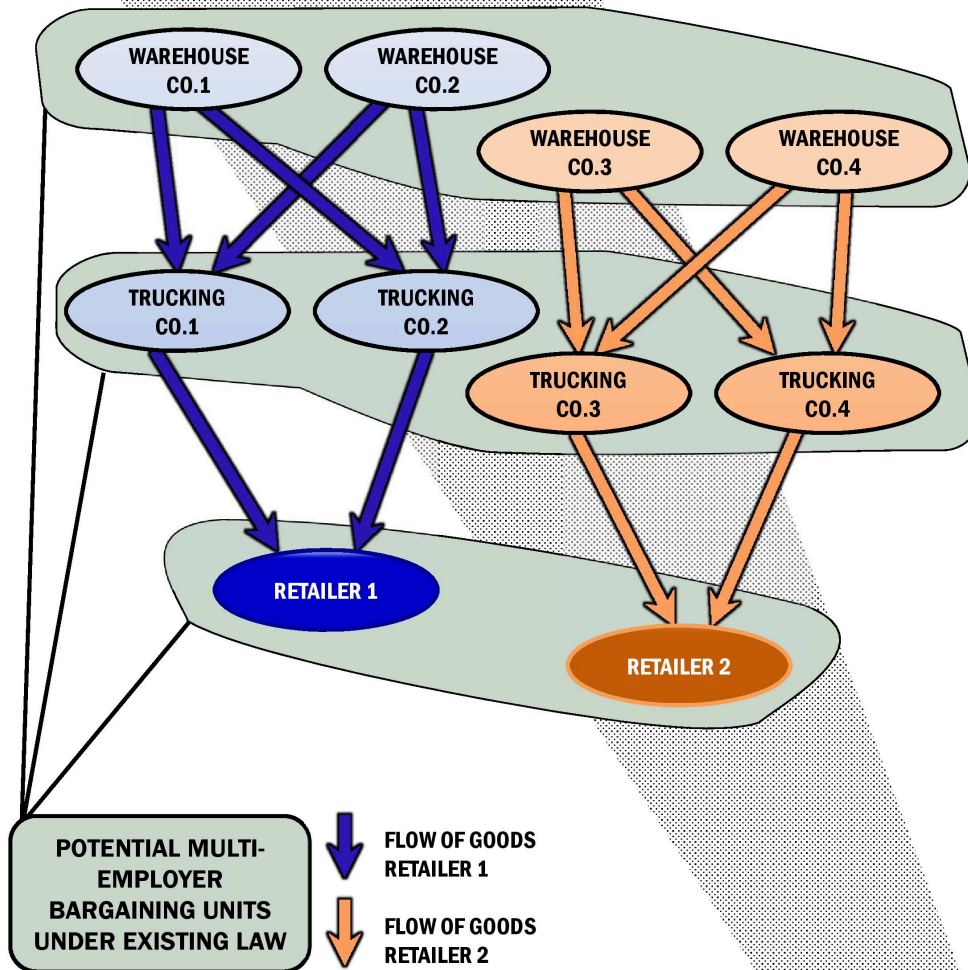
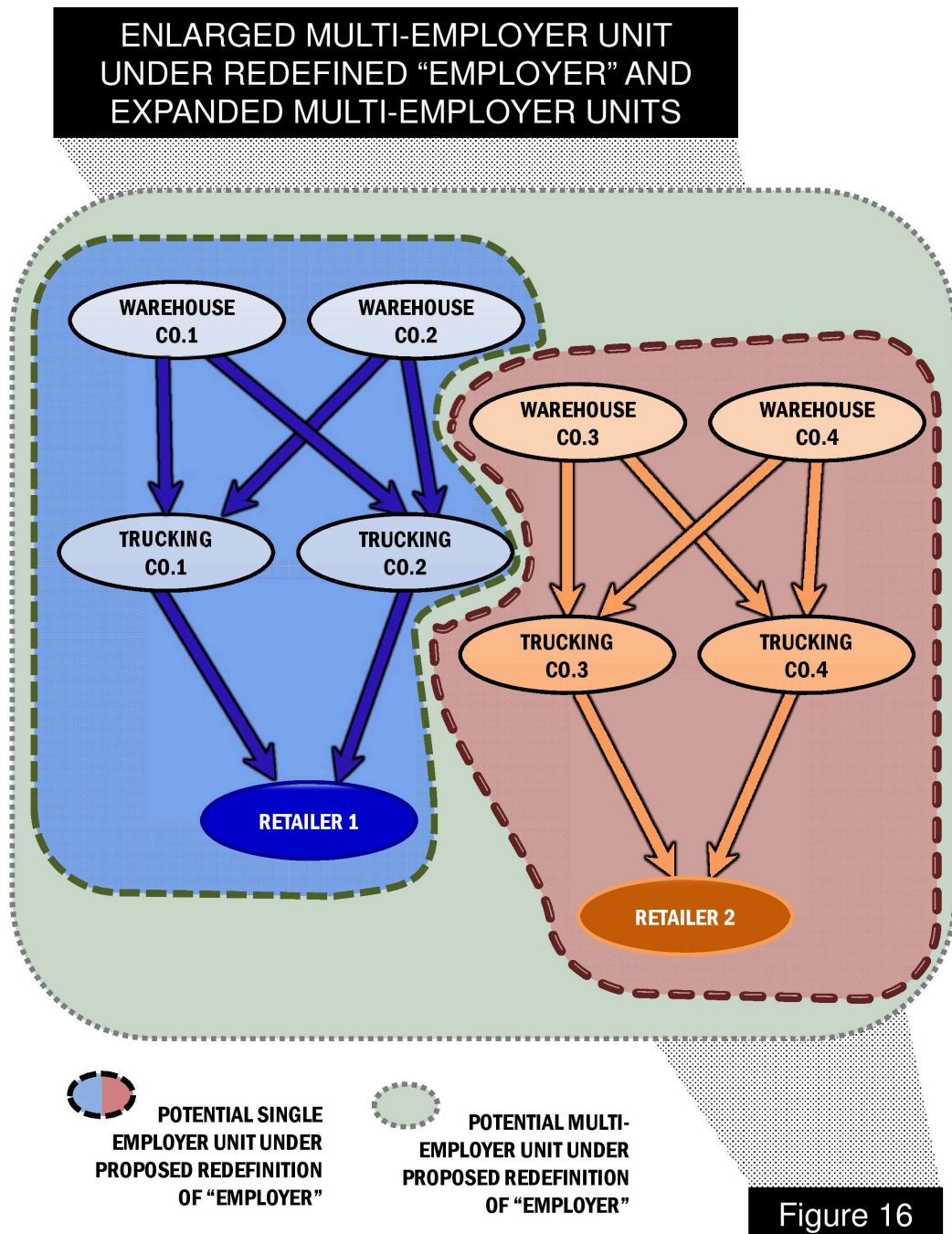


Figure 15



Reforming the Process of Designating Multi-Employer Units

Recall that existing legal rules do not authorize the Board to mandate multi-employer units, except in limited situations. Multi-employer units are created only when employers voluntarily choose to bargain as a group, indicated by historical practice or present consent. These rules do not authorize worker organizations to demand the aggregation of single-employer units into multi-employer units, and to strike in support of that demand. These rules should be reversed.

Legislative reform should authorize the Board to designate multi-employer units, rather than single-employer units, if such enlarged units provide the “maximum potential for worker empowerment.” (The definition of the latter key concept is discussed below, in section five.)

The legislation should provide for Board designation, at the initial organizing stage, of either single-employer or multi-employer units, based on the “maximum potential for worker empowerment” standard. The law should also stipulate that single-employer units may, at a later time, be aggregated into a multi-employer unit in cases where intervening or ongoing organizing shows that workers will be most empowered by such a sequence. To implement the second step of this sequence, the legislation should authorize a process akin to the Board’s current “unit clarification” procedure.^{xxxv}

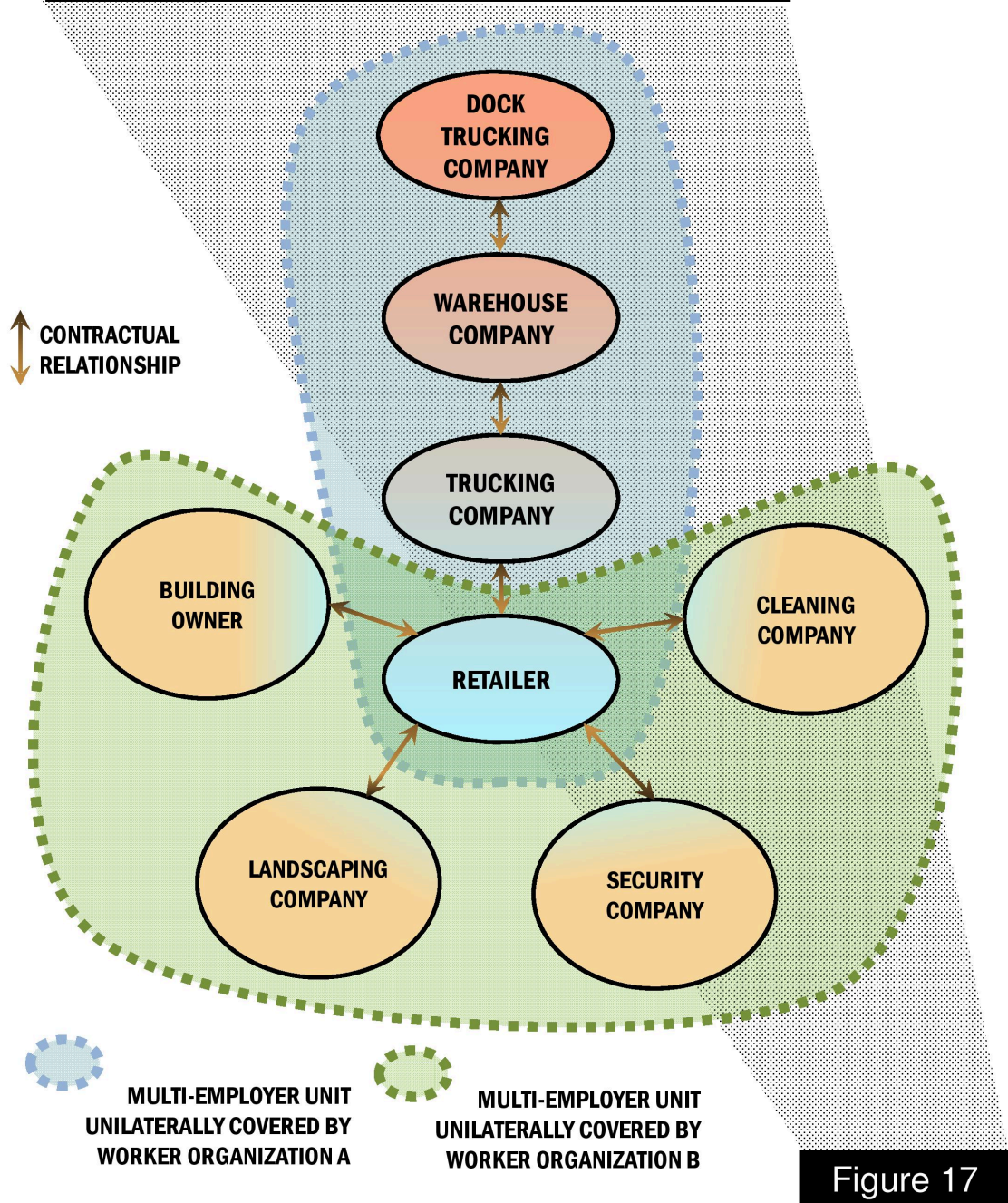
Legislative reform should also authorize worker organizations (as distinct from the employer or the Board) to choose multi-employer units or any other unit defined by the organization. At a minimum, worker organizations should be authorized to strike in support of a demand for multi-employer bargaining. More straightforwardly, the law should simply authorize worker organizations, as they see fit, to unilaterally mandate organizing and bargaining in multi-employer units (or any other units designated by the worker organization). If employers resist the worker organization’s unilateral designation of the unit, the Board should enforce the worker organization’s choice of unit.

True, these rules would generate many tricky legal questions—too many to answer in the context of this paper’s broad articulation of guiding principles for reform. For example, two worker organizations might unilaterally designate two different, partially overlapping multi-employer units. Think again of the situation in which a retailer is simultaneously both the downstream node of a supply chain and the hub of a contractual hub-and-spoke wheel. (To simplify the exposition, assume now that the retailer is not an indirect employer of any non-retail workforce. That is, assume the retailer does not have sufficient bargaining power to determine the terms and conditions of any workforce in the supply chain and hub-and-spoke wheel, other than the terms and conditions of the retailer’s direct employees.) Suppose Worker Organization A unilaterally announces a multi-employer unit encompassing the supply chain, while Worker Organization B unilaterally announces a multi-employer unit encompassing the hub-and-spoke wheel. The retailer would be a member of both announced units. (See Figure 17.)

This conflict could be resolved in several ways. The law could authorize the Board to make a determination among the following options:

(1) Affirm each of the separate units; include the retailer in each unit; and require employers in the first unit to bargain with Worker Organization A and the employers in the second unit to bargain with Worker Organization B.

ILLUSTRATION OF SUPPLY CHAIN AND CONTRACTOR WHEEL OVERLAP



(2) Affirm and merge both units and require all employer members of the merged unit to bargain concurrently with the two worker organizations.

(3) Place the retailer in only one of the two units; and require employers in the first unit to bargain with Worker Organization A and employers in the second unit to bargain with Worker Organization B.

The Board's choice among these three options would again be guided by the "maximum potential for worker empowerment" principle. That principle may often steer the Board to the various criteria used in existing law to identify which group of employees have a "commonality of interest," although those criteria will likely not be the only factors that are relevant to the measurement of "maximum potential for worker empowerment."

Beyond Employer-Based Units

The reforms proposed above assume that the scope of multi-employer organizing and bargaining will follow the boundaries of employers connected contractually with one another, whether two employers that directly contract with one another or employers that stand at several removes in a chain or network of contracts.

But worker organizations may wish to organize workers across employers that are not contractually interconnected. A prominent example is ROC's organizing of restaurant workers from city to city.^{xxxvi}

Legal reform should authorize worker organizations to designate a multi-employer unit not only on the basis of supply-chain, network, hub-and-spoke wheel, or pyramid, but also on the basis of industry, occupation, and/or geography. And the Board should defer to that designation, unless another worker organization meets a burden of proving that a different unit will maximize potential worker empowerment.

In many settings of this type, aggressive legal reforms that directly address the logistical difficulty of demonstrating majority support in the workforce of each small employer, prior to aggregation of the employers into a multi-employer unit, may be essential. One such reform would give bargaining rights to a worker organization if it organized a majority of workers across the entire multi-employer unit, even if it has not organized a majority in each of the individual employer workforces. Suppose, for example, that the organization has the support of the majority of fast-food workers in New York City. Under the proposed reform, the organization could mandate that all New York fast-food restaurants participate in multi-employer bargaining with the organization, even though the organization has the support of only a minority of the workers in many of the individual restaurants.

It will not be surprising if, in some contexts, the master principle of "maximizing the potential for worker empowerment" calls for bargaining units that match the expanded definition of "employer" set forth above—since, as we have seen, the new definition of "employer" is designed to ensure that the worker organization negotiates with the entities that can most fully enable workers to improve their terms and conditions. But, as previously mentioned, a unit the width of the employer, even under the expanded definition, will not always provide maximum potential for worker gains. It is therefore necessary to provide greater flexibility for worker organizations and the Board to explore other, potentially more empowering structures. In some contexts, that master principle may point to bargaining units that span supply chains, networks, pyramids, and other contractually interconnected entities, even when no single entity has "sufficient bargaining power" over the terms and conditions of all employees in the unit. In others, it may point to (perhaps geographically bounded) occupational or industrial units that include multiple employers that are not contractually interconnected at all. Indeed, the number and identity of the employers covered by such units may be quite changeable, since the scope of the unit is not defined by the boundaries of existing employers.

Beyond the Majority-Rule Principle

The reforms proposed above retain the rule that employers are obligated to bargain with the worker organization only if it has organized a majority of workers within the unit, whether a single-employer unit or a multi-employer unit. As just noted, that rule creates especially severe obstacles to organizing in the many sectors with small, dispersed employers that are not linked to more powerful entities that might provide centralized leverage.

That rule could be modified: Suppose a majority of workers in a relatively small unit join the worker organization but those workers comprise only, say, from 10 to 50 percent of the workers in an enlarged multi-employer unit. Suppose further that only a trivial percentage of workers outside the small unit but within the multi-employer unit have designated that worker organization. Legal reform could require other employers in the enlarged unit to comply with the collective agreement already negotiated for the smaller unit, to join the multi-employer bargaining association, and to jointly bargain with the worker organization in future rounds of negotiation.^{xxxvii}

The mandate for multi-employer bargaining in a unit in which one or more worker organizations have organized only a minority of the workforce—even a relatively small minority—is a radical reform. But there are precedents for such a system, both in labor law regimes that otherwise closely resemble that of the U.S. (such as Canadian provincial labor law) and in regimes that are substantially different (such as several Western and Northern European countries). In some countries or provinces, the labor board or labor ministry may order the “extension” of a collective agreement across an entire sector even when the agreement is bargained by a union representing a minority of workers in the enlarged unit, so long as there is a finding that the union is “substantially representative” of the enlarged workforce, or the “most preponderant” among multiple unions.^{xxxviii}

These rules would not foreclose the right of other worker organizations to organize in the same unit and attempt to bargain agreements that set a new unit-wide standard by negotiating the “most representative” or “most preponderant” agreement. Multiple worker organizations might therefore engage in a healthy race to the top; alternatively, they might engage in coalition bargaining with the employer association. A race to the bottom among rival unions is, of course, a possibility. Here again, the outcome would likely depend on the capacity of a progressive movement to ensure the appointment of progressive administrators and judges charged with determining the most representative or preponderant agreements in the most empowering units.

These proposals are hardly silver bullets. The reform is a top-down extension of terms and conditions and a top-down mandate to bargain prior to broad-based organizing on the ground. Many organizers and researchers doubt the viability of collective bargaining by a minority organization that cannot credibly threaten a meaningful strike across a wider workforce.^{xxxix} Nonetheless, the experience in other countries indicates that such reforms are viable when other preconditions are in place. The two most important legal preconditions are rigorous protection of workers against retaliation, and either mandatory payment of organizational dues by all workers in the enlarged unit or government subsidies to worker organizations. The most important non-legal precondition is a strong culture and politics of dynamic worker organizing. Most relevantly, some worker organizations in the U.S., such as ROC, the Coalition of Immokalee Workers, and SEIU have pursued strategies of concurrently organizing and promoting multi-employer associations that encompass workforces in which the organization has not yet organized a significant minority.

An even more radical reform would require employers to join and bargain through employers associations, even in the absence of a significant minority of organized workers, in sectors that are highly resistant to organizing by reason of the small scale and dispersion of businesses. This reform, too, has precedents in foreign countries and provinces, especially but not exclusively in the construction sector. A home-grown paradigm is the recent creation, under state law, of employers-of-record for purposes of collective bargaining over wages and benefits of home healthcare workers.

How to Define “Sufficient Bargaining Power” and “Maximum Potential for Worker Empowerment”

The concepts of “sufficient bargaining power” and “maximum potential for worker empowerment” are critical to the proposed reforms. Recall that under the proposed expansion of the concept of “employer,” an entity is an indirect employer of a workforce if it has “sufficient bargaining power” to insist that the workforce’s direct employer provide terms and conditions of employment specified by the entity. And a second proposed reform would require the Board to designate bargaining units that afford “maximum potential for worker empowerment.”

As important as these two concepts are, legislation embodying the reform proposals should explicitly leave those concepts undefined. The legislation should instead authorize the Board and courts to define the concepts through the case-law method, or through iterative administrative rule-making.

As for the concept of “sufficient bargaining power,” worker organizations and alleged indirect employers will be well-motivated to present the Board and courts with theoretical and empirical arguments about whether the putative indirect employer has sufficient bargaining power to negotiate agreements requiring the direct employer to afford specified terms and conditions. And, in the many cases where multiple employers are found jointly and severally liable for violations of employment law, the various employers will be well-motivated to present theoretical and empirical arguments about each party’s relative bargaining power, for purposes of allocating damage awards among the employers. We can also expect that legal commentators and social-science researchers will analyze those theoretical and empirical questions in publications that are useful to litigants, judges, and administrators.

For judges and administrators, certain indicators of bargaining power may seem clear-cut. For example, a corporation that purchases a large proportion of another company’s goods or services has relatively more bargaining power vis-à-vis the supplier company than does a corporation that purchases a smaller proportion. And, if the supplier of goods and services has sunk capital into technology that is specific to idiosyncratic goods and services produced for the purchaser corporation, the purchaser’s bargaining power is increased still further. Further, if the purchaser is a large, well-capitalized corporation with substantial cash reserves or easy access to credit, and can readily switch its purchases to other suppliers, then it has relatively strong bargaining power vis-à-vis a small, poorly capitalized supplier with minimal cash reserves and limited access to credit. The large corporation has greater capacity to hold out during contract negotiations, and can exit the negotiation altogether and change suppliers at relatively low cost.

Although such general indicators can be identified prior to application of the proposed reform legislation, the question of whether one party has “sufficient bargaining power” to achieve a certain agreement with another party will likely hinge on detailed, contextual facts. That question is therefore best answered by judicial and administrative decision-making over time, informed by careful fact-finding, by the arguments of workers’ and employers’ legal representatives, and by legal and social-science research.

The legislature may wish to return to the question and codify indicators of bargaining power after the ripening of this process through judicial and administrative application. Before that time comes, it is critical that the initial legislation explicitly requires judges and administrators, when in doubt, to rule in favor of claims that a party is an indirect employer—since the core purpose of the legislative reform is to dramatically expand the definition of “employer” and ensure that larger, well-resourced employers are at the bargaining table to provide improved terms and conditions of employment. The model legislation in Appendix A contains just such a provision, directing judges and administrators to adhere to this principle.

Analogous points can be made about defining bargaining units that have the “maximum potential for worker empowerment.” Worker organizations, their lawyers, and their social-science allies will analyze that concept and present their arguments to the Board and courts. And recall that, under the proposed reform, the Board must defer to the worker organization’s choice of bargaining unit, unless two or more worker organizations claim to represent overlapping units.

Concluding Thoughts: From Here to There

To reiterate the essential political foundation of these proposals: The scale of the proposed reforms makes their enactment and lasting enforcement highly unlikely unless a durable progressive movement transforms the political landscape. And such a movement is essential to ensure reliable administrative and judicial interpretation of the key concepts—“sufficient bargaining power” and “maximum potential for worker empowerment”—through persistent pressure for appointment of progressive administrators and judges and for ongoing Congressional commitment to the spirit of the reforms.

Even then, the reforms’ practical success would require ancillary legal reforms that enable workers to organize without fear of employer retaliation. This is a long-term and unpredictable project, to be sure.

And, the promise of these policy reforms would be realized only by dynamic worker organizations that seize the opportunity to organize on the ground. Imagining the path to such a future from our current dreary political life is far beyond the scope of this paper and the capacity of this author. The main intent of this paper, to repeat, is to enlarge progressive debate about long-term possibilities for a new legal infrastructure. But I conclude by pointing to two sorts of incremental steps that aim in the right direction.

Affirmative Incentives to Accelerate Multi-Employer Organizing

Policy reforms might amplify the existing positive incentives (monetary subsidies and tax benefits) for organizing across business entities—incentives that flow to both worker organizations and the workforces they organize. There are many real-world examples. States provide subsidies to consortia of unions and employers for vocational training keyed to actual workplace needs.^{xi} The federal government offers tax deductions and reduced insurance premiums for multi-employer pension and welfare funds financed and managed by unions and employers. In many countries, worker organizations serve as the vehicle for providing social insurance of various kinds.^{xli}

These examples could be generalized. They rest on the principle that multi-employer bargaining structures and partnerships provide a wide array of collective goods to the public and should therefore be reimbursed by the wider citizenry, just as our tax dollars go to the provision of public goods. Indeed, the Supreme Court has recognized the principle that employers who fail to comply with labor standards are

effectively taking unfair subsidies from the community and, obversely, that mechanisms to ensure labor standards provide community goods.^{xlii}

Progressives should take every opportunity to publicly reiterate and disseminate this principle.

The principle applies to both traditional unions and non-traditional worker organizations, such as “open-source” unions, worker centers, or employee associations. Each of these organizational forms provides community-sustaining benefits, even when their activities are not directed at achieving collective bargaining agreements.

Initial Administrative and Judicial Steps toward Multi-Employer Bargaining

Short of the comprehensive legislative reforms proposed in this paper, are there incremental steps in the right direction that might be achieved by legally valid reinterpretation of existing legislation by the Board and courts?

The proposed redefinition of “employer”—enlarging the scope of a single employer to cover multiple links in supply chains, networks, contractual wheels, or pyramids—cannot be achieved by reinterpretation of the existing NLRA definition (even if such reinterpretation could yield small-scale revisions around the edges of the currently narrow joint employer rules). Clear legislative history, repeatedly cited by the Supreme Court, decisively states that the NLRA codifies narrow, well-settled rules of principal-agent law.

Likewise, in light of the NLRA’s clear rule against exclusive representation by a minority union, it would be implausible, by administrative or judicial reinterpretation, to extend a worker organization or collective agreement across a multi-employer unit in which only a minority of workers has designated the organization as their representative.

But an activist Board or Supreme Court might take incremental steps toward almost any of the other reforms proposed above. Here are four such steps:

First, as explained above, the Board has interpreted the NLRA’s definition of bargaining units to permit the certification of multi-employer units, and the courts have affirmed the Board’s interpretation. But the Board has limited multi-employer units to contexts in which multi-employer bargaining has been historically entrenched or is grounded in current majority support for the worker organization in each single-employer unit. In doing so, the Board looks backward, not forward.

However, the Board’s reading of the relevant NLRA language does not foreclose a forward-looking authorization of multi-employer units, should a progressive Board or court choose to reinterpret the Board’s authority. The Board could authorize a multi-employer unit and require an employer association to bargain with a worker organization if a majority of unit workers designates the organization as their representative, even if the organization does not have majority support in some of the workforces of individual employer members of the association.

Second, the Board’s existing general criteria for determining the scope of bargaining units do not preclude greater emphasis on the degree to which the proposed unit increases workers’ capacity for future multi-employer organizing, even if it is a stretch to expect even the most activist Board and Supreme Court to adopt this paper’s proposed test of “maximum potential for worker empowerment.”

Third, the text of the NLRA does not explicitly require the Board and courts to adhere to the existing rule that a labor organization may not unilaterally demand that employers join a multi-employer unit and may not strike in support of that demand. True, reversing that rule would upend settled precedent holding that unit determinations are permissive subjects of bargaining, over which worker organizations may not strike. But, as labor lawyers know well, the NLRA text drawing the line between mandatory subjects (over which worker organizations may strike) and permissive subjects (over which they may not) is open-ended and susceptible to discretionary reinterpretation,^{xliii} if a progressive Board and Supreme Court were so inclined.

Finally, the Board might give a broader, more dynamic interpretation to its unit clarification authority. That is, as a worker organization succeeds in organizing more and more workers, the Board should be open to proportionately expanding the bargaining unit in which the organization constitutes a majority.^{xliiv} There are precedents for this dynamic expansion of bargaining units in foreign labor law, including Canadian provincial systems.^{xliv}

ⁱ U.S. Department of Labor, Bureau of Labor Statistics. 2015. Economic News Release: Union Members Summary (January 23, 2015). Retrieved April 25, 2015 (<http://www.bls.gov/news.release/union2.nr0.htm>).

ⁱⁱ Rosenfeld, Jake. 2014. *What Unions No Longer Do*. Cambridge, MA: Harvard University Press.

ⁱⁱⁱ Barenberg, Mark. 1994. "Democracy and Domination in the Law of Workplace Cooperation." *Harvard Law Review*. 94(3): 753-983.

^{iv} Closely related to the reform proposals discussed in this paper are complementary reforms that would legalize secondary strikes and boycotts, deregulate strikes to gain employers' recognition of worker organizations, and facilitate so-called "open-source unionism." This paper touches briefly on those three topics but does not comprehensively discuss them.

^v As mentioned in the introduction, the paper's concluding section does offer some incremental steps that might be implemented via reinterpretation of existing statutes.

^{vi} Katz, Harry. 2004. "United States: The Spread of Coordination and Decentralization without National-Level Tripartism." Pp.192-212 in *The New Structure of Labor Relations*, edited by H. Katz, V. Lee, and J. Lee. Ithaca, NY: Cornell University Press.

^{vii} Gary Herrigel and Zeitlin, J. 2010. "Inter-Firm Relations in Global Manufacturing: Distintegrated Production and its Globalization." Pp. 527-563 in *The Oxford Handbook of Comparative Institutional Analysis*, edited by G. Morgan and J. Campbell. Oxford: Oxford University Press.

^{viii} And, of course, the five patterns and their variations pre-date the current era of the disintegrated corporation, though in this era we see a relative increase in the first four patterns and their combinations.

^{ix} Jayaraman, Saru. 2013. *Behind the Kitchen Door*. Ithaca, NY: Cornell University Press.

^x Savage, Lydia. "Justice for Janitors: Scales of Organizing and Representing Workers." *Antipode*. 38(3): 645-666.

^{xi} Allen, Nicholas. 2010. "Exploring the Inland Empire." *New Labor Forum*. 19(2): 36-43.

^{xii} Section 8(e) of the National Labor Relations Act grants partial exceptions to this rule in the construction and garment industries.

^{xiii} The NLRA is also known as the Wagner Act. The NLRA was amended in 1947 by the Labor Management Relations Act (LMRA), also known as the Taft-Hartley Act. But "the NLRA" conventionally refers to "the NLRA as amended by Taft-Hartley." The Taft-Hartley Act also includes some free-standing provisions, as distinguished from amendments of NLRA provisions. The former provisions are referred to as Taft-Hartley provisions, not as NLRA provisions. References to the NLRA or "The Act" in this paper denote the NLRA as amended by Taft-Hartley.

^{xiv} As discussed below, the Board has in fact interpreted "employer" to include multi-employer associations in particular contexts.

^{xv} Barenberg, Mark. 1994. "Democracy and Domination in the Law of Workplace Cooperation." *Harvard Law Review*. 94(3): 753-983.

^{xvi} *Mohawk Business Machine Corp.*, 116 NLRB 248 (1956).

^{xvii} J&L Plate, 310 NLRB 1085 (1993).

^{xviii} Note that the specifically legal problem here is not the existing rules, just described, that obstruct multi-employer units but rather (a) the law's failure to protect workers against employer retaliation; (b) the law's requirement that a collective representative be designated by a majority of workers in each of the scattered worksites; and (c) the absence of legal rules that might proactively mandate wider bargaining structures. Some conceivable rules that respond to points (b) and (c) are discussed below.

^{xix} Kroger Co., 148 NLRB 569 (1964).

^{xx} Since multi-employer bargaining is entirely voluntary, an employers association emerges for purposes of bargaining, striking, and lockouts only where significant advantages accrue to employers. Employers may want to avoid "whipsaw" strikes that would otherwise enable the worker organization to pick off employers one at a time. If the organization strikes against one member of an employers association, the others can lockout their workers. Or employers may want to bargain for a Most Favored Nation ("MFN") clause that requires the worker organization to agree to lower wages for every employer in the multi-employer association if the organization agrees to lower wages for a single employer that never joined or that has withdrawn from the association. The MFN clause gives some protection to organized employers against competition with rival businesses with lower labor costs.

The worker organization, like the employer, can sometimes reap significant gains from multi-employer bargaining. Industry-wide bargaining promises to "take wages out of competition," the primordial goal of unionism. Further, in a multi-employer unit, it is more difficult to decertify a recognized worker organization, since obtaining the 30 percent of worker support required to trigger a decertification election is more difficult than in a smaller, single-employer unit. And workers of a single employer, so long as it remains in the multi-employer unit, may not petition for decertification of the worker organization as the representative of that employer's workforce. Also, for a number of reasons, the worker organization may anticipate that, in the face of an MFN clause, a weaker employer may in fact stay in the association and pay higher wages, rather than leave the association and hope to rid itself of the organization. Each employer is aware that all workers in the multi-employer arrangement subsidize the strike fund that sustains workers who might strike a lone employer. The worker organization can also engage in area-standards picketing against a renegade employer, demanding that the employer incur labor costs equivalent to those incurred by members of the association. Moreover, the strongest employers may—by dominating the procedures through which withdrawal penalties are exacted against employers who leave the association—impose disproportionate costs on the employer who threatens to exit.

^{xxi} More precisely, Section 2(2) defines "employer" to include "any person acting as an agent of an employer, directly or indirectly;" and Section 2(1) defines "person" to include one or more "associations." The Board concludes that a multi-employer association is a person acting as an agent of its constituent employers and is therefore itself an "employer" for purposes of Section 9(b)'s limitation of the scope of appropriate units to the breadth of an employer.

^{xxii} Arden Farms, 117 NLRB 1216 (1957).

^{xxiii} York Transfer & Storage Co., 107 NLRB 139 (1953).

^{xxiv} American Consolidating Co., 226 NLRB 923 (1976).

^{xxv} McAnary & Welter, 115 NLRB 1029 (1956).

^{xxvi} Ruckelshaus, Catherine, Rebecca Smith, Sarah Leberstein, and Eunice Cho. 2014. *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*. New York: National Employment Law Project.

^{xxvii} This rule is recognized under existing Board law. If there are joint employers of one workforce, the Board finds that the workforce comprises a single-employer unit, since the joint employers are deemed to be a merged, single employer. But the Board's definition of joint employers is very narrow compared to the definition proposed in this paper.

^{xxviii} In legal parlance, the joint employers would be "jointly and severally liable" for any damage award. These are the rules already imposed by the Board in cases where joint employers are found liable for unfair labor practices. *Aim Royal Insulation, Inc.*, 358 NLRB No. 91 (2012). But as discussed in the text, the Board's definition of joint employers is much more narrow than this paper's proposed definition.

^{xxix} *Aim Royal Insulation, Inc.*, 358 NLRB No. 91 (2012).

^{xxx} *Capitol EMI Music*, 311 NLRB 997, 1000 (1993), *en'd.* 23 F.3d 399 (4th Cir. 1994).

^{xxxi} *H.S. Care L.L.C. (Oakwood Care Center)*, 343 NLRB 659 (2004). Suppose, for example, that Employer A has 600 regular production employees, and a distinct temporary agency (Employer B) provides 30 additional workers to work alongside the regular employees. And suppose that both Employer A and Employer B control significant aspects of the 30 additional workers' terms and conditions of employment. The two employers are therefore joint employers of the additional workers. Those 30 employees are therefore deemed to have a single employer (Employer A/B), and a unit including those employees is a valid single-employer unit. But a unit including both the 600 regular and 30 additional employees is a multi-employer unit, since the unit employees are employed by both Employer A and Employer A/B. This example is pictured in Figure 8.

^{xxxii} The proposed strategy of expanding the definition of “employer” is similar to the strategy of transnational anti-sweatshop campaigners who pressure global retailers to take financial responsibility for improving labor conditions in the overseas factories that produce the retailers’ goods. Currently, the retailers pay low prices to the factories, forcing the factories to lower their labor costs, violate labor rights, and suppress worker organizations even while the retailers claim they are enforcing a code of labor rights for the factory workers. Unless the retailers are required to provide resources that enable the factories to maintain safe conditions, pay a living wage, and bargain with a worker organization, the retailers’ codes of conduct are hollow promises. If the retailers and factories were deemed joint employers of the factory workers, the retailers would have legal responsibility for raising those standards, including responsibility for fulfilling the factory workers’ rights of association, bargaining, and striking.

^{xxxiii} This general kind of objective analysis is not foreign to labor and employment law. For example, in employment discrimination law, a court will strike down certain employment rules that are not objective “business necessities.” And a court will require an employer to make reasonable accommodations for disabled workers if the employer cannot prove that the accommodations cause objective financial “hardship” to the employer. In labor law itself, the Board will look to objective efficiency (among other factors) in resolving two unions’ competing claims about jurisdiction over particular jobs. E.g., *International Brotherhood of Electrical Workers (IBEW) Local 211 (Sammons Communications of N.J.)*, 287 NLRB 930 (1987). There are many other instances in which the Board and courts must determine the degree to which employment practices objectively lower or raise profits relative to other employment practices.

^{xxxiv} And the various clients of the cleaning company and payroll company may not have sufficient bargaining power, even if those clients joined together as a group, to bargain with those companies and insist on improvements in their terms and conditions of employment. Those clients would therefore not be deemed joint employers under the “cumulation” rule discussed in the text.

^{xxxv} Section 9(c)(5) of the NLRA (one of the Taft-Hartley amendments) provides that the Board, in determining the scope of bargaining units, may not treat “the extent to which the employees have organized” as the “controlling” factor. The proposed reform—expanding the bargaining unit over time, as the worker organization gains the strength to organize in enlarged units—would not necessarily conflict with section 9(c)(5). The Board has ruled that, while criteria other than “the extent to which the employees have organized” must be significant factors in any given unit determination, the extent of prior organizing may validly be a decisive factor, in the sense that the Board would not have drawn the unit in question “but for” that factor. However, the proposed reform would require revision of court and Board jurisprudence that denies the Board’s authority to define bargaining units to calibrate the relative bargaining power of labor and management.

^{xxxvi} Jayaraman, Saru. 2013. *Behind the Kitchen Door*. Ithaca, NY: Cornell University Press.

^{xxxvii} Existing antitrust law prohibits a collective agreement between a worker organization and employers that requires the extension of the agreement’s terms to non-signatory employers. That rule should be reversed.

^{xxxviii} European Foundation for the Improvement of Living and Working Conditions. 2011. *Extension of Collective Bargaining Agreements in the EU*. Dublin: Eurofound.

^{xxxix} Fisk, Catherine and Xenia Tashlitsky. 2011. “Imagine a World Where Employers are Required to Bargain with Minority Unions.” *ABA Journal of Labor & Employment Law* 27: 1.

^{xl} Workforce and Economic Development. 2007. *Working Together: Sectoral Lessons from Labor-Management Training Partnerships in California*. Berkeley, CA: University of California Berkeley Labor Center.

^{xli} Arrangements of this sort are known as the “Ghent System,” in light of their origin in 19th Century Belgium. Van Rie, Tim, Ive Marx and Jeroen Horemans. 2011. “Ghent Revisited: Unemployment Insurance and Union Membership in Belgium and the Nordic Countries.” *European Journal of Industrial Relations*. 17(2): 125-139.

^{xlii} *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

^{xliii} “The distinction between mandatory and permissive subjects is often an elusive one, particularly in coordinated or coalition bargaining.” American Bar Association. 2012. *The Developing Labor Law*. Arlington, VA: Bloomberg BNA. p. 1453.

^{xliv} As discussed in footnote xxxvi, in defining appropriate bargaining units the Board has given determinative weight to workers’ prior organizing, notwithstanding the Taft-Hartley amendment of the NLRA that seems to say otherwise.

^{xlv} Colvin, Alexander. 1998. “Rethinking Bargaining Unit Determination.” *Hofstra Labor & Employment Law Journal*. 15(2): 419-490.

Appendix A

The Employer Responsibility Act: A Model Statute

Annotations

Part 1. Title

Part 2. Preamble

Part 3. Statutes and Regulations Amended, and Decisions Overridden

Part 4. Definitions

Part 5. Liability of Joint Employers

Part 6. Intentional Evasion of Duties as Employer.

Part 7. Duty to Implement Internal Compliance Systems.

Part 8. Duty to Support and Monitor Contractor's, Sub-contractor's, and Sub-subcontractor's Compliance with Legal Requirements

Part 9. Duty to Disclose and Post Information About Charges of Non-compliance

Part 10. Remedies for Violations of Duties under Parts 7, 8 and 9

Part 11. Deliberations Over Best Practices in Internal Compliance Systems and in Systems to Monitor Compliance by Contractors

ANNOTATIONS:

The core purpose of this Act is to redefine “employer” and “employee” for purposes of imposing obligations and entitlements under all state labor and employment laws. The new definition of employee greatly expands the number and type of persons who are deemed employees rather than “independent contractors” or other types of parties who perform services for compensation. Reciprocally, the new definition of employer greatly expands the number and type of parties deemed employers of any given employee.

In pre-existing labor and employment law, the party that hires, pays, and controls or has the right to control an employee is typically the only employer of that employee. That employer and employee typically stand in privity with one another. This Act refers to such an employer as the “direct employer” of the employee. In order to greatly expand the definition of “employer,” this Act defines three additional categories of employer—“indirect employer,” “collective employer,” and “joint employer.”

Under the Act, an employee may have multiple employers. Each such employer is a “joint employer.” A given employee’s joint employers include any of the employee’s direct, indirect, or collective employers, as well as additional parties standing in certain defined relationships with any of the direct, indirect, or collective employers. The Act imposes on each joint employer identical obligations toward the employee in question under applicable labor and employment law; and the employee has identical entitlements vis-à-vis each joint employer. The joint employers are jointly and severally liable to the employee for violations of rights and standards under any labor and employment law.

Under the Act, to be deemed an indirect employer, a party need not actually hire, pay, control, or have the right to control the employee in question; need not actually stand in privity with the employee; and need not actually have any existing contractual or corporate relationship with the direct employer. Rather, a party is deemed an indirect employer of a direct employer’s employee if the party has “sufficient bargaining power” to negotiate one or more of the following agreements, assuming the party had the will to negotiate any such agreement(s): agreements that require the direct employer to

comply with applicable labor and employment laws; and agreements that authorize the party or some third party to directly control the employee's performance of work, to directly set or negotiate the terms and conditions of the employee's employment, or to ensure the fulfillment of the employee's rights and standards under labor and employment law.

A paradigmatic example of an indirect employer is a large retail chain that has a contract with a logistics company that, in turn, has a contract with a trucking company that, in turn, has a contract with a warehouse that stores the retailer's goods. If the retail chain does not currently hire, pay, control, or have the right to control the employees working for the warehouse company, but has sufficient bargaining power to negotiate and reach any agreement(s) of the sort specified in Annotation 4 with the warehouse company or with a third party, then under the Act the retailer is deemed an indirect employer of the warehouse employees. The retailer is also the indirect employer of employees even further upstream in the supply chain, such as employees of companies that unload goods at the ports or that transport the goods from the ports to the warehouses, if the retailer has sufficient bargaining power to negotiate any such agreement(s) with respect to those employees.

The Act deliberately leaves the concept of "sufficient bargaining power" undefined, even though that concept is crucial to the statute. Instead, the Act explicitly authorizes relevant judicial and administrative bodies to define that concept through the case-law method or through administrative rule-making. It is expected that putative employees and employers will be motivated to present to such bodies theoretical and empirical arguments about whether the putative employer has sufficient bargaining power to negotiate a particular agreement with the direct employer or with third parties. And, in the many cases where multiple employers are found jointly and severally liable for violations of employment law, the various employers will be well-motivated to present theoretical and empirical arguments about each party's relative bargaining power, for purposes of allocating damage awards among the liable employers. It is also expected that legal commentators and social-science researchers will analyze those theoretical and empirical questions in publications that are useful to pertinent litigants and judicial and administrative bodies.

For judges and administrators, certain indicia of bargaining power may seem clear-cut. For example, an enterprise that purchases a large proportion of another company's goods or services has relatively more bargaining power vis-à-vis the supplier company than does an enterprise that purchases a small proportion. And, if the supplier of goods and services has sunk capital into technology that is specific to idiosyncratic goods and services produced for the purchaser company, then the purchaser's bargaining power is increased still further. Further, if the purchaser is a large, well-capitalized enterprise with substantial cash reserves and can readily switch its purchases to other suppliers, it has relatively strong bargaining power toward a small, poorly capitalized supplier with minimal cash reserves – since the large enterprise has greater capacity to hold out during contract negotiations and can exit the negotiation altogether and change suppliers at relatively low cost.

Although such general indicators can be identified prior to application of the Act, the question of whether one party has "sufficient bargaining power" to achieve a certain agreement with another party will likely turn on detailed, contextual facts. That question is therefore best answered by judicial and administrative decision-making over time, informed by careful fact-finding, by the arguments of employees' and employers' legal representatives, and by legal and social-science research.

The legislature may wish to return to the question and codify indicia of bargaining power after the ripening of this process of learning through judicial and administrative application. Before that time comes, it is critical that judges and administrators, when in doubt, rule in favor of claims that a party is

an indirect or collective employer, since the core purpose of the Act is to dramatically expand the definition of employer and ensure that larger, well-resourced enterprises are responsible for securing the rights and standards of labor and employment laws, if those enterprises are able to do so.

Note the critical difference between even the most expansive existing definitions of “employer” and the new definition stipulated in this Act. One of the broadest existing definitions deems a party an employer if the party has the “right to control” the performance of the services in question, even if the party has not exerted actual control. This definition, broad though it may be, is much more narrow than the one contained in this Act. The “right of control” test takes as given the putative employer’s existing contractual or corporate rights toward the employees in question. That is, there must be an existing contract or a corporate ownership structure that entitles the party to control the employee. In contrast, under the Act, the indirect or collective employer need have no entitlement to exercise control over the employee under the terms of existing contracts or company structure. Rather, the question is whether the party has sufficient bargaining power to negotiate such a contract or construct such a company structure, if the party had the will to do so. The party may have no existing formal or informal contract with or ownership control over the direct employer or with the employee in question. The question instead is whether the party, if it approached the direct employer and sought to bargain with the direct employer, has sufficient bargaining power to gain such rights of control.

Consider the example in Annotation 5 above. Company A is a large retailer. Company D is a warehouse company that stores goods to be sold by Company A. Company A has a contract with Logistics Company B which has a contract with Trucking Company C requiring delivery of the goods from Warehouse Company D to Company A. Note that, in this example, there is no existing contract or ownership structure that gives Company A (the retailer) the right to control the work of Company D’s (the warehouse’s) employees. That is, Company A’s agents are not entitled to march into the property of Warehouse Company D and supervise Company D’s employees or negotiate with those employees over the terms of their employment. The retailer would therefore not be deemed an employer of the warehouse employees, under the existing “right of control” test. But, under the Act, if Company A has sufficient bargaining power to negotiate a formal contract or informal agreement with Warehouse Company D that ensures that Company D complies with the labor and employment law rights and standards of employees hired, paid, and controlled by Company D, or if a formal contract or informal agreement authorizes Company A to directly control the employees’ performance of work, to directly set or negotiate the terms and conditions of the employees’ employment, or to ensure compliance with the employees’ rights and standards under labor and employment laws, then the retailer and Warehouse Company D are each deemed the employer of those warehouse employees. The retailer is an indirect employer, and the warehouse is the direct employer.

Continuing the example in Annotation 11, if Company B has sufficient bargaining power to negotiate a formal contract or informal agreement with Company D that ensures that Company D complies with the labor and employment law rights and standards of an employee hired, paid, and controlled by Company D, or if a formal contract or informal agreement authorizes Company B to directly control the employee’s performance of work, to directly set or negotiate the terms and conditions of the employee’s employment, or to ensure compliance with the employee’s rights and standards under labor and employment laws, then the warehouse employee has two indirect employers (Companies A and B) and one direct employer (Company D).

At the same time, in the Preamble and text of the Act, the legislature recognizes that nearly every powerful company in the economy can potentially exert its power to change the employment conditions of almost any less powerful company throughout the economy. A powerful company can

therefore be said to have sufficient bargaining power to ensure that nearly any less powerful company complies with labor and employment rights. For example, a powerful company, by moving from its current industry into a completely different industry, could gain the capacity to bargain with weak companies in the second industry over the terms and conditions of employees employed by those weak companies. The company might therefore be said to have sufficient power to negotiate agreements that would make it an indirect employer. The Act therefore contains a limiting principle, to avoid imposing obligations on nearly every powerful company toward nearly every employee directly hired by every less powerful company in the economy. Under the Act, a party has labor and employment law obligations toward a particular employee only if, under existing commercial relationships, the party has the bargaining power to approach the direct employer and successfully negotiate an agreement that would require the direct employer to comply with labor rights and standards or an agreement that would create the party's right to set or negotiate the employee's terms and conditions of employment. "Existing commercial relationships" are defined as any existing direct or indirect dealings among a set of parties, such as the existing relationships among companies A, B, C, and D in the example in Annotations 11 and 12 above. In that example, Company A has sufficient bargaining power to negotiate an agreement with Company D to require Company D to comply with labor and employment laws, or to authorize Company A to directly set or negotiate the terms and conditions of Company D's employees. But Company A has such bargaining power only by virtue of the fact that it already does business in the relevant supply chain. Retail Company A stores a large volume of goods in Warehouse Company D, accounting for much of Company D's business, and therefore Company A has sufficient bargaining power over Company D. But Company X, located in an entirely different industry and doing no business with Company D, does not have such bargaining power over Company D (no matter how large and well-resourced Company X may be) because under existing commercial relationships Company X accounts for none of Company D's revenue or profit. Company X is therefore not an indirect employer of Company D's employees, notwithstanding the fact that company X might conceivably acquire such bargaining power over Company D if Company X moved into the retail sector and began storing its goods with Warehouse Company D. The same logic applies to Company Y, a different large retailer, if Company Y stores none of its goods in Warehouse Company D. Company Y cannot be an indirect employer of Company D's employees, because Company Y is not located within the existing commercial relationships that constitute the supply chain linking Company A and Company D. (Under the Act, there is an exception to the proposition just stated. Company Y, in the example above, is in fact the indirect employer of Company D's employees if Company Y uses a different warehouse with the intent to evade labor and employment law duties to employees of Company D.)

The Act also designates as "collective employers" multiple parties that do not meet the definitions of direct or indirect employers but, if those parties were to bargain as a group, would collectively have sufficient bargaining power to negotiate agreements of the sort that define indirect employers. This applies only to multiple parties that are "similarly situated" with respect to the direct employer of the employees in question. Under the Act, multiple parties are similarly situated with the direct employer if the direct employer provides the same goods and services to each of the multiple parties. For example, if each of three retailers store goods at the same warehouse company, then those three retailers would be deemed collective employers of that warehouse's direct employees if the retailers collectively (but not individually) have sufficient bargaining power to negotiate agreements that define indirect employers of the warehouse employees. The retailers are "similarly situated" since the warehouse provides the same service (storage of retail goods) for each retailer. These statutory provisions serve two purposes. First, they ensure that parties that would otherwise meet the definition of indirect employer do not intentionally evade that designation by dispersing their purchases or supplies among multiple parties. A retailer, for example, could not evade designation as an employer of

a given warehouse employee by dispersing its goods among so many warehouses that the retailer would no longer have sufficient bargaining power to individually negotiate agreements of the sort that define indirect employers. Second, even if a party did not disperse its purchases or sales with the intent to avoid its designation as an indirect employer, the Act effectively pools the purchases or supplies of similarly situated parties that had dispersed their purchases or supplies, if such pooling would enable the parties to reach agreements of the sort that define indirect employers (so long as such pooling would not impair the parties' objective efficiency). If multiple parties could, if acting collectively, negotiate such agreements, the Act imposes on such parties the joint obligation to satisfy the labor and employment rights and standards of the employee in question. This pooling principle would designate the multiple retailers as collective employers in the illustration above, regardless whether they intended to evade that designation by dispersing their goods across multiple warehouse companies, so long as such pooling did not impair the retailers' efficiency. This reflects the Act's core principle: A person performing services should be entitled to the rights and standards contained in labor and employment law if there are parties that are capable of ensuring the fulfillment of those rights and standards with respect to that person.

The Act also designates as joint employers additional categories of parties that stand in certain defined relationships with direct, indirect, or collective employers of the employee in question. These additional categories include: a party that controls or is controlled by one or more direct, indirect, or collective employer; a party that temporarily assigns the employee to or is temporarily assigned the employee by one or more direct, indirect, or collective employer; and any other party whose existing commercial relationships with one or more direct, indirect, or collective employer are such that designation of the party as a joint employer would best ensure fulfillment of the rights and standards to which the employee is entitled. The Act makes clear that a given party may meet more than one of the definitions of a joint employer. That is, the various definitions may overlap; and judicial and administrative bodies should not strain to narrowly interpret the definitions to make them non-overlapping categories.

The Act's expanded definition of "employee" is precisely symmetrical with the Act's expanded definition of "employer." That is, a person providing services for compensation is an "employee" rather than an independent contractor or other non-employee category, so long as any party meets the expanded definitions of direct employer, indirect employer, collective employer, or any of the additional categories of joint employer with respect to the person in question. This again reflects the core principle of the statute stated in the final sentence of Annotation 14.

The Act imposes obligations on employers to maintain internal compliance systems to ensure that the employer complies with applicable labor and employment laws. The Act also imposes obligations on certain actors to monitor contractors, sub-contractors, and sub-sub-contractors, to ensure that such parties comply with applicable labor and employment laws — even if the actors are not indirect or collective employers of the employees of the contractors, sub-contractors, and sub-sub-contractors. The Act exempts from these obligations a person who hires employees or contractors to perform services in the person's home or to meet other personal needs not directly related to accruing monetary profit or revenue or to the operation of not-for-profit, non-household employers. Thus, while a household employer must, for example, pay minimum wages, overtime, and social security taxes for, say, its homecare worker or housecleaner, the employer need not have an internal compliance mechanism nor monitor any companies from which the employee purchases work-related goods or services.

The Employer Responsibility Act: A Model Statute

Part 1. Title

1. This Act shall be called the “Employer Responsibility Act” and may be referred to by the acronym “ERA.”

Part 2. Preamble

This Act amends all [State or Commonwealth X] statutes and regulations and overrides all [State or Commonwealth X] judicial and administrative decisions pertaining, in relevant respects, to the employment relationship or to other pertinent activities, including but not limited to amendments and overrides of labor, employment, and antitrust law, to the extent such amendments and overrides are not preempted by federal law or by the [State of Commonwealth X] Constitution. The Act redefines “employer” and “employee” and imposes additional obligations on employers, for purposes of each such statute, regulation, and decision.

The legislature finds that the definition of “employer” should be greatly expanded to ensure that powerful, profitable, well-resourced companies are made legally responsible for violations of the labor and employment rights and standards of another employer’s employees when the powerful companies have sufficient bargaining power to ensure — if the powerful companies so wished — that those rights and standards are fulfilled. Reciprocally, a person performing services for compensation should be deemed an “employee” and not an “independent contractor” and should be entitled to the rights and standards in labor and employment law if there is a party that directly hires, pays, controls, or has the right to control the person, or if there are other parties with sufficient bargaining power to ensure fulfillment of those rights and standards.

3. The legislature finds that, under pre-existing law, powerful, profitable, well-resourced companies often have no legal responsibility for the rights and standards of employees whose labor directly or indirectly benefits those companies. Powerful, profitable, well-resourced companies avoid such responsibilities by contracting out many stages of production and distribution of goods and services — that is, by entering into contracts with weaker, less profitable, poorly-resourced companies whose employees perform work that directly or indirectly benefits the more powerful companies. Those weaker companies in turn enter into contracts with still other, relatively weak companies whose employees perform other stages of production and distribution that ultimately benefit the most powerful companies. These contracts produce “supply chains” and “production-and-distribution networks,” in which multiple companies are linked by a chain or web of contractual relationships. Under most existing labor and employment laws, the weaker company bears sole legal responsibility for protecting the rights of the employees directly hired, paid, and controlled by the weaker company; the powerful company typically bears no responsibility for the rights of employees throughout the supply chain or production-and-distribution network, other than the employees directly hired by the powerful company. As a result, genuine fulfillment of employee rights has grown more and more precarious, employment standards have eroded, and economic inequality has grown.

4. In some cases, powerful companies enter into such contractual arrangements with the intention of diminishing employment standards and reducing labor costs throughout the supply chain or production-and-distribution network, thereby raising the profit of the powerful company and of other employers in the chain or network. In other cases, powerful companies benefit from such diminished

employment standards and from such reduced labor costs, even if that is not the powerful companies' intent in entering into such contractual arrangements and, in many instances, even if the powerful company is not aware of the employees in question or of their actual terms and conditions of employment. In sum, powerful companies have, whether intentionally or not, benefited from such diminished employment standards and reduced labor costs; and these developments have contributed substantially to precarious employment and increased inequality.

5. Under this Act, a given employee may have multiple employers, which are jointly and severally liable for any violations of the labor and employment law rights of the employee. That is, each such "joint employer" is liable for the full remedy for any violation of the employee's rights. More specifically, under this Act, a given employee always has a "direct employer" and may have one or more "indirect employers," "collective employers," or certain additional categories of employers defined by their special relationships with direct, indirect, or collective employers.

6. The term "direct employer" refers to an employer with whom an employee has a direct contractual or at-will relationship. The employee and direct employer stand in "privity of contract" or "privity of at-will relationship." A direct employer is typically, though not always, the party that hires the employee, bargains with the employee over the terms and conditions of employment, pays the employee, and supervises or has the right to supervise the employee.

The legislature finds that an "indirect employer" — owing the same duties to the employee in question as are owed by the direct employer — is any party that has sufficient bargaining power to negotiate, if the party had the will to do so, one or more formal or informal agreements that either require the direct employer to comply with applicable labor and employment law or authorize the party or some third party to directly control the employee's performance of work, to directly set or negotiate the terms and conditions of the employee's employment, or to ensure the fulfillment of the employee's rights and standards under all applicable labor and employment laws.

The legislature finds that a "collective employer" — owing the same duties to the employee in question as are owed by the direct and any indirect employer(s) — is a party that, standing alone, lacks sufficient bargaining power to negotiate agreements of the sort described above in Section 7 of this Preamble, but that would have sufficient bargaining power if it joined a group of similarly situated parties to bargain with the direct employer or with other parties. The legislative purpose of designating some parties as "collective employers" is twofold: first, to ensure that a party does not disperse its production, purchase, sale, storage, transport, or distribution of goods and services with the intent to avoid being designated as an indirect employer; and second, to ensure that a given employee's rights and standards are fulfilled whenever there is a group of parties that, together, are capable of ensuring those rights and standards.

The legislature also finds that parties standing in certain defined relationships with direct, indirect, or collective employers should owe the same duties as those employers to the employee in question. Such parties include: a party that controls or is controlled by one or more direct, indirect, or collective employer; a party that temporarily assigns the employee to or is temporarily assigned the employee by one or more direct, indirect, or collective employer; and any other party whose existing commercial relationships with one or more direct, indirect, or collective employer are such that designation of the party as a joint employer would best ensure fulfillment of the rights and standards to which the employee is entitled.

The legislature also finds that, under pre-existing law, many persons who provide labor for compensation are classified as “independent contractors” rather than as employees, even when parties that directly or indirectly benefit from such labor have sufficient bargaining power to ensure that those persons are afforded the rights and standards contained in labor and employment laws. There is no legitimate reason for excluding such persons from the protections of labor and employment laws. Such persons stand in the relationships, described in Section 3 through Section 9 of this Preamble, of relative disempowerment vis-à-vis more powerful parties — that is, relationships between employees and a direct employer, between employees and an indirect employer, between employees and a group of collective employers, and between employees and the additional categories of joint employers described in Annotation 9 above.

11. The legislature concludes, in sum, that if a person provides labor for compensation, then (a) that person should be deemed an “employee” and not an “independent contractor,” so long as one or more other parties benefit from the person’s labor and have the bargaining power, individually or collectively, to ensure that the person is afforded the rights and standards contained in labor and employment laws, and (b) that any and all such parties should be deemed “employers” of the employee in question, with the joint and several obligation to afford those rights and standards to the employee.

12. At the same time, the legislature recognizes that nearly every powerful company in the economy can potentially exert its power to change the employment conditions of almost any less powerful company throughout the economy and can therefore be said to have sufficient bargaining power to ensure that nearly any less powerful company complies with labor and employment rights. For example, a powerful company, by moving from its current industry into a completely different industry, might gain the capacity to bargain with weak companies in the second industry over the terms and conditions of employees employed by those weak companies. The Act therefore contains a limiting principle, to avoid imposing obligations on nearly every powerful company toward nearly every employee directly hired by every less powerful company in the economy. Under the Act, an employer has labor and employment law obligations toward a particular employee only if, under existing commercial relationships, the employer has the bargaining power to negotiate the agreement(s) specified in Sections 7 and 8 of this Preamble and in other relevant Parts of this Act. A company that is not presently located in the same supply chain or production-and-distribution network as the direct employer cannot be an indirect or collective employer of the direct employer’s employees, since the company, under existing commercial relationships, has no bargaining power vis-à-vis the direct employer.

13. The legislature also finds that companies should be deterred from entering into contracts with other companies with the intention of avoiding obligations under any employment law.

14. The legislature also finds that all employers, except for certain individual and household employers, should have the duty to implement internal compliance systems that meet best practices in the industry, trade, or profession, to ensure that each employer internalizes the rights and standards contained in labor and employment laws. Such internal compliance systems should include mechanisms for employees to assert complaints that their superiors are violating such rights and standards; mechanisms to protect complaining employees against retaliation; mechanisms to ensure that non-managerial employees participate in the design and implementation of the internal compliance system; and mechanisms for managers and non-managerial employees to periodically

deliberate about best practices in internal compliance systems, based on annual statements, issued by the [competent state agency], of best practices and potential improvements in best practices in the relevant industry, profession, or trade.

15. The legislature also finds that companies, except for certain individual and household employers, should have the duty to establish monitoring systems, for purposes of continuously monitoring compliance with labor and employment laws by certain of the companies' contractors, sub-contractors, and sub-sub-contractors, even if the company is not the indirect or collective employer of the employees of the contractor, sub-contractor, or sub-sub-contractor. Companies should also have the duty to remedy and report on violations of employment law by such contractors, sub-contractors, and sub-sub-contractor, and the duty to compensate their contractors sufficiently to enable such contractors, sub-contractors, and sub-sub-contractors to meet their labor and employment law obligations.

16. The legislature also finds that employees can only assert their rights if they are well-informed about those rights and the avenues for enforcing them. Hence, each employer should have the duty to periodically provide its employees and the [competent state agency] with information about the employer's compliance or non-compliance with labor and employment law obligations, and about the means to enforce those obligations, including the operation of the employer's internal compliance system; and such information should be available on publicly accessible, readily searchable web-pages.

17. Finally, the legislature concludes that employers can learn from one another and from employee representatives about the best ways to operate internal compliance systems and to monitor contractors, sub-contractors, and sub-sub-contractors, and about potential innovations that improve existing compliance and monitoring systems. Hence, the [competent state agency] should convene and facilitate annual meetings among the representatives of employers and employees in each industry, profession, or trade. The participants in the meetings should engage in good-faith deliberations to compare their compliance and monitoring practices and to strive for a rough consensus about what constitutes best practices and what constitutes identifiable variables that justify particular employers' failure to achieve best practices. The [competent state agency] should promulgate standards of good-faith deliberation and procedures for reviewing whether participants are satisfying those standards. On the basis of the participants' deliberations, the [competent state agency] should issue annual statements of best practices and potential improvements in best practices. For purposes of judicial or administrative review, the [competent state agency's] statements should create rebuttable presumptions of whether an employer is complying with best practices in compliance and monitoring. The annual deliberations should be designed to generate and disseminate continuous improvements in best practices.

Part 3. Statutes and Regulations Amended, and Decisions Overridden

This Act amends all [State or Commonwealth X] statutes and regulations, and overrides all pertinent aspects of [State or Commonwealth X] judicial and administrative decisions, pertaining in relevant respects to the employment relationship or to other activities, including but not limited to labor, employment, and antitrust statutes, regulations and decisions, to the extent such amendments and overrides are not preempted by federal law or by the [State or Commonwealth X] Constitution.

Part 4. Definitions

A person is a “direct employee” of a party, and the party is a “direct employer” of the person if

the party enters into a formal or informal contract with the person for the provision of services or enters into an at-will employment relationship with the person for the provision of services, and therefore the person and the party stand in privity of contract or in privity of at-will relationship, and

the person performs the services in exchange for compensation paid by that or another party, and

the party directly or indirectly gains a monetary benefit from the performance of the services in question or, if the party is a not-for-profit entity, an organizational benefit from performance of the services in question; seeks to directly or indirectly gain such a benefit; or potentially may directly or indirectly gain such a benefit,, and

the party actually takes one or more of the following actions or, without additional negotiation or agreement with any other party, has the right to take one or more of the following actions:

- (i) To direct or control the person’s performance of the services in question.
- (ii) To set the terms or conditions of the person’s performance of the services in question, or to negotiate with the person to set such terms or conditions.
- (iii) To take any lawful action(s) necessary to ensure that the person’s right(s) or standard(s) under any applicable labor or employment law is or are fulfilled with respect to the performance of the services in question.

A person is an “indirect employee” of a party and the party is an “indirect employer” of the person if

the person and the party do not stand in privity of contract or in privity of at-will relationship, and

the person performs services for compensation paid by that or another party, and

regardless whether the party is aware of the performance of the services in question, the party, under existing commercial relationships, directly or indirectly gains a monetary benefit from the performance of the services or, if the party is a not-for-profit entity, an organizational benefit from performance of the services; seeks to directly or indirectly gain such a benefit; or potentially may directly or indirectly gain such a benefit, and

the party has, under existing commercial relationships, sufficient bargaining power to lawfully negotiate with the direct employer(s) or any third party or parties and reach agreement(s) that require (s) one or more of the direct employers and third party or parties or that authorize (s) one or more of the party and third party or parties to undertake one or more of the following three actions:

- (i) To direct or control the person’s performance of the services in question.
- (ii) To set the terms and conditions of the person’s performance of the services in question, or to negotiate with the person to set such terms or conditions.

(iii) To take any lawful action(s) necessary to ensure that the person's right(s) or standard(s) under any applicable labor or employment law is or are fulfilled with respect to the performance of the services in question.

3. A person is an employee of multiple parties and each of the parties is a "collective employer" of the person if

(a) the person and the parties would otherwise meet the respective definitions of indirect employee and indirect employer of Section 2 of this Part, except each of the multiple parties individually lacks sufficient bargaining power to negotiate any of the agreements defined in Section 2(d) of this Part, and

(b) the multiple parties would collectively have, under existing commercial relationships, sufficient bargaining power to lawfully negotiate as a group with the direct employer(s) as defined in Section 1 of this Part, with any indirect employer(s) as defined in Section 2 of this Part, or with any third party or parties and reach agreement(s) that require(s) one or more of the direct employer(s), third party or parties, and indirect employer(s), or that authorize(s) one or more of the party, third party or parties, and indirect employer(s) to undertake one or more of the following three actions:

(i) To direct or control the person's performance of the services in question;

(ii) To set the terms and conditions of the person's performance of the services in question, or to negotiate with the person to set such terms or conditions;

(iii) To take any lawful action(s) necessary to ensure that the person's right(s) or standard(s) under any applicable labor or employment law is or are fulfilled with respect to the performance of the services in question; and

(c) the multiple parties are similarly situated in their commercial relationships with the direct employer(s) or with the third party or parties specified in section 3(b) of this Part, and

(d) each of the multiple parties has greater bargaining power than any other party or parties similarly situated in their commercial relationships with the direct employer(s), and it would not be necessary to include such other parties in the group of multiple parties in order to ensure that the group would collectively have sufficient bargaining power to reach the agreement(s) specified in section 3(b) of this Part.

4. "Sufficient bargaining power" and "greater bargaining power" shall be defined by case law and rule-making of the competent judicial and administrative bodies authorized to interpret and enforce the applicable labor and employment law(s) in question. In so defining those terms, the bodies shall take full cognizance that the core purpose of this Act is to greatly expand the definitions of employee and employer to ensure that persons who perform services for compensation are entitled to the rights and standards in labor and employment law when there exist(s), under existing commercial relationships, any party or parties that individually or collectively can directly or indirectly ensure fulfillment of those rights and standards. If there is doubt about whether a person is an employee or a party is an employer, the judicial or administrative body shall resolve the doubt in the affirmative.

5. For purposes of this Part, a “commercial relationship” means any economic relationship of any kind among parties, including but not limited to

a formal or informal contract, agreement, transaction, or other type of economic relationship, for purposes including but not limited to any production, purchase, sale, lease, storage, transport, or other creation, assembly, provision, holding, transfer, or distribution of goods, services, or any form of property, or

any employment relationship, whether at-will, for-cause, definite term, indefinite term, or any other type of employer-employee relationship, or

any investment, ownership, shareholding, partnership, franchise, corporate or other economic structure or transaction within or among any forms of business enterprise, or

any purchase, sale, deposit, lending, borrowing, provision, issuance, receipt, underwriting, ownership, or holding of money, credit, insurance, or other monetary or financial instrument, asset, or security.

A party’s “existing commercial relationships” means, during the relevant period of time, the commercial relationships between the party in question and any second parties with which the party stands in privity; the commercial relationships between such second parties and any third parties with which the second parties stand in privity; and any further such indirect commercial relationships at more than two removes from the party in question.

For purposes of Section 6 of this Part, the “relevant period of time” is the period of time

during the performance of the services in question, and

during the application, interview, negotiation, or other process(es) through which the hiring of the person to perform the services in question and through which the terms and conditions of the performance of the services in question are decided, and

during the remediation of any violation of labor and employment laws pertaining to the performance of the services in question, whether such remediation is ordered by a judicial or administrative body, is lawfully required by another private party, or is undertaken at the initiative of any employer(s) of the employee whose entitlement(s) under those laws was or were violated.

8. Two parties are “similarly situated” in their existing commercial relationships with a direct employer or with a third party, if the direct employer or third party provides, directly or indirectly, similar goods and services to each of the two parties or otherwise stands in a similar commercial relationship with each of the two parties.

9. A party shall be deemed a “joint employer” of a given employee for purposes of the performance of the services in question, when one or more of the following provisions is or are satisfied:

(a) The party and at least one other party each meet this Part’s definition of direct, indirect, or collective employer with respect to the employee’s performance of the services in question.

- (b) The party controls, is controlled by, or is under common control with another party that meets this Part's definition of direct, indirect, or collective employer with respect to the employee's performance of the services in question.
- (c) The party hires or pays the employee in question and temporarily assigns the employee to another party that meets this Part's definition of direct, indirect, or collective employer with respect to the employee's performance of the services in question.
- (d) The party is temporarily assigned the employee in question by another party that meets this Part's definition of direct, indirect, or collective employer with respect to the employee's performance of the services in question.
- (e) The party has existing commercial relationships with one or more other parties, at least one of which meet(s) this Part's definition of direct, indirect, or collective employer with respect to the employee's performance of the services in question, and those relationships are such that any labor and employment rights or standards of the employee in question will be best fulfilled if the party is, under Part 5 of this Act, jointly liable for fulfillment of the right(s) or standard(s).

10. When a party enters into a formal or informal contract with a second party for the provision of goods or services, the first party is termed a "contracting party" and the second party is termed a "contractor" if the first party has greater bargaining power than the second party, regardless whether the first party is a direct, indirect, or collective employer of any of the second party's employee(s) when the employee(s) perform(s) services pertaining to the goods or services to be provided to the first party.

11. When a contracting party's contractor enters into a formal or informal contract with a third party to provide services pertaining to all or part of the goods or services to be provided to the contracting party, the third party is termed a "sub-contractor" if either the contracting party or the contractor has greater bargaining power than the third party, regardless whether the contracting party or contractor is a direct, indirect, or collective employer of any of the third party's employee(s) when the employee(s) perform(s) services pertaining to all or such part of the goods or services.

12. When a contracting party's sub-contractor enters into a contract with a fourth party to provide services pertaining to all or part of the goods or services to be provided to the contracting party, the fourth party is termed a "sub-sub-contractor" if the contracting party or contractor or sub-contractor has greater bargaining power than the fourth party, regardless whether the contracting party or contractor or sub-contractor is a direct, indirect, or collective employer of any of the fourth party's employees when the employee(s) perform(s) services pertaining to all or such part of the goods or services.

13. A "not-for-profit employer" is any employer that does not accrue, or seek to accrue, monetary profit from an employee's performance of the services in question, but instead accrues or seeks to accrue other benefits to the employer's organization.

Part 5. Liability of Joint Employers

1. Joint employers shall be jointly and severally liable for any monetary award, punitive damages, equitable relief, attorneys' fees and costs, and any other remedies ordered by a court or administrative

body for violations of any labor or employment law applicable to the performance of the services with respect to which the parties in question are joint employers.

Part 6. Intentional Evasion of Duties as Employer

An employer (hereafter, for purposes of this Part, “the first employer”) that enters into any formal or informal contract(s) or agreement(s) with one or more other party or parties with intent to avoid any duties that a labor or employment law would, in the absence of such contract(s) or agreement(s), impose on the first employer, shall be bound by those duties.

For purposes of Section 1 of this Part,

- (a) intent to avoid duties may be proven by any relevant direct or circumstantial evidence; and
- (b) there shall be an irrebuttable presumption that the first employer in question intended to avoid duties of the pertinent labor or employment law if the contract(s) or agreement(s) result(s) in the employee(s) of another employer performing services that
 - (i) were formerly performed at lower cost by the first employer’s employee(s) than by the other employer’s or employers’ employee(s), or
 - (ii) could be performed at lower cost by employee(s) newly hired by the first employer than by the other employer’s or employers’ employee(s).

3. After a first employer intentionally enters into a contract or agreement specified in Section 1 of this Part, if the first employer or other employer(s) of the employee(s) in question violate(s) any labor or employment law duties referred to in Section 1 of this Part with respect to the performance of the services in question, then the first employer shall be subject to punitive damages equal to double the damages, penalties, or other remedies normally provided for violations of the pertinent labor or employment law.

Part 7. Duty to Implement Internal Compliance Systems

Every employer shall establish and maintain an internal compliance system that meets best practices in the relevant industry, profession, or trade, unless the employer proves that an identifiable variable justifies its failure to meet such best practices. Such internal compliance systems shall, at a minimum, include

a dedicated officer or officers charged with ensuring that the employer complies fully with all applicable labor and employment laws, and

a mechanism for employees to lodge complaints with such dedicated officer or officers that the employer is failing to fully comply with the requirements of any labor or employment law, and

a mechanism to ensure that an employee is protected against retaliation for

lodging an internal complaint, including but not limited to a means by which an employee may lodge a complaint anonymously if the employee so wishes, or

filing any charge or complaint, or preparing to file any charge or complaint, with any external administrative or judicial body, alleging a violation of any labor or employment law, or

providing any oral, documentary, digital or other evidence for any investigation, litigation, prosecution, or remediation of any alleged violation of any labor or employment law, or

communicating with one or more other person(s) about employer activity that the employee in good faith believes is or may be a violation of any employer's obligation under any labor or employment law, and

a mechanism to ensure that non-managerial, non-supervisory employees participate or are represented in the process of designing, operating, and continuously improving the internal compliance system, in at least equal numbers with managerial and supervisory employees or representatives, and

training of all managers, supervisors, and non-managerial, non-supervisory employees, at intervals of no more than one year, in

all non-trivial requirements of applicable labor and employment laws, and

(ii) the managerial, organizational, and technical means necessary for the employer to ensure compliance with those requirements, and

(iii) all judicial and administrative channels for employees to file charges or complaints that the employer has violated any applicable labor or employment law, and

(iv) the structure and functioning of the internal compliance system, including the protections against retaliation specified in Section 1(c) of this Part, and

a process in which managers, supervisors, and non-managerial, non-supervisory employees engage in deliberations about each annual statement issued by [the competent state agency] setting out best practices, variables justifying failures to meet best practices, and ways of improving compliance systems, as provided in Part 11 of this Act.

2. Every employer shall post, in a prominent location at each site where the employer's employees perform services, except homework sites, a hard-copy poster, no smaller than 18 inches by 24 inches and using font no smaller than 16 points, describing the structure and functioning of its internal compliance system, including all elements specified in Section 1 of this Part. Whenever there are material changes in the elements of the employer's internal compliance system specified in Section 1 of this Part, the employer shall update the poster.

3. In the first week of each February, the employer must provide an updated description of the structure and functioning of its internal compliance systems, including all elements specified in Section 1 of this Part, to the [competent state agency]. The [competent state agency] must, within four weeks, post the updated information on publicly accessible, readily searchable web-page(s) of the [competent state agency's] website.

4. The employer shall ask each employee, including homeworkers, upon hire and at least once in every calendar year thereafter, to provide a current email address and shall email, to every employee who has provided an email address in response to that request

(a) a link to the web-pages specified in Section 3 of this Part, and

(b) a digital document, in no smaller than 12-point font, containing the information on the poster specified in Section 2 of this Part, and

(c) each time the poster is updated as required by Section 2 of this Part, an updated digital document, in no smaller than 12-point font, containing the information on the updated poster.

5. To every employee, including every homeworker, who has not provided an email address in response to the employer request required by Section 4 of this Part, the employer shall provide, in person or via postal mail,

(a) at least once in every calendar year, a hard-copy document stating the web address for the relevant web-page(s) of the [competent state agency's] website, and

(b) at least once in every calendar year, a hard-copy duplicate of the most recently updated digital document specified in Section 4(c) of this Part,, and

(c) each time the digital document is updated as required by Section 4(c) of this Part, a hard-copy duplicate of that updated document.

6. The [competent state agency] shall promulgate regulations prescribing the means by which the employer shall electronically submit to the [competent state agency] the updated information specified in Sections 1 and 3 of this Part, setting forth the [competent state agency's] procedure for ensuring that the information is publicly accessible and readily searchable on the [competent state agency's] website within four weeks of its receipt, and providing a template for the employer poster specified in Section 2 of this part, the employer disclosure specified in Section 3 of this Part, the digital communications specified in Section 4 of this Part, and the hard-copy documents specified in Section 5 of this Part.

7. In any judicial or administrative proceedings, the employer shall have the burden of proving what constitutes an internal compliance system that meets best practices in the relevant industry, profession, or trade, and what variables, if any, justify the employer's failure to meet best practices.

8. The [competent state agency's] statement, as provided in Part 11 of this Act, of best practices and variables justifying failure to meet best practices shall, in any judicial or administrative proceedings, constitute a rebuttable presumption of the definition of such best practices and variables for purposes of the employer duties imposed by this Part. In determining whether the presumption is rebutted, the judicial or administrative body shall give consideration to [the competent state agency's] statement, as provided in Part 11 of this Act, of views about ways to feasibly improve on current best practices and to feasibly overcome factors that currently justify failures to follow best practices. If the presumption is rebutted, the burden of proof specified in Section 7 of this Part reverts to the employer.

9. The obligations set forth in this Part shall not apply to any natural person who hires employees or contractors to perform services in the person's home or to meet other personal needs not directly related to accruing monetary profit or revenue or to the operation of not-for-profit employers.

Part 8. Duty to Support and Monitor Contractor's, Sub-Contractor's, and Sub-Sub-Contractor's Compliance With Legal Requirements

A contracting party that enters into a contract with a contractor for the provision of services or goods shall be strictly liable if

the contract or agreement does not provide sufficient compensation to enable the contractor and each of the contractor's sub-contractors and sub-sub-contractors to comply with all labor and employment laws applicable to the performance of services pertaining to all or part of the goods and services to be provided to the contracting party, or

during the contractor's fulfillment of the contract, the contracting party fails to use best practices in the relevant industry, profession, or trade to continuously monitor compliance, by the contractor and each of the contractor's sub-contractors and sub-sub-contractors, with all labor and employment laws applicable to the performance of services pertaining to all or part of the goods and services to be provided to the contracting party, or

the contracting party fails to report to competent enforcement authorities the contractor's, sub-contractor's, or sub-sub-contractor's non-compliance with any labor and employment laws applicable to the performance of services pertaining to all or part of the goods and services to be provided to the contracting party, if such non-compliance

is detected by the contracting party, or

would have been detected by a contracting party using best practices to continuously monitor the contractor's, sub-contractor's, and sub-sub-contractor's compliance as specified in Section 1(b) of this Part, or

(d) the contracting party fails to make all reasonable efforts to induce the contractor, sub-contractor, or sub-sub-contractor to expeditiously come into compliance with any labor and employment laws applicable to the performance of services pertaining to all or part of the goods and services to be provided to the contracting party, if non-compliance

is detected by the contracting party, or

(ii) would have been detected by a contracting party using best practices to continuously monitor the contractor's, sub-contractor's, and sub-sub-contractor's compliance as specified in Section 1(b) of this Part, or

the contracting party fails to terminate the contract if the contractor, sub-contractor, or sub-sub-contractor fails to expeditiously come into compliance as specified in Section 1(d) of this Part.

2. In the first week of each February, the employer must provide to the [competent state agency] an updated description of the structure and functioning of the monitoring system it established pursuant to this Part, including all elements specified in Section 1 of this Part. The [competent state agency]

must, within four weeks of receiving the updated description, post the updated information on publicly accessible, readily searchable web-page(s) of the [competent state agency's] website.

3. In any judicial or administrative proceedings, the contracting party shall have the burden of proving what, for purposes of this Part, constitutes a continuous monitoring system that meets best practices in the relevant industry, profession, or trade, and what variables, if any, justify the contracting party's failure to meet best practices.

4. The [competent state agency's] statement, as provided in Part 11 of this Act, of best practices and variables justifying failure to meet best practices shall, in any judicial or administrative proceedings, constitute a rebuttable presumption of the definition of such best practices and variables for purposes of the employer duties imposed by this Part. In deciding whether the presumption is rebutted, the judicial or administrative body shall give consideration to [the competent state agency's] statement, as provided in Part 11 of this Act, of views about ways to feasibly improve on current best practices and to feasibly overcome factors that currently justify failures to follow best practices. If the presumption is rebutted, the burden of proof specified in Section 3 of this Part reverts to the contracting party.

5. The obligations set forth in this Part shall not apply to any natural person who hires employees or contractors to perform services in the person's home or to meet other personal needs not directly related to accruing monetary profit or revenue or to the operation of non-profit employers.

Part 9. Duty to Disclose and Post Information about Charges of Non-Compliance

1. During the first seven days of February and the first seven days of August of each year, each employer and contracting party must provide the following updated information to the [competent state agency]

a list of all pending judicial or administrative charges or complaints against the employer or contracting party or any of the employer's or contracting party's contractors, sub-contractors, or sub-sub-contractors for alleged violations of applicable labor and employment laws, any complaint filed with the employer's internal compliance system, and any grievance filed pursuant to a collective bargaining agreement applicable to the employer, and

a detailed statement of the allegations contained in any such charge, complaint, or grievance, and

the status of the governmental or non-governmental proceedings for each such charge, complaint, or grievance, and

the final or interim disposition of any such charge, complaint, or grievance in the preceding six months.

2. Within four weeks of receiving the updated information specified in Section 1 of this Part, the [competent state agency] must post the information on publicly accessible, readily searchable web-page(s) of the [competent state agency's] website.

3. The employer shall ask each of its employees, upon hire and once in every calendar year, to provide a current email address and shall, within one week of providing the updated information to the [competent state agency] as specified in Section 1 of this Part, email a link to the relevant web-page(s) of the [competent state agency's] website and shall email a digital document containing the

information specified in Section 1 of this Part to every employee who has provided an email address in response to that request. To every employee who has not provided an email address, the employer shall, in person or via postal mail, provide a hard-copy of that document and of the web address for the web-page(s), specified in Section 2 of this Part, of the [competent state agency's] website.

4. The [competent state agency] shall promulgate regulations prescribing the means by which the employer or contracting party shall electronically submit the updated information to the [competent state agency] as required by Section 1 of this Part, setting forth the [competent state agency's] procedures for ensuring that the information is publicly accessible and readily searchable on the [competent state agency's] website within four weeks of its receipt as required by Section 2 of this Part, and providing a template for the employer document specified in Section 3 of this Part.

5. The obligations set forth in this Part shall not apply to any natural person who hires employees or contractors to perform services in the person's home or to meet other personal needs not directly related to accruing monetary profit or revenue or to the operation of non-profit employers.

Part 10. Remedies for Violations of Duties under Parts 7, 8, and 9

The [competent court or administrative body] shall order a party that violates Parts 7, 8, or 9 of this Act to pay the employee(s) in question

back pay and all other consequential damages resulting from the violation, and

liquidated damages equal to double the damages specified in Section 1(a) of this Part, and

a penalty in the amount of 10,000 dollars for each day the employer violates, or continues to violate, any duty under Parts 7, 8, or 9 of this Act, cumulating the penalties for violations of multiple duties on each day, and

in the event of willful violations, punitive damages in an amount set in the [competent court or administrative body's] discretion, and

attorneys' fees and costs.

Part 11. Deliberations Over Best Practices in Internal Compliance Systems and in Systems to Monitor Compliance by Contractors

1. The [competent state agency] shall convene annual conferences of bona fide representatives of employers and employees in each industry, profession, or trade, for purposes of deliberating about best practices in companies' internal compliance systems and monitoring of contracting parties. The [competent state agency] shall promulgate regulations that specify industries, professions, and trades; criteria and procedures for identifying bona fide representatives; and protocols for scheduling the conferences.

With the facilitation of the [competent state agency], the employer and employee representatives shall deliberate in good faith over existing internal compliance systems and monitoring systems. The representatives shall in good faith assess the information disclosed pursuant to Section 3 of Part 7 and Section 2 of Part 8 of this Act; attempt to reach consensus over best practices in the structure and

functioning of such systems; evaluate any contention that identified variables demonstrably justify the failure of particular categories of employers to follow best practices; and attempt to reach consensus over such contentions. Representatives shall also deliberate in good faith about feasible ways to improve on current best practices and to overcome factors that currently justify failures to follow best practices.

The [competent state agency] shall promulgate regulations that specify the procedures and format for the deliberations required by this Part; the procedures for the [competent state agency's] determination whether any representative is not deliberating in good faith; and the remedies for failure to deliberate in good faith.

If the representatives reach rough consensus over best practices and variables justifying employers' adherence to less-than-best practices, the [competent state agency] shall publish a statement of that rough consensus. If the representatives fail to reach rough consensus or if the [competent state agency] concludes, in light of all relevant data, that the rough consensus does not accurately reflect the employers' capacity to most effectively implement internal compliance systems and monitoring systems, the [competent state agency] shall determine best practices and variables that justify particular categories of employers' adherence to less-than-best practices and shall publish a statement of such practices, variables, and categories and the [competent state agency's] reasons for its determinations. The [competent state agency] shall also publish a statement of the representatives' views and the [competent state agency's] views about ways to feasibly make improvements in current best practices and to feasibly overcome factors that currently justify failures to follow best practices.

The [competent state agency] shall promulgate a definition of "rough consensus," which in no event shall be less than the views of a super-majority of representatives participating in the deliberations, when such views are weighted by the number of employers or employees represented by each representative.

The obligations set forth in this Part shall not apply to any natural person who hires employees or contractors to perform services in the person's home or to meet other personal needs not directly related to accruing monetary profit or revenue or to the operation of non-profit employers.

Appendix B

Scenarios and Figures presented in the main text of the paper show how the proposed reforms would apply to contractual “production-and-distribution networks.” (See Figures 13-15.) This appendix presents two, more complicated, examples of networks. These two examples build on the example shown in Figure 13. The reader might wish to look again at Figure 13, before turning to these additional examples.

Suppose there are three warehouses (owned by three different warehouse companies) storing goods of two different big-box retailers, and there are two different trucking companies that transport goods from those warehouses to the retailers’ stores.¹ Suppose further that all three warehouses store goods of both retailers, and each trucking company transports goods of both retailers. But suppose that goods from two of the warehouse companies are transported by only the first trucking company, and goods from the third warehouse company are transported by only the second trucking company. (Figure 18.) That is, unlike in Figure 13 in the main text of this paper, in this example goods do not flow from each warehouse to every trucking company.

In analyzing the possible bargaining units in this scenario, begin with the differing legal standpoints of Trucking Company 1 and Trucking Company 2. Assume that in this scenario, Trucking Company 1 is the indirect employer of workers in Warehouse Companies 1 and 2, and Trucking Company 2 is the indirect employer of workers in Warehouse Company 3. That is, assume that the trucking companies have sufficient bargaining power to insist on the terms and conditions of employment in the respective warehouse(s) with which they deal. And assume that legislative reform includes two of this paper’s key proposals—namely, the redefinition of “employer,” and the authorization of worker organizations to unilaterally choose the bargaining units they wish to organize and potentially merge.

In this example, a worker organization could seek to organize, as a single-employer unit, the workforces of Trucking Company 1 and Warehouse Companies 1 and 2, since Trucking Company 1 is a direct employer of its own workers and an indirect employer of the workers of Warehouse Companies 1 and 2. (In Figure 18, this is depicted by the pale blue unit bordered by small blue squares.) If a majority of the combined workforces of those three companies designated the worker organization as their representative, then Trucking Company 1 would be legally obligated to sit at the bargaining table along with Warehouse Companies 1 and 2 to negotiate the terms and conditions in all three companies. Likewise, a worker organization could seek to organize, as a single-employer unit, the combined workforces of Trucking Company 2 and Warehouse Company 3, since Trucking Company 2 is a direct employer of its own workers and an indirect employer of the workers of Warehouse Company 3. (In Figure

18, this is depicted by the pale yellow unit bordered by small pink squares.) If a majority of the combined workforces of those two companies designated a worker organization as their representative, then Trucking Company 2 would be legally obligated to sit at the bargaining table along with Warehouse Company 3 to negotiate the terms and conditions in both companies. But the worker organization could further declare that these two single-employer units are merged into a multi-employer unit, which includes both trucking companies and all three warehouse companies. (In Figure 18, this is depicted by the rectangular white unit bordered by purple dashes.) If a majority of the combined workforces of those five companies designated the organization, then all five employers would sit together to negotiate the terms and conditions of the five companies.

Now analyze the scenario from the legal standpoint of the two retailers. Assume that each retailer has sufficient bargaining power to insist on the terms and conditions of employment in each warehouse and trucking company; or, assume, alternatively, that each retailer falls within the paper's proposed "rule of cumulation" applied to each warehouse and trucking company. Under the expanded definition of "employer" proposed in this paper, each retailer is the indirect employer of all three warehouse companies and both trucking companies. Therefore, if a worker organization is designated by a majority of the combined workforces of Retailer 1, the two trucking companies, and the three warehouse companies, then Retailer 1 must bargain over the terms and conditions of all those workforces in a single-employer unit. (In Figure 18, this is depicted by the darker-blue unit bordered by green dashes.) The two trucking companies and three warehouse companies would sit at the bargaining table alongside Retailer 1. Likewise, if a worker organization is designated by a majority of the combined workforces of Retailer 2, the two trucking companies, and the three warehouse companies, then Retailer 2 must bargain over the terms and conditions of all those workforces in a single-employer unit. (In Figure 18, this is depicted by the red unit bordered by red dashes.) And again, the two trucking companies and three warehouse companies would sit at the bargaining table alongside Retailer 2.

Suppose, now, we again add the paper's second proposed reform — namely, authorizing worker organizations to unilaterally merge single-employer bargaining units into multi-employer bargaining units. In this example, then, a worker organization could declare that the two single-employer units just identified constitute one multi-employer unit. (In Figure 18, this is depicted by the light green unit bordered by a solid line.) If a majority of workers in the multi-employer unit designate the worker organization, then the two retailers would be required to bargain alongside each other, as well as alongside all the warehouse and trucking companies in Figure 18.

SINGLE-EMPLOYER AND MULTI-EMPLOYER UNITS UNDER VARYING SCENARIOS

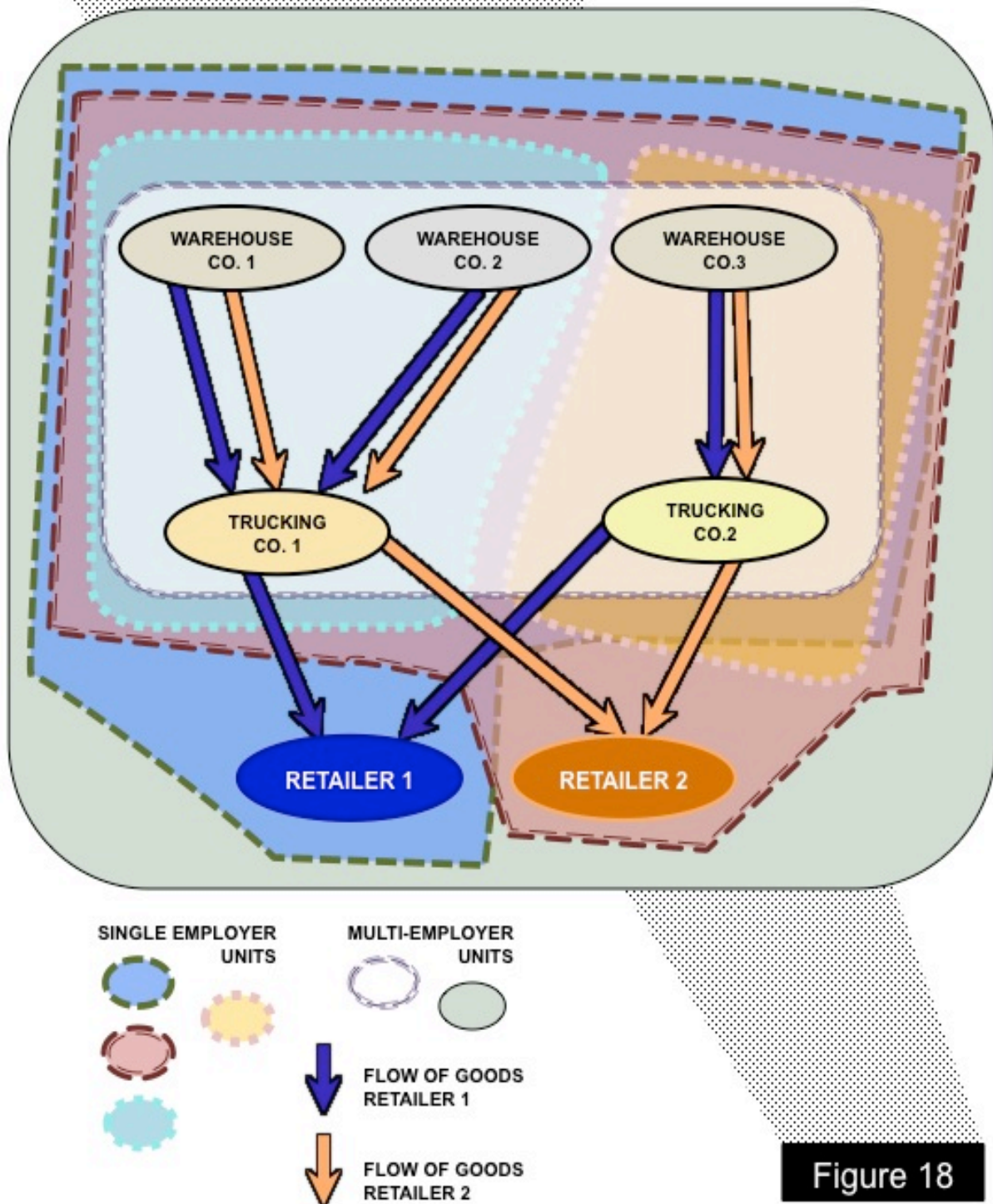


Figure 18

2. Suppose now that Retailer 1 and Retailer 2 are indirect employers of the same group of warehouse companies and trucking companies. In Figure 19, this group contains Warehouse Companies 1, 2, and 3, and Trucking Companies 1 and 2. But now assume that, in addition, Retailer 1 uses a warehouse company and a trucking company that Retailer 2 does not use (namely, Warehouse Company A and Trucking Company X, in Figure 19); and, likewise, Retailer 2 uses a warehouse company and a trucking company that Retailer 1 does not use (namely, Warehouse Company B and Trucking Company Y, in Figure 19). And suppose that Retailer 1 has sufficient bargaining power to be deemed an indirect employer of Warehouse A and Trucking Company X; and, likewise, that Retailer 2 has sufficient bargaining power to be deemed an indirect employer of Warehouse B and Trucking Company Y. We then have two overlapping single-employer units. That is, Retailer 1's single-employer unit includes (a) the workers employed in the warehouses and trucking fleets used jointly with Retailer 2, (b) the workers employed in the additional warehouse and trucking fleet used only by Retailer 1, and (c) Retailer 1's direct employees. Analogously, Retailer 2's single-employer unit includes (a) the workers employed in the warehouses and trucking fleets used jointly with Retailer 1, (b) the workers employed in the additional warehouse and trucking fleet used only by Retailer 2, and (c) Retailer 2's direct employees. The two single-employer units overlap: they each contain the workers in Warehouse Companies 1, 2 and 3, and the workers in Trucking Companies 1 and 2. But, in addition, the first single-employer unit contains the workers in Warehouse Company A and Trucking Company X, and the second single-employer unit contains the workers in Warehouse Company B and Trucking Company Y. (Figure 19 depicts the former unit by the blue space bordered by green dashes, and the latter unit by the red space bordered by red dashes.)

If the worker organization is designated by a majority within the combined workforce of the first single-employer unit, then Retailer 1 must, alongside all the warehouse companies and trucking companies in that unit, bargain over the terms and conditions of all workers in that combined workforce. Likewise, if the worker organization is designated by a majority within the combined workforce of the second single-employer unit, then Retailer 2 must, alongside all the warehouse companies and trucking companies in that unit, bargain over the terms and conditions of all workers in that combined workforce.

As with the preceding example, suppose, now, that we add the paper's second proposed reform — namely, authorizing worker organizations to unilaterally merge single-employer bargaining units into multi-employer bargaining units. In this example, then, a worker organization could declare that the two single-employer units just identified constitute one multi-employer unit. (This is depicted in Figure 19 by the green unit bordered by a solid line.) If a majority of workers in the multi-employer unit designate the worker organization, then the two retailers would be required to bargain alongside each other, as well as alongside all the warehouse and trucking companies in Figure 19.

OVERLAPPING AND MERGING ENLARGED SINGLE-EMPLOYER UNITS IN NETWORK

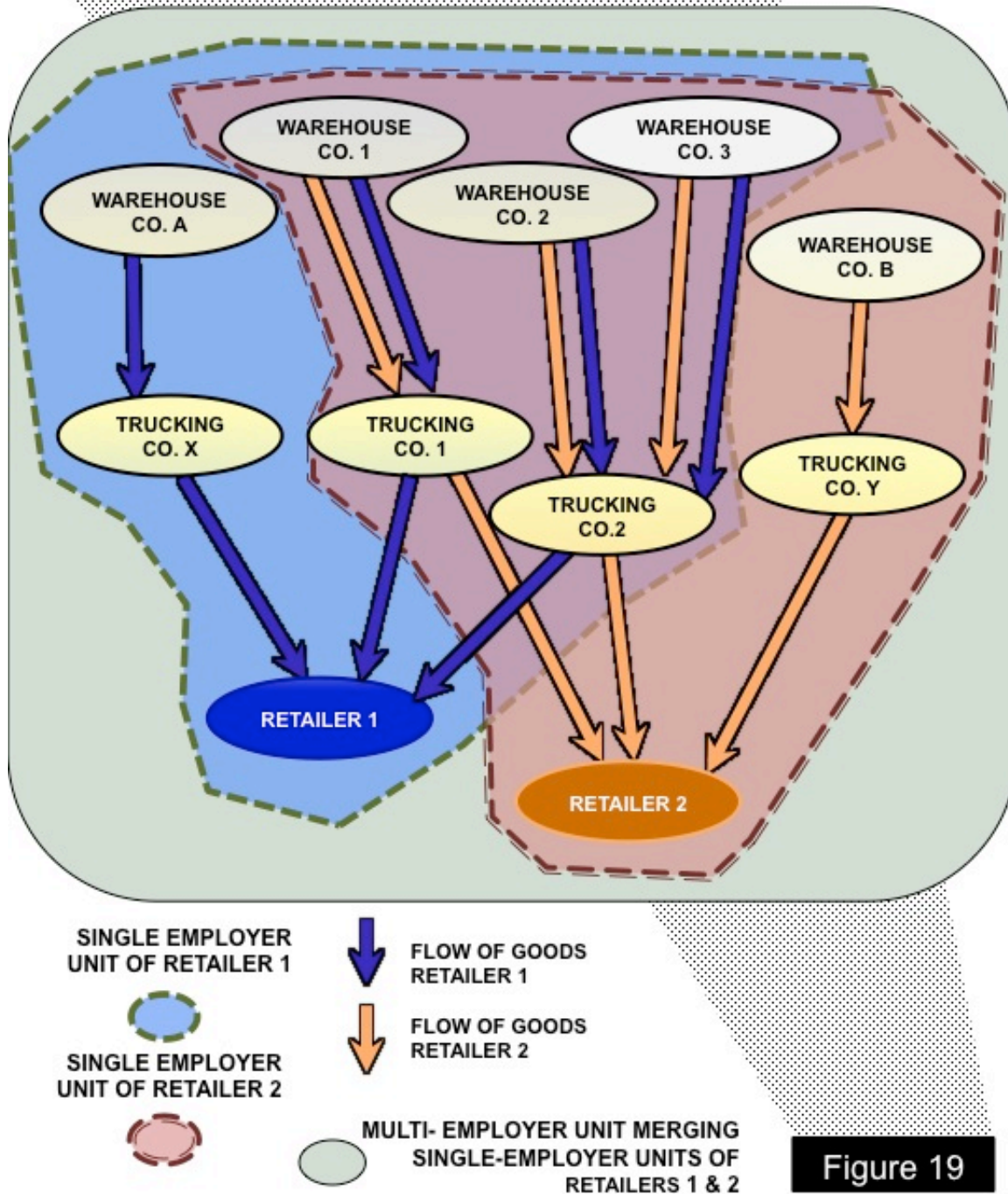


Figure 19